Emitati v Republic (Criminal Appeal E061 of 2022)
[2024] KEHC 15572 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E061 OF 2022

AC BETT, J

NOVEMBER 29, 2024

BETWEEN

RASHID OPWORA EMITATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an Appeal against the Judgement, conviction, and sentence of Hon. G. Ollimo, Senior Resident Magistrate, in Butere SO No. E017 of 2021delivered on 3{{^rd}} August 2022))

JUDGMENT

Introduction

1. The appellant herein was convicted for defilement contrary to Section 8(1) of the *Sexual Offences Act* as read with Section 8(3) of the same act and was consequently sentenced to 20 years imprisonment.

2. The particulars of the charge were that on the 1st day of December 2021 at around 1330 hours at (particulars withheld), Kakamega county, the appellant intentionally caused his penis to penetrate the vagina of VJ, a child aged 11 years.

3. The appellant was charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences act*. The particulars were that on the 1st day of December 20201 at around 1330 hours at (particulars withheld) Kakamega county, the appellant intentionally touched the vagina of VJ, a child aged 11 years, with his fingers. No findings were made on this charge.

4. Seeking to upset the said conviction and sentence, the appellant herein filed the instant appeal vide a Petition of Appeal dated 7th September 2022 in which he relied on the following grounds: -

a. That the learned trial magistrate erroneously convicted the appellant by failing to find that the charges were defective in form and substance under Section 214(1) and Section 134 of the Criminal Procedure Act.

b. That the learned trial magistrate erred in law and facts by admitting the evidence of penetration proved to the required standard even in the wake of flimsy medical evidence by the prosecution.

c. That the learned trial magistrate grossly erred in law and facts by failing to appreciate that the victim was in the habit of practicing sex.

d. That the learned magistrate grossly erred in law and facts by failing to appreciate that there were no medical corresponding results between the appellant and the complainant.

e. That the trial magistrate erred in law and facts by convicting and sentencing the appellant after failing to appreciate that the key ingredients of defilement were not proven beyond reasonable doubt as required by the law.

f. That the learned magistrate erred in law and facts by failing to consider and exercise discretion powers over mandatory minimum sentence.

Background

5. At the trial court, PW1, VJ who is the complainant, gave her unsworn statement and stated that on the material date she was at home since she had been sent away for school fees. She testified that her father had asked her to take some bananas to a neighbour's home when she met the appellant. She averred that the appellant requested her to go into their house with a promise that he would give her Kshs.20 and she obliged. She further testified that the appellant took a sack from the beddings and spread it on the sitting room floor and forced her to lie on the floor. It was her testimony that the appellant removed her trousers and pant and then he proceeded to insert his penis into her vagina, and she felt pain. She stated that when the appellant finished, he used his trousers to wipe himself and asked her to give him water to wash his hands and she obliged. She further narrated that the appellant told her that he was going to retrieve the Kshs. 20/= he had promised her, and he asked her to go and keep his wife company. She stated that she shortly went to a neighbour named Akwane and told her that she had been raped by the appellant. She stated that Akwane then called a neighbour, who then called the area chief. She stated that the area chief went to her grandmother's house where the appellant was also present. She recounted that the chief called the police who first escorted them to the hospital and then to the police station alongside the appellant.

6. In cross-examination, she stated that she did not scream as the appellant raped her. She asserted that she was speaking the truth and that there was nobody who witnessed the ordeal.

Submissions

7. The appellant submitted that the charges against him were fatally defective under Section 134 of the Criminal Procedure Code. He stated that he was charged with the offence of defilement under Section 8(1) of the *Sexual offences Act* as read with Section 8(4) of the same act. He stated that the particulars in the charge sheet indicated that the child was 11 years old but Section 8(4) of the *Sexual Offences Act* deals with defilement of children between the age of sixteen (16) and eighteen (18) years old. He submitted that the facts did not match the section that he was charged with.

8. He relied on the Court of Appeal's decision in Benard Ombuna vs Republic [2019] eKLR where the court stated that: -

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

9. He also relied on Section 382 of the Criminal Procedure Code which provides that:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

10. He argued that the defect in the charges he was charged with could not be cured under Section 382 of the Criminal Procedure Code.

11. The appellant further contended that the prosecution did not prove all the ingredients necessary to be proven in a case of defilement. He argued that the court was wrong to invoke Section 124 of the *Evidence Act* since the complainant was not completely truthful. He further submitted that the complainant ought to have told the court that she regularly engages in sexual activity to make a living. He posited that on that knowledge, the court ought to have ordered a DNA test to be conducted on the complainant and himself to establish whether PW1 was indeed defiled by the appellant.

12. The appellant further contended that the doctor's findings did not corroborate the complainant's testimony because she stated that she felt pain when the appellant defiled her, but the doctor did not see any bruises or scars in her vaginal walls.

13. The appellant, relying on the case of Michael Odhiambo vs Republic [2005] eKLR, asserted that the rupture of the hymen was not conclusive proof of defilement. The appellant also relied on the case of P.K.W vs Republic to support his assertions. The Appellant submitted that the clinical officer did not conclude whether the complainant was defiled or not.

14. The appellant further argued that this court should use its discretionary powers following the constitutional provisions under Article 50 (2) (Q) to revoke the mandatory minimum sentence of 20 years imprisonment and substitute it with a more lenient sentence. The appellant relied on the case Nathan Khaemba Makokha, Philip Mueke Maingi & others v Attorney General & Director of Public Prosecution [2022] KEHC 2631 (KLR) where the court held that the minimum mandatory sentences are unconstitutional in that they deny the trial court the jurisdiction to award a suitable sentence in suitable circumstances.

15. The appellant submitted that he is a first offender, he was and is remorseful that the offence occurred and that he is a youth who deserved a lesser sentence. He submitted that the court should invoke the

provisions of Articles 23 and 165 (3b) of *the Constitution* and substitute his sentence with a lesser sentence.

16. The respondent on the other hand submitted that all the elements of defilement were proved beyond reasonable doubt. On the age of the complainant, the respondent submitted that the production of the complainant's birth certificate showed that the complainant was 12 years old at the time of the incident.

17. On proof of penetration, the respondent asserted that the complainant had given cogent testimony in the trial court regarding the penetration. On the medical evidence regarding the penetration, the respondent posited that the clinical officer confirmed that she examined the minor two days after the incident. The respondent relied on the case of Remmy Wanyonyi Wanjoki v Republic [2020] KEHC 4929 (KLR) where the court held that a doctor's medical opinion must flow from the examination findings.

18. The respondent argued that the clinical officer failed to pronounce her opinion on record as to whether from the examination the minor had been defiled or not. The respondent further submitted that the trial court did not rely on the medical evidence because it lacked probative value, and it relied on only on the evidence of the statement of the minor pursuant to Section 124 of the *Evidence Act*.

19. On the issue of identification, the Respondent posited that the appellant was well known to the complainant and thus identification was by recognition.

20. The Respondent submitted that the alleged defect in the charge was a minor omission curable under Section 382 of the Criminal Procedure Code and that it did not in any way occasion any injustice to the appellant. The respondent relied on the case of Brian Kipkemoi Koech v Republic [2013] KEHC 920 (KLR) and the case of Obedi Kilonzo Kevevo Vs Republic where similar principles were enunciated.

21. The respondent contended that the appellant's defence of existing grudges between him and the victim's family was an afterthought by the appellant because the issue of a grudge was never raised during the cross-examination of the prosecution's witnesses.

22. On the issue of the sentence, the respondent relied on the case of David Ouma Abayo Vs Republic (2021) eKLR where the court stated that:-

> "Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the court can impose a different sentence."

23. The respondent argued that the appellant has not demonstrated any compelling reasons to persuade the court to depart from the minimum sentence that was imposed by the trial court.

Analysis

24. This court, being a first appellate court, is conscious of its duty to re-evaluate the evidence that was placed before the trial court and come up with its own independent findings while bearing in mind that it did not have the privilege of either seeing or hearing from the witnesses. This principle is drawn from the case of Okeno v. R [1972] EA. 32 where the court stated that:-

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower

court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

25. I have considered the material that was placed before the trial court and the judgement of the trial court, the submissions by both parties in this matter and the authorities they relied upon. From the appellant's Petition of Appeal, I find that the pertinent issues to be determined are as follows:

    a. Whether the charge against the Appellant was defective in form and substance under Section 214(1) and Section 134 of the Criminal Procedure Act

26. The Appellant claims that the charge was defective in form and substance since he was charged under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, but he was sentenced in accordance with Section 8(3) of the *Sexual Offences act*.

27. While directing itself on the issue of defective charges, the Court of Appeal in the case of Isaac Nyoro Kimita & Michael Rurigi Kibara v Republic [2014] KECA 125 (KLR) cited with authority the case Of Willie (William) Slaney V State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391], where the Supreme Court of India held that:-

> " We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.
>
> To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent. We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands ... but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told? Was it explained to him? Did he understand? Was it done in a fair way? Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

28. The Court of Appeal further rendered itself on the circumstances in which a defect in the charge might upset a conviction in the case Obedi Kilonzo Kevevo v Republic [2015] KECA 127 (KLR) where it was held that:-

> " The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of J.M.A v R [2009] KLR 671, it was held inter alia that:
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> > "It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible."

29. The court in the case of Kamai v Republic [2022] eKLR as well directed itself as follows on the issue of a defective charge: -

> " The charge sheet indicates that the appellant was charged in count 1 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* for allegedly defiling a child aged seventeen (17) years. From the evidence on record, it is obvious that PW1 did not fall within the age bracket specified in section 8(2) of the Act which prescribes the punishment for persons convicted of defiling children aged eleven years or less. PW1 fell within the age bracket specified under section 8(4) of the Act due to her age and the learned magistrate took due note of this in his judgment.
>
> The only question that the court has to concern itself with in the circumstances is whether the appellant was prejudiced in any way with the obvious defects in the charge sheet. I have looked at the trial court's record. It is apparent that the appellant was not embarrassed or prejudiced during cross examination or in his defence by the defect, as he understood clearly what he was alleged to have done. In the circumstances, the defect was not fatal as it did not occasion any miscarriage of justice. It is a defect that is curable under section 382 of the Criminal Procedure Code."

30. From the foregoing authorities, it is evident that for a charge sheet to be rendered fatally defective, it must be couched in such a way that the accused is totally unable to understand the charges that he is faced with and for which he is being tried. Or that the accused has been charged with a non-existent offence. Or that the defects in the charge sheet would cause prejudice to the accused like when he is charged with one offence but convicted for a different offence that he did not have an opportunity to respond to.

31. I have considered the impugned charge sheet and find that the defect alleged by the appellant herein did not in any way prejudice him since he was still able to understand that he was charged with the offence of defilement of a minor and he pleaded not guilty on the charge. Though the charge sheet indicated that the Appellant was charged under Section 8(4), the appellant was aware that the child was alleged to be 12 years old since it was clearly stated in the charge sheet. The alleged defect in the charge sheet was therefore an irregularity that was curable under Section 382 of the Criminal Procedure Code as it did not occasion any prejudice or injustice on the appellant.

b. Whether the prosecution proved the elements of defilement beyond reasonable doubt.

32. The prosecution was burdened with proving the three elements of defilement which are the age of the victim, identification of the perpetrator and penetration.

33. On the issue of the age of the Victim, the prosecution adduced the birth certificate of the complainant as an exhibit which revealed that the complainant was 12 years old at the time of incident. I find this element proven beyond reasonable doubt.

34. On identification of the perpetrator, it is clear that the complainant and the Appellant lived in close proximity with each other thus the Appellant was well known to the complainant and identification was by recognition. Similarly, I find this element proven beyond reasonable doubt.

35. On penetration, the same is defined in section 2 of the *Sexual Offences Act* as:-

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

36. The complainant gave her testimony in the trial court that the appellant defiled her. The prosecution further adduced medical evidence through PW3 who examined the complainant and found that the complainant's hymen was missing but was not freshly broken, no bruises or scars were seen. PW3 testified that a high vaginal swab was conducted, and she noted a presence of epithelial cells in her urine which she stated were a sign of friction. PW3 did not however make a finding as to whether the complainant was defiled or not.

37. The appellant alleges that the medical evidence adduced in this case was not conclusive as to prove penetration.

38. The court in the case of Rono v Republic [2024] eKLR directed itself as follows on the absence or lack of conclusiveness of medical evidence: -

> " Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration."

39. Similarly, in the case of Mohamed vs. Republic [2006] 2 KLR 138, the Court of Appeal stated:-

> " It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

40. Section 124 of the *Evidence Act* provides 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."

41. By dint of Section 124 of the *Evidence act* and the authorities cited above, it is clear that the failure of medical evidence to corroborate the claim of defilement does not render the claim of defilement to be untrue. The court can solely rely on the evidence of the victim to convict the alleged perpetrator if the court is satisfied that the victim is telling the truth.

42. In the instant case, the victim, PW1, stated that the chief was called to her grandmother's house on the day of the incident and the chief called the police, who first escorted them to the hospital then to the station. The father of the victim, PW3, stated that when he heard of the news on the day of the incident which was 1st December 2021, he immediately went to report to the station, but he found that the accused was already at the police station. PW5, who was the arresting Officer in the matter, stated that she picked the complainant and the appellant on 2nd December 2021, and she first took them to the hospital and then to the police station. She stated that the complainant's father received a call from the chief and he proceeded to the chief's office where he found both the appellant and the complainant. The clinical Officer on the other hand claims that she received the complainant and the appellant in hospital on 3rd December 2021.

43. The charge sheet shows that the appellant was arrested on 1st December 2021, but the arresting officer claims to have arrested the appellant on 2nd December 2021from Harambee and first took them to the hospital then to Butere Police station. The complainant's father claims that he went to report the matter on 1st December 2021 but found the appellant already at Butere Police station. The complainant stated that they were taken to hospital first before they went to the police station, but the medical reports show that they went to the hospital on 3rd December 2021. The arresting officer (PW5) claims that the complainant's father found the complainant and the appellant at the chief's office while the complainant's father states that he found the appellant at Butere Police Station.

44. From the cited contradictions, various questions arise: Was the appellant arrested on 1st December 2021 or on 2nd December 2021? Was the medical examination conducted on 1st on 2nd or on 3rd December 2021? Was the complainant taken to hospital on the day of the incident or two days after the incident, and if so, would the medical results be different if the complainant was taken earlier or later? Who is lying to the court regarding the day of arrest of the appellant and the day they were taken to hospital out of the four key witnesses adduced by the prosecution? Alas, the court does not know whose version of the events to believe!

45. Although the trial court found that testimony of the complainant's testimony appeared to be consistent with what the other witnesses testified, I find that the glaring contradictions regarding the day of the arrest of the appellant and the day the appellant and the complainant were taken to the hospital for examination which denotes some deliberate untruthfulness in the testimonies of the witnesses, trickles down to the complainant and thus makes it hard to invoke Section 124 of the *Evidence Act*. It is incumbent for the prosecution to prove its case beyond reasonable doubt. Despite the saving provisions of Section 124 of the *Evidence act*, where the evidence of the complainant is rendered doubtful by contradictory evidence or inconsistencies in the evidence as in the present case, the court must be cautious in accepting wholly, the complainant's evidence and seek for corroboration.

46. Although it was the complainant's testimony that the penetration by the appellant was forceful and that she felt pain, the medical report that was in court did not conform with her claims for according to the P3, the complainant did not have any injuries on her private parts.

47. The court in Julius Kioko Kivuva vs. Republic [2015] eKLR held as follows as regards specificity required in the proof of penetration:-

> " Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness' testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

48. In the case of MTG v Republic (2022) eKLR, the clinical officer while giving his statement stated that: "the PRC showed that her hymen was broken, that she had fresh bruises on her outer genitalia indicating forced penetration" denoting that forced penetration is characterized by some bruises on the genitalia.

49. It is only to be expected that forceful penetration, as was alleged in this case, would be followed by injuries on the genitalia of the complainant. It is however a baffling in this case that the complainant was examined on the same day of the incident as she alleged, but no bruises, injuries or scars were noted in her genitalia. Even though medical evidence is not always required to prove penetration in occasions

that the court believes in the truthfulness of the victim, it was essential in this case that the medical evidence should have concurred with the complainant's testimony of forced penetration. This, in my opinion, is a loophole in the prosecution's case which was never resolved.

50. Having said so, I find that the element of penetration was not proven beyond reasonable doubt.

c. Whether the learned magistrate erred in law and facts by failing to consider and exercise discretion powers over mandatory minimum sentence.

51. On this issue, I will rely on the Supreme Court directions on the constitutionality of the minimum mandatory sentences in the *Sexual Offences Act*.

52. The Supreme Court issued directions in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) [2021] KESC 31 (KLR) and stated as follows:-

> "In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision."

53. It was set out clearly that the intention of the Supreme Court in the Muruatetu case was not to render every mandatory sentence unconstitutional. The unconstitutionality of the mandatory sentence only applied to the mandatory sentence envisioned under Section 204 of the Penal Code. This court, being careful not to misdirect itself on the matter, finds that the trial court lawfully directed itself when meting the 20 years imprisonment sentence based on the conviction of the Appellant.

Determination

54. For the above reasons, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt. Consequently, I uphold the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set free forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:

The Appellant present virtually at Naivasha

Ms. Chala for the Prosecution/Respondent

Court Assistant: Polycap