BKM v Republic (Criminal Appeal 1 (E001) of 2021)
[2023] KEHC 65 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 65 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 1 (E001) OF 2021

AC MRIMA, J

JANUARY 19, 2023

BETWEEN

BKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Appeal arising out of the conviction and sentence of Hon. Nyang'ara Osoro (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 40 of 2019 delivered on 23 rd June, 2020))

JUDGMENT

Background:

1. BKM was charged alongside two others in Kitale Chief Magistrates Criminal (S.O) No 40 of 2019. He faced the charge of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between January 28, 2019 and February 9, 2019 at {Particulars Witheld} within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of JC, a child aged sixteen (16) 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 diverse dates between January 28, 2019 and February 9, 2019 at {Particulars Witheld} within Trans-Nzoia County, the Appellant intentionally caused his penis to touch into the vagina of JC, a child aged sixteen (16) years old.

3. Each of the two co-accused charged with the Appellant faced a charge of Benefitting from child prostitution contrary to Section 16(g) of the *Sexual Offences Act*.

4. All the accused denied the charges and were put on trial. After a full hearing, the Appellant was found guilty and convicted on the main charge of defilement and he was sentenced to serve a term of 15 years'

imprisonment. The rest of the accused were acquitted under Section 215 of the *Criminal Procedure Code*.

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

The Appeal:

6. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of placing an unsafe conviction pegged on insufficient and scanty evidence. Noting that his defence was cogent, he urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

7. The Appellant extensively argued his appeal by way of written submissions. He submitted that the ingredient of penetration had not been established due to paucity of evidence. He was emphatic that he was improperly identified as the perpetrator asserting that had crucial witnesses been called, this question would have been properly addressed. He cited that his defence was not taken into consideration by the trial Court. As such, the Court arrived at a decision in error. He invoked this Court's revisionary powers enshrined in Sections 362 and 364 of the *Criminal Procedure Code*. He also relied on Article 50(2)(q) of the *Constitution* urging this Court to reconsider the sentence as his health had deteriorated. He attached a discharge summary to that effect.

8. On the part of the prosecution, this Court as at the time of writing this judgment had not benefitted from its submissions.

Analysis:

9. 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*.

10. 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.

11. 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.

12. This Court will deal with each of the issues in turn.

Age of the victim:

13. 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.

14. In this case, the complainant herself testified that she was born in 2003 and that she was a Class 7 pupil at {Particulars Witheld} Primary School. That evidence was corroborated by PW5 Dr Sammy Osore, a Dentist practicing at Kitale District Hospital. The complainant was assessed on February 22, 2019 and based on her dentition formula, the Doctor concluded that the minor was 16 years old. He produced the Age Assessment Report as an exhibit. No objection was raised over the same.

15. Going by the evidence of the complainant and PW5, 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.'

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 testified to by two witnesses. They are the complainant and PW6 one Dr Gichuki Gabriel.

21. In the evidence, the complainant narrated how she was waylaid to the home of the Appellant. She was only informed of being married to the Appellant on reaching the homestead. She also learnt that her dowry had already been paid.

22. The complainant stayed with the Appellant for a period of 2 weeks before she was rescued. She testified that she engaged into sexual intercourse with the Appellant on various instances.

23. PW6 examined the Complainant on February 11, 2019 at Kitale District Hospital and made the following observations: Firstly, the Complainant had exhibited physical attributes of a lactating mother. Secondly, the hymen was torn and old looking. Thirdly, the Complainant had bruises on her perianal area. Lastly, she had epithelial cells in her urine.

24. PW6 concluded that there was evidence of penetration which decision was corroborated by the contents of the P3 Form and treatment notes which produced as exhibits.

25. 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.

26. The record also has the manner in which the complainant was rescued from the home of the Appellant. It is, therefore, true that the complainant was at the home of the Appellant and as such her testimony on the sexual activities cannot be faulted.

27. 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:

28. 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.

29. The identification aspect in this matter was attested to by the complainant. The Complainant testified that on January 28, 2019 she was asked by EKM alias Mwalimu, the 2nd accused person in the criminal case, to escort her to church. Before departure, the complainant informed her grandmother EC, PW2, of her whereabouts. At around 2:00pm, both parties boarded a motorcycle together with one DK, the 3rd accused person in the criminal case. She sat between the 2nd and 3rd accused persons. However, instead of heading to church, the motorcycle rider diverted to another route.

30. The complainant grew concerned since she was a pillion alongside her 10-month old child seated in between the 2nd and 3rd accused persons. The rider whisked his pillion passengers to a certain homestead. When they arrived, the2nd and 3rd accused persons remarked 'Kwemoi leo amepata bibi.' The complainant had never met the Appellant before.

31. The person who was the owner of the homestead and who would eventually turn out to be the Appellant herein and his co-accused left the complainant and stepped aside to speak further. On return, the owner of the home stated that he had paid the accused persons a total sum of Kshs 3,000/= as bride price. He then declared that the complainant was his wife. The other accused persons left never to return again.

32. In that evening, the owner of the home and the complainant had dinner. Thereafter, that owner and the complainant had sexual intercourse. This act occurred on another two occasions.

33. The complainant stayed with the said person for two weeks. During the day, the owner of the home would lock the complainant inside his semi-permanent dwelling. On one occasion, the complainant tried to seek help from the siblings of the home owner but was threatened with assault.

34. It was the following day's fate that would have it that the complainant and her child were rescued by one LN, PW3. She was the mother of R. PW3 testified that she found the complainant guarded by two boys. PW3 informed PW2 of the complainant's whereabouts.

35. On February 9, 2019, PW2 reported the matter at {Particulars Witheld} Administration Police Post. The report was received at the Police Post by one PC Jane Korir Ruto who was the arresting officer. The officer also arrested the other accused persons.

36. The matter was then assigned to PW7 Cpl Mwanguma Njinango Saidi, who became the investigation officer. He recorded witness statements, gathered evidence and charged the Appellant alongside the others with the respective offences.

37. After the close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence. He raised an alibi. His sworn testimony was that he was at work when he was arrested. He was then interrogated and transferred to Kitale Police Station. He was later arraigned in Court to answer to the charges. He denied committing the offence.

38. 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.'

39. 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.

40. Notwithstanding the foregoing legal position, in this case the evidence of PW3 materially corroborated that of the complainant to the extent that when PW3 received information from PW2 that the complainant had disappeared she was later informed that indeed the complainant was at the homestead of the Appellant. PW3 proceeded thereto and found the complainant locked inside a house and was guarded by two boys. PW3 informed PW2 who reported the matter to the police.

41. This Court has also considered the Appellant's defence. It only centered on the manner he was arrested. 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.

42. The argument that some potential witnesses were not called does not hold in this matter. 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) EA 594*, *Kingi versus Republic (1972) EA 280* and *Nguku versus Republic (1985) KLR 412*). The witnesses called were sufficient to prove the offence.

43. Drawing from the above coupled with the fact that the owner of the home declared that the complainant was his wife, the two weeks' stay in the same house with the said person and the engagement in sexual intercourse for around three times are sufficient reasons to make the complainant be able to adequately recognize the person who she sexually engaged. The complainant was categorical that it was the Appellant in this case.

44. The trial Court believed the witnesses as truthful. There is nothing on record for this Court to review that finding. In sum, the evidence affirms the position that the identification of the Appellant as the assailant was not in error.

45. Having found that the Appellant was properly identified as the perpetrator he was rightly found guilty and properly convicted. As such, the appeal against the conviction is hereby dismissed.

Sentence:

46. The Appellant was sentenced to 15 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

47. 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.

48. 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.

49. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.

Disposition:

50. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **KITALE** this **19th** day of **January, 2023.**

A. C. MRIMA

JUDGE

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

Benjamin Kwemoi Marongo, the Appellant in person.

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

Regina/Chemutai – Court Assistants.