Hinga v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 13538 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E006 OF 2023

JN KAMAU, J

OCTOBER 28, 2024

BETWEEN

DAVID QUETT HINGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. R. M. Ndombi (PM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 1 of 2020 on 1st March 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with two (2) counts of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with two (2) alternative charges of the offence of committing an indecent act with two (2) children contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon. R. M. Ndombi (PM), on the charge of defilement in respect of Count I and sentenced to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgment, on 18th April 2023, he lodged the Appeal herein. His Petition of Appeal was dated 11th April 2023. He set out five (5) grounds of appeal.

4. His Written Submissions were dated 27th February 2024 and filed on 1st March 2024 while those of the Respondent were dated 28th March 2024 and filed on 2nd April 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal were dealt with under this head as they were all related.

10. The Respondent submitted that for the Prosecution to prove the offence of defilement beyond reasonable doubt, it had to be established that the victim was a child within the meaning of the Children's Act, that the accused was positively identified and that there was penetration by the perpetrator.

11. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

12. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

13. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

14. The Appellant did not submit on this issue. On its part, the Respondent contended that age could be proven in various ways. In this regard, it placed reliance on the case of *Mwalengo Chichoro Mwajembe vs Republic Criminal Appeal No 24 of 2015* (UR) (eKLR citation not given) where it was held that age could be proved by documentary evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other credible forms of proof.

15. It asserted that the complainant, RS, (hereinafter referred to as "PW 2") testified that she was fourteen (14) years old and that the Investigating Officer, No 86662 Inspector Rael Ambasa (hereinafter referred

to as "PW 3") produced an age assessment report as an exhibit showing that as at 2022, PW 2 was fifteen (15) years. It was its contention that the victim's age was proved beyond reasonable doubt.

16. Although the Appellant was charged with the offence of defilement S.O. and PW 2", a perusal of the Trial Court's proceedings showed that only PW 2 testified against him.

17. In the case of Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

18. Tessy Watulo (hereinafter referred to as "PW 1") was the clinical officer who examined SO and PW 2 herein. She testified that SO was fourteen (14) years old while PW 2 was thirteen (13) years old.

19. PW 3 tendered in evidence the Age Assessment Report dated 22nd August 2022 in respect to the said SO The same showed that she was approximately fifteen (15) years old as at 2022. Although, the Prosecution had sought for an order for age assessment in respect to PW 2, the same was not availed. The Prosecutor amended the Charge Sheet to indicate that PW 2 was twelve (12) years.

20. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut the evidence relating to PW 2's age by adducing evidence to the contrary.

21. Be that as it may, this court noted that the Prosecution did not adduce any evidence to show that PW 2 was twelve (12) years of age. However, in the absence of any evidence to challenge that of PW 1 that PW 1 was a child when he examined her on 9th January 2021 and the fact that the Trial Court took her through a voir dire examination, this court was persuaded to find and hold that PW 2 was a child at the time that she testified.

B. Identification

22. The Appellant argued that this case was based on assumptions and hearsays. He contended that the women who took SO and PW 2 to Peter Olukwa (hereinafter referred to as "PW 4"), the Village Elder and the Assistant Chief were not called as witnesses in this case. He termed PW 4's evidence as untrue and malicious and asserted that a court of law should not rely on the evidence of a witness who appeared untrustworthy to convict an accused person.

23. He added that while the Prosecution had the discretion to call its witnesses, it was trite law that its duty was to avail to court all relevant witnesses whether its evidence was for or against the accused person as was held in the case of Bukenya vs Uganda [1972] EA 348 and Charles Irungu Thigo vs Republic [2006] eKLR .

24. In that regard, he placed reliance on the cases of Ndungu Kimani vs Republic (1979) KLR 282 where it was held that evidence of a witness should not create an impression in the mind of the court that he was not straightforward.

25. He further relied on the case of *Nganga vs Republic CA Criminal Appeal No 50 of 1981*(eKLR citation not given) where it was held that the prosecution could opt not to call a material witness but that it did so at the risk of its case. He argued despite the case being full of gaps and having contradictions, discrepancies and inconsistencies, the Trial Court nonetheless relied on Section 124 of the *Evidence Act* to fill the said gaps in the Prosecution's case.

26. He was emphatic that the Trial Court relied on the evidence of PW 2 without corroboration. He pointed out that PW 2 was not a reliable witness and that the Prosecution ought to have called witnesses and evidence to corroborate PW 2's evidence. In this regard, he relied on the case of Abel Monari

Nyanamba & 4 Others vs Republic (1994) where it was held that it was trite law and a general rule that evidence must itself require corroboration. It was his case that the Prosecution had failed to prove its case beyond reasonable doubt.

27. On the other hand, the Respondent submitted that the Appellant was known to PW 2 as she testified that the mother would leave her with him and he would defile her. It added that PW 2 stated that the incident was not the first time that the Appellant was defiling her.

28. It contended that the inconsistency and contradiction raised by the Appellant did not go to the core of the case and that the variance in itself did not distort or dislodge the defilement subject of the charge as the same had been proved beyond reasonable doubt. It urged the court to consider the evidence that was adduced as a whole and not selectively.

29. In this regard, it relied on a Tanzanian case of Dickson Elia Nsamba Shapwata & Another vs Republic Criminal Appeal No 92 of 2007 where it was held that the court must consider whether the inconsistencies went to the root of the matter.

30. It was categorical that the witnesses that were called were sufficient to establish the case as against the Appellant. It invoked Section 143 of the *Evidence Act* Cap 80 (Laws of Kenya) and relied on the case of Keter vs Republic [2007] EA 135 where it was held that the prosecution was not obliged to call a superfluity of witnesses but was only required to call those witnesses who were sufficient to establish the charge beyond reasonable doubt.

31. PW 2 testified that in October 2019, SO told her to accompany her to visit the Appellant who had many sugar cane in his farm and when they arrived, the Appellant gave them flour, soap, steel wire and cooking oil. She stated that they went back home, cooked food and ate and that while they were there, the Appellant would take SO to his house and sleep with her but SO did not tell her how that happened. She further told the Trial Court that the Appellant took her to the napier grass and defiled her. She added that later he took her to his room, locked her in, removed his clothes and defiled her after defiling SO She stated that that was the only time that the Appellant defiled her.

32. This court noted that PW 2 was the only identifying witness. SO did not testify although she was said to have been impregnated by the Appellant herein.

33. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

34. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

35. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

36. The incident took place at day time. PW 2 and the Appellant knew each other as she stated that she knew he was a friend to S.O's mother. PW 2 positively identified him by pointing at him in the dock during trial. The events of the material day from S.O and PW 2 visiting him and later being defiled by him was ample opportunity for PW 2 to recognise him. There could not therefore have been any possibility of a mistaken identity because they were not strangers.

37. In October 2019, two (2) women took SO and PW 2 to PW 4 alleging that the Appellant had lured SO and PW 2 and was defiling them. PW 4 took SO and PW 2 to the Assistant Chief who asked him to deal with the matter. He then told SO and PW 2 to return to Elukango. However, in 2020, he was informed that the Appellant had taken them to be his wives. His evidence was that he was the one who arrested the Appellant and that when he went to his house, he found SO and PW 2 at his house but the Appellant ran away.

38. From the aforesaid evidence, it was clear that both the Appellant and PW 2 were not strangers. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification, which was by recognition, beyond reasonable doubt.

C. Penetration

39. The Appellant did not submit on this issue. On the other hand, the Respondent contended PW 1's and PW 2's evidence proved penetration.

40. It submitted that under normal circumstances, victims of sexual offences were the only witnesses and the offence occurred in secrecy. It therefore submitted that the Trial Court arrived at the correct conclusion that the Appellant penetrated PW 2's vagina.

41. PW 1 confirmed that examination of high vaginal swab that was taken from PW 2 showed that she had a normal vagina. She had white discharge and a missing hymen. She also had epithelial cells which led him to conclude that she had been defiled. He produced P3 Form, Post Rape Care (PRC) Form and Treatment notes in respect of both SO and PW 2 as exhibits in support of the Prosecution's case.

42. Notably, PW 2's evidence was well corroborated by the oral evidence of PW 3 and PW 4. The scientific evidence that PW 1 tendered confirmed that there was recent penetration of PW 2's vagina.

43. The Appellant's defence was simply a denial that did not outweigh the inference of guilt on his part. The Trial Court could not therefore have been faulted for having found that he did in fact defile PW 2 and that the Prosecution had proved its case against him beyond reasonable doubt. There were no gaps and/or inconsistencies as he alleged and his argument that there were witnesses that were not called by prosecution fell on the wayside as the witnesses called established the case against him sufficiently. Any gaps and inconsistencies were not sufficient to dislodge the Prosecution's case.

44. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

45. The Appellant submitted that minimum mandatory sentences were unconstitutional as held in Julius Kitsao *Manyeso vs Republic Criminal Appeal No 12 of 2021*(eKLR citation not given). He was categorical that mandatory minimum sentences were discriminatory in nature because they gave differential treatment to a convict distinct from the treatment accorded to convicts under other offences which did not impose mandatory sentences.

46. He added that mandatory minimum sentences violated an accused's right under Article 27 of *the Constitution* and took away the discretion of the trial court contrary to the doctrine of separation of powers under Article 160 (1) of *the Constitution*. He urged this court to exercise its discretion to his benefit.

47. On its part, the Respondent submitted that the sentence meted upon the Appellant was lenient and lawful and should be upheld.

48. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

49. In view of lack of cogent proof that PW 2 was twelve (12) years where the sentence was life imprisonment, this court therefore agreed with the Respondent that the Trial Court was lenient for having sentenced him to fifteen (15) years imprisonment that was meted where a victim was between fifteen (15) and eighteen (18) years.

50. This court took cognisance of the fact that there had emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.

51. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

52. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

53. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

54. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

55. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. Bearing in mind that the same was already reduced from the provided minimum of twenty (20) years imprisonment and the fact that the Appellant was not warned of the risk of appealing against the decision, this court left the sentence that was meted against him undisturbed.

Disposition

56. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 11th April 2023 and lodged on 18th April 2023 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld.

57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF OCTOBER 2024.

J. KAMAU

JUDGE