



REPUBLIC OF KENYA



KENYA LAW
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**DWW v Republic (Criminal Appeal E079 of 2022)
[2024] KEHC 9339 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E079 OF 2022
AC MRIMA, J
JULY 25, 2024**

BETWEEN

DWW APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. D. K. Mutai
(Senior Resident Magistrate) in Kitale Chief Magistrate's Court
Criminal Case (S.O.) No. 220 of 2018 delivered on 5th October, 2022)*

JUDGMENT

Background:

1. DWW, the Appellant herein, was charged in Kitale Chief Magistrates Criminal (S.O.) No. 220 of 2018. He faced the charge of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 24th December, 2018 at [particulars withheld] within Trans-Nzoia County, intentionally caused his penis to penetrate into the vagina of DJL, a child aged 11 years old.
2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act whose particulars were that on 24th December, 2018 at [particulars withheld] within Trans-Nzoia County, intentionally caused his penis to touch the vagina of DJL, a child aged 11 years old.
3. The Appellant denied the charges and he was tried. After a full hearing, the Appellant was found guilty and convicted on both the main and the alternative charges. He was sentenced to serve a term of 15 years' imprisonment on the offence of defilement. He was, however, discharged under Section 35(1) of the Criminal Procedure Code on the alternative charge.



4. The Appellant was aggrieved by the convictions and sentence. He lodged an appeal which is under consideration in this judgment.

The Appeal:

5. In his Amended Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He averred that his rights under Articles 20,25,27,47,48,49 and 50 of the Constitution were infringed as he was held in custody for an inordinate period. He urged that his defence was not considered, that crucial witnesses were not called and that the sentence was not proportional to the offence.
6. The Appellant extensively argued his appeal by way of written submissions. He expounded on the above grounds and referred to some decisions in asking this Court to allow the appeal.
7. The prosecution relied on its written submissions dated 6th September, 2023 in urging this Court to dismiss the appeal. Several decisions were also relied on.

Analysis:

8. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
9. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.
10. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.
11. This Court will deal with each of the issues in turn.

Age of the victim:

12. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.
13. In this case, the complainant herself testified that she was 12 years old and that she was a Class 5 pupil at [Particulars Withheld] Primary School. That evidence was corroborated by her mother, VCL, who testified as PW2. PW4 Dr. Timothy Nyukuri, attached at Cherangany Sub-County Hospital and who examined and treated the complainant also affirmed the age at 11 years old.
14. It was the investigating officer, No. 95529 PC Sharon Maloy [testified as PW3] attached at Cherangany Police Station who produced the complainant's Child Health Card as an exhibit. According to the Health Card, the complainant was born in November 2007. The Complainant was, hence, aged 11 years old as at December 2018 when the offence was committed on her.
15. Going by the evidence of the complainant, PW2 and PW3, the complainant was, therefore, a child within the meaning ascribed to the term under the Children's Act.



Penetration:

16. Section 2(1) of the Sexual Offences Act defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
17. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.... (emphasis added).
18. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
19. The Appellant herein vehemently argued that the prosecution failed to establish penetration.
20. The issue of penetration was attested to by three witnesses. They are the complainant, PW2 and PW3.
21. In the evidence, the complainant narrated how she went to sleep in her usual room as her mother, PW2, proceeded to work in a nearby bar that night. That, the complainant woke up to find that she had been undressed and that there was a man on top of her. The man had inserted his penis in her vagina. It was painful, but the assailant threatened to kill her if she either raised alarm or she disclosed what had happened to her. The man then woke up and went away. The complainant slept until morning. She was very fearful and purposed not to tell anyone.
22. In the morning of the following day, PW2 sent the complainant to get her some water. She, however, noticed that was not walking properly. She suspected something may be amiss. PW2 called and asked the complainant if there was anything wrong with her. The complainant denied that there was anything wrong with her.
23. Unconvinced, PW2 beat the complainant and that is when she disclosed what one Dan [the Appellant herein] had done to her the previous night and the stern warning she had been given. PW2 examined the complainant’s private parts and noticed that the vagina was swollen.
24. When PW2 reported the matter to the police, the complainant as led to Cherangany Sub-County Hospital where she was examined and treated by PW4.
25. It was his evidence that, on examining the complainant, PW4 found bruises on the labia majora and minora and that the hymen was freshly torn. There was also a blood discharge around the genitals.
26. PW4 concluded that there was evidence of penetration which decision was corroborated by the contents of the P3 Form and treatment notes which he also produced as exhibits.
27. The trial Court observed the witnesses as they testified. The Court did not make any adverse inferences on the demeanor of any of the witnesses. It believed their testimonies.
28. This Court, therefore, finds favour with the analysis and conclusion of the trial Court on this issue. For certainty, the aspect of penetration was duly proved.



Identity of the perpetrator:

29. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.
30. The identification aspect in this matter was attested to by the complainant. As stated earlier above, the impugned events were not complicated. As a brief recap, the complainant stated that in the night of the 24th December 2018, she went to sleep in her usual room as her mother, PW2, proceeded to work in a nearby bar that night. That, the complainant woke up to find that she had been undressed and that there was a man on top of her. The man had inserted his penis in her vagina. It was painful, but the assailant threatened to kill her if she either raised alarm or she disclosed what had happened to her. The man then woke up and went away.
31. According to the complainant, her room was well lit as she used to let the lights on as she slept. She affirmed that she saw the Appellant herein quite well, being a person, he knew before. The Appellant was a boda boda rider and used to regularly ferry PW2 to Kachibora.
32. Further, the person talked to the complainant. In fact, he warned her from telling anyone of what had happened. It was the complainant also who gave the name of the Appellant to PW2 and the police.
33. Evidence by a single witness must be treated carefully and cautiously. In *R –vs- Turnbull & Others (1973)* 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

.... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....
34. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the Evidence Act, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences as long as the Court believes the victim.
35. Notwithstanding the foregoing legal position, this Court, as a prerequisite, must also consider the Appellant's defence. In this case, the Appellant gave sworn testimony and called a witness one Stella Wekesa Wamalwa [testified as DW2].
36. The Appellant stated that he was at his usual place of work during the day on 24th December 2018 and thereafter retreated to his home in the evening. That, he stayed at home the whole night. He, therefore,



- distanced himself from the allegation. He also testified on how he was arrested on the 25th December 2018.
37. DW2 was the Appellant's neighbour. She narrated how he engaged the Appellant on 23rd December, 2018 at her home until around 10pm when the Appellant left.
 38. According to the charge sheet, the offence was allegedly committed in the night of 24th December 2018. The evidence of DW2, therefore, happens not to be relevant to the case.
 39. As appertains the evidence of the Appellant, that has to be placed side by side with that of the complainant. The trial Court watched the witnesses give evidence. From the record, there were no adverse findings made by the Court. Their demeanors were not impugned in any way. In essence, the trial Court believed the witnesses.
 40. On a balanced scale, this Court finds the evidence of the complainant to be believable and truthful. The record has no possible reason that would have led the complainant to fix the Appellant. Therefore, given the nature of the charges against the Appellant, the defence does not aid the Appellant in any manner whatsoever. It is for rejection as rightly so found by the trial Court.
 41. Having found as much, there was the argument that some potential witnesses were not called to testify. This Court takes the position that the prosecution has a discretion to call witnesses. (Section 143 of the Evidence Act). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See *Bukenya & Others versus Uganda* (1972) E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku versus Republic* (1985) KLR 412). The witnesses called in this case were sufficient to prove the offence.
 42. The Appellant also raised the issue of his alleged extended stay in custody on arrest which infringed on his Article 49 rights. He contended that he was arrested on 25th December, 2018 and that he was arraigned before Court on 27th December, 2018.
 43. It is a fact that the Courts were not operational on 25th and 26th December 2018, the two days being official holidays in Kenya. They are, indeed, the Christmas and Boxing days, respectively. The next day the Courts were operational was the 27th December 2018, the day the Appellant was arraigned before Court and was charged.
 44. Further, from the record, the issue was not raised at the trial. As such, the issue was not considered by the Court of first instance to be properly before this Court for consideration.
 45. This Court now finds that there was no infringement of the Appellant's rights under Article 49 of the Constitution. The contention, hence, fails.
 46. The upshot of the above is that the prosecution discharged its burden to the required standard of proof and the trial Court, rightly so, found the Appellant guilty and convicted him.
 47. Consequently, this Court finds that the appeal against the conviction lacks merit and is hereby dismissed.

Sentence:

48. The Appellant was sentenced to 15 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.
49. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only



interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

50. There is no doubt the offence is serious and indeed inhumane. It was also committed against an innocent child. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.
51. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.
52. As I come to the end of this issue, this Court finds that the trial Court found the Appellant guilty on both the main and alternative charges.
53. That was a misdirection. Once the Court convicts an Accused on the main count, then the alternative count must stand dismissed. In fact, in practice, Courts do not even deal with the alternative counts at all once the accused is found culpable of the main count. Therefore, the conviction and sentence on the alternative count cannot stand.

Disposition:

54. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
55. Drawing from the above considerations, the following final orders do hereby issue: -
 - a. The appeals on conviction and sentence are hereby dismissed.
 - b. The conviction on the alternative charge of committing an indecent act with a minor contrary to Section 11(1) of the Sexual Offences Act is hereby quashed and the sentence set-aside accordingly.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

DWW, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

