Republic v Ndunda (Criminal Appeal E182 of 2023)
[2024] KEHC 16185 (KLR) (Crim) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E182 OF 2023

LN MUTENDE, J

DECEMBER 19, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

ISAAC MUSYIMI NDUNDA ..... RESPONDENT

JUDGMENT

1. Isaac Musyimi Ndunda, the Appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 8th day of August, 2020 at Nairobi County, he intentionally caused his penis to penetrate the vagina of L.N. a child aged 10 years.

2. In the alternative he faced the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 8th day of August, 2020, at Nairobi County, he intentionally and unlawfully committed an indecent act with L. N. a child aged 10 years by touching her private parts namely vagina.

3. Briefly, facts were that on 8th August, 2020, the complainant L. N. went to the house of the assailant having been sent. Upon arrival on knocking the door she was pulled inside. The assailant placed her on the bed and molested her. The son of the assailant, her agemate, entered the one roomed house. He went back and returned with his mother and the assailant pushed her under the bed and covered her with clothes. Having not seen her, the wife left and she seized the opportunity to leave the house. She went home and later informed her grandmother, PW3 CN, of the incident. The following day they reported the incident to the village elder, then the police.

4. The complainant was taken to Mater Hospital for medical examination. Her hymen was torn and gapping. The suspect, the appellant herein, was arrested and charge.

5. Upon being placed on his defence the appellant denied the allegations. He testified that he left work at 3.00 pm on the 8th August, 2020 and passed by the salon where his wife works. He went to the house and found his children J. and E watching Television. That they left the house and while E was at the stairs other children said that L N was inside his house. E went to call her mother who confronted him. They searched under the bed but L N was not there.

6. The following day his wife called him with L N's grandmother who argued that L N was in his house. On 10th August, 2020 his wife told him that "Jeajea" was looking for him. He went to see her only to find that she was LN's relative. Another lady was sent to him seeking to help him just like 'Jeajea' alleging that there was evidence of blood on clothes but he dismissed them. Later, he was arrested on 18th August, 2020.

7. The appellant called his wife DW2 CN as a witness. She testified that on 8th August, 2020 at 5.00 pm while at the salon her daughter E called her saying that LN was inside their house. She went to the house, confronted her husband, checked under the bed but LN was not there and, she returned to the salon. That at 6.30 pm LN went and asked why she was looking for her. At 7.30 pm LN's mother went to find out why she was looking for LN and she told her the reason why. A day later one Mama Fei told her that her husband had defiled LN.

8. The trial court considered evidence adduced and basing the decision on the provisions of Section 124 of the *Evidence Act*; and, the demeanor of the victim, It satisfied that that she spoke the truth. It also considered the defence and evidence called which confirmed the allegations of the victim having been at the house. In the result it found the defence a sham and affirmed the testimony of the complainant. The court convicted the appellant for defilement and sentenced the appellant to serve fourty five (45) years imprisonment.

9. Aggrieved, the appellant appeals against the conviction and sentence on grounds that:– The complainant's evidence was incredible and it could not lead to a conviction.– The genital penetration was not proved.- Conviction of a single witness evidence without giving reasons for believing the complainant's testimony was erroneous.– The appellant was not properly identified as the perpetrator of the offence.– Rejecting the defence was an error.

10. The appeal was canvassed through written submissions. It is urged by the appellant that penile penetration of the complainant's genitalia was in doubt. That following examination the complainant's genetalia had no physical injuries and the hymen that was torn and gaping was consistent with previous forcible penetration and no spermatozoa were seen.

11. That there were serious discrepancies in the medical examination reports and evidence in support which suggest that the report was made after the P3 had already been filled.

12. That E, the village elder and neighbours who saw LN leaving the house of the appellant should have been called to testify. Reliance is placed on the case of Juma Ngondia v Republic [1982-1988] KAR 454 where it was held that:

> "The prosecution has in general a discretion whether to call or not someone as witness. If it does not call vital reliable witness(es) without satisfactory explanation, it runs the risk of the court presuming that the evidence which could be and is not produced have been unfavourable to the prosecution."

13. The court is faulted for not analyzing the relative credibility of the witness before admitting her testimony pursuant to the requirement of Section 124 of the *Evidence Act*.

14. On Sentence, it is argued that the sentence meted upon the appellant was excessive and harsh. The appellant relied on the case of Ali Abdalla Mwanza v Republic [2018] eKLR where the Court of Appeal stated that:

> "(14) In considering whether the sentence of 40 years was manifestly excessive, we have taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) data for 2018, on life expectancy which is indicated as 64.4 for male and 68.9 for the females and total life expectancy average as 66.7. .....
>
> (15) In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction."

15. This being a first appellate court, it is expected to re-appraise the record and come up with independent conclusions bearing in mind that it neither saw nor heard witnesses who testified and such allowance has to be given. This was well stated in the case of Okeno v R [1972] EA 32, as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

17. Section 8(1) of the *Sexual Offences Act* provides thus:

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

18. The provision of law outlines circumstances under which a person will be considered to have committed the offence of defilement. It captures the three elements required to prove the offence which were also set out in the case of Charles Busutu Kavulavu v. Republic [2015] eKLR thus:

> " There are three ingredients that the prosecution was required to establish for the Appellant to be convicted of the charge. The first one is the indecent act. The second is the age of the victim and the third is the identity of the perpetrator."

19. On the question of age, the particulars of the offence stated that the victim was ten (10) years old. In Omuroni v Uganda, Court of Appeal No. 2 of 2000, it was held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

20. A birth certificate was adduced in evidence indicating that the victim L N was born on 21st May, 2010. The appellant did not dispute the age of the victim. The birth certificate being formal evidence of age, the complainant was proved to have been ten (10) years old at the time. She was a child of tender years (See Section 2 of the *Children Act*.)

21. On the question of penetration, evidence was of a single witness, the complainant who said she was pulled into the house by the assailant who placed her on the bed and did 'bad manners' to her. That he removed her dress and panty, also removed his and lay on top of her. She not only gave a detailed account of what happened but also demonstrated where exactly he lay; and, that he put his urinating thing inside her vagina, but, was interrupted by his son.

22. The primary biological organ used to urinate would be a genital organ. The appellant questions penile penetration having occurred. Section 2 of the Sexual Offence Act defines penetration thus:

> The partial or complete insertion of the genital organs of a person into the genital organs of another person.

23. In other words, the argument advanced is whether vaginal penetration occurred. It is the prosecution's case that the appellant inserted his penis into the vagina of the complainant. She was subjected to medical examination at the outset, at Mater Misericordiae Hospital on 10th August, 2020. This was two days after the incident. It was established that there were no bruised/lacerations on the outer part of the genetalia but the hymen was torn and gaping consistent with previous penetration.

24. On cross examination PW3 DR. Jacinta Wachira stated that it was possible to have sex at her (the complainant) age and not see blood. She said she had never had sex with another person but with the same person. And no spermatozoa were seen. In Kassim Ali v Republic Cr. Appl No. 84 of 2005 (MSA) it was held that:

> " ...fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence..."

25. Section 124 of the *Evidence Act* provides thus:

> 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.

26. The court has been faulted for not giving reasons for the belief. The court took into consideration the story recounted by the victim as narrated in court. It noted that the victim understood the duty of speaking the truth; when cross examined, she answered questions without a hitch. It took into consideration how the complainant narrated that the appellant's wife was called by her son and she went to the house but did not see her as she was hidden under the bed. The court further considered that the story narrated by the wife of how her daughter called her to go to the house was also consistent to the prosecution case. Further, the court stated that it observed the demeaner of the complainant and was satisfied that she was telling the truth. Reasons for the belief were given.

27. It is argued that discrepancies existed that should have moved the court to doubt the victim. In Shapwata & Another v Republic Criminal Appeal No. 92 of 2007, the Court of Appeal of Tanzania stated that:

> " in evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

28. The discrepancies pointed out stated by witnesses who did not witness the act were minor and/rightly disregarded by the court. The question of the complainant having not screamed while her mother PW3 Nehema Nekesa having alleged that when called to her mother (PW1's) house LN was crying is not a discrepancy that would go to the root of the case.

29. On the question of calling other witnesses who may have observed what happened other than the actual act of penetration; Section 143 of the *Evidence Act* provides thus:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

30. In Donald Majiwa Achilwa & 2 others v Republic (2009) eKLR the Court of appeal stated that:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549)."

31. Not everything of little importance can be considered serious enough to unsettle what is truthful. The alleged discrepancies were insignificant.

32. On the question of identification, the appellant and the victim were neighbours. The complainant described his house as a single room, a fact admitted by the appellant. She referred to him as "Baba E". The question of improper identification could not arise.

33. On sentence, Section 8(2) of the *Sexual Offences Act* provides thus:

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

34. In Petition E018 of 2023, Republic v Joshua Gichuki Mwangi &Others, the Supreme Court held that Section 8 of the *Sexual Offences Act*, remains valid.

35. It is trite that an appellate court can only interfere with the trial court sentence if it acted upon wrong principles, took into account irrelevant factors such that the sentence was illegal. This was well captured in the Case Ogolla s/o Owuor v Republic, [1954] EACA 270, pronounced itself as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

36. In Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No 253 of 2003 the Court of Appeal held:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R (1989 KLR 306)"

37. Although the trial court had discretion to impose the sentence, it applied wrong principles of law. What transpired was an illegality which must be corrected. Therefore, I set aside the sentence of 45 years imprisonment meted which I substitute with the sentence of life imprisonment.

38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19th DAY DECEMBER, 2024.

L. N. MUTENDE

JUDGE