Kyalo v Republic (Criminal Appeal E074 of 2024)
[2024] KEHC 16177 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16177 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E074 OF 2024

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

CHARLES NZAU KYALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. N. Kihara SRM in the Magistrate's Court at Siakago Sexual Offence Case No. E016 of 2023 delivered on 15{{^th}} February 2024)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* No.3 of 2006. Particulars are that on 10th January 2023 at 1600hrs in [Particulars withheld] sub-county within Embu County, the appellant intentionally and unlawfully inserted his penis into the vagina of CWM, a child aged 13 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 10th January 2023 at 1600hrs in [Particulars withheld] sub-county within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of CWM a child aged 13 years.

2. At the trial, the appellant pleaded 'not guilty' to the charge and after the full hearing, he was convicted and sentenced to 20 years imprisonment. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 05th March 2024 seeking that the appeal be allowed, conviction be quashed, sentence be set aside and that he be set at liberty.

3. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

    1. By convicting the appellant on charges that were not proved beyond reasonable doubt as stipulated by the law;

2. By failing to prove the elements of the offence as required by law;

3. By convicting the appellant on a defective charge sheet;

4. By admitting a document that does not support the charge;

5. By rejecting the appellant's defense without giving cogent reasons;

6. By failing to consider the mitigating factors by the appellant.

4. At the trial, PW1 was George Kariuki who examined the victim. He observed that the victim's panty had blood stains and she had tenderness on her upper right hand. On examination of her private parts, he stated that there was a tear on the vaginal wall and it was bleeding, the hymen was freshly broken and there were no spermatozoa cells present. He produced the P3 and PRC forms which were produced as evidence. On cross-examination, he stated that the evidence was sufficient to prove that the victim was defiled.

5. PW2 was the victim who stated that she was at home watching TV when the appellant entered the house, grabbed her by the hand, took her to her bedroom, removed her trouser and panty and then inserted his penis into her vagina. That when he was done, he put on his clothes and left. She stated that when he left, she noticed that she was bleeding from her vagina and she couldn't walk properly. That her mother noticed her walking differently and so she told her what the appellant had done to her the previous day. That her mother reported the matter to the police and she took her to hospital for examination. She identified the appellant as her assailant and she said she knows him as a Sunday school teacher at[Particulars withheld] Catholic Church. On cross-examination, she stated that when the appellant went to her house, he asked where the bedroom was and she showed him.

6. PW3 was the victim's mother who stated that she noticed her daughter walking with difficulty and when she asked, the victim told her that the appellant had defiled her. That she reported the matter to the police station and then took her to hospital for examination and treatment. The appellant was traced and arrested in connection with the incident.

7. PW4 was PC Phineas Mworia of DCI Mbeere South who stated that the incident was reported at the Kataraka Police Post by PW2 and PW3. That the victim was sent to the hospital for treatment and at the time the appellant had gone into hiding. That he was tracked through his mobile phone and was found in Koma village. He was arrested and charged with the offence.

8. At the close of the prosecution's case, the trial court put the appellant to his defense. He gave unsworn evidence as DW1 stating that the prosecution's evidence is made of lies. That he is a student and because of this charge, he has not been able to continue with his education.

9. The court directed the parties to file their written submissions but only the respondent complied.

10. The respondent relied on sections 2 and 8(1&3) of the *Sexual Offences Act* and the cases of Hadson Ali Mwachongo v Republic [2016] eKLR, Mwangi v Republic (2022) eKLR and AML v Republic (2012) eKLR and argued that the elements of the offence were proved beyond reasonable doubt. It argued that the charge sheet was not defective since it clearly communicated the offence that the appellant was facing. It relied on the case of Bernard Ombuna v Republic [2016] eKLR. It stated that there is no legal basis for reviewing or setting aside the sentence imposed by the trial court.

11. The issues for determination are as follows:

1. Whether the offence was proved beyond reasonable doubt; and

2. Whether the sentence meted out to the appellant is harsh and excessive.

12. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of Kiilu & Another v. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings 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."

13. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the *Sexual Offences Act* provide:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) 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."

14. Therefore, the elements of the offence are as follows:

1. The age of the complainant- that the complainant was a child;
2. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;
3. The perpetrator was positively identified.

15. The age of the victim herein was determined through her birth certificate produced as evidence and it shows that she was born in April 2009. As at the time of the incident, she was 13 years old, a minor within the meaning of the Children's Act. This is sufficient proof of the complainant's age. In the case of Alfayo Gombe Okello v. Republic Cr App No 203 of 2009 (Kisumu), the court stated as follows;

> " In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

16. The element of penetration was proved through the testimony of PW1 which corroborated that of PW2. PW1 stated that upon examining the victim, he noticed that her hymen was freshly broken and that there was vaginal bleeding. He stated that the injuries were proof of penetration. PW2 testified that the appellant, who she knew to be a Sunday school teacher at[Particulars withheld] Catholic Church, went to her home and defiled her in her bedroom.

17. PW3 noticed that PW2 was walking with difficulty and that is when PW2 told her that she had been defiled by the appellant. On the identity of the assailant, there may not have been anyone else at the house where the incident occurred but the testimony of the victim is sufficient to identify her

perpetrator. Section 124 of the *Evidence Act* provides that the testimony of the victim in a sexual offence is sufficient to identify the assailant and no corroboration is needed to that effect. The proviso states:

> " 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."

18. From the evidence, there is no doubt in the court's mind as to identity of the appellant as the assailant. All in all, the prosecution did prove the case against the appellant beyond reasonable doubt. The appellant argued that the trial court did not consider his defense. In the final paragraphs of his judgment, the trial magistrate did consider the appellant's defense and observed that the same was a mere denial of the charges. It did not have any specific rebuttals to the prosecution's evidence.

19. The appellant has also decried the validity of the charge sheet, terming it as defective. In the case of MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR), the court stated:

> " The Court of Appeal in Benard Ombuna v Republic (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-
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> "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.""

20. In this case, the appellant understood the charge he was facing and he actively participated in the trial by cross-examining the witnesses. In light of this, the charge sheet cannot be held to be defective in any way.

21. The final issue is whether sentence meted out to the appellant is excessive in the circumstances. The sentence is prescribed under section 8(3) of the *Sexual Offences Act* and the court applied it as is. The supreme court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> (66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

Bearing this in mind, I find that the sentence imposed by the trial court is lawful and need not be disturbed by this court.

22. For the foregoing reasons, I find that the appeal herein lacks merit and the same is hereby dismissed.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent