Njapit v Republic (Criminal Appeal 03 of 2019)
[2023] KEHC 1534 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 03 OF 2019

F GIKONYO, J

FEBRUARY 28, 2023

BETWEEN

DENNIS NJAPIT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. H. Ng'ang'a (S.R.M) in Narok SOA No. 50 of 2017 on 11th January 2019)

JUDGMENT

1. This appeal is against the appellant's conviction, and sentence of 15 years' imprisonment imposed on 11th January 2019 for the defilement of the complainant- a girl aged 17 years.

2. Being dissatisfied with the said sentence he preferred an appeal *vide* the memorandum of appeal received in court on 23/01/2019.On 10/02/2022, the appellant sought leave to amend earlier lodged grounds of appeal pursuant to provisions of Section 350 (2) (v) of the *CPC* as follows;

    i. That the trial learned magistrate erred in law and facts in failing to find that the age of the victim was not conclusively proved.

    ii. That the court did not take into account the provisions of the cited law hence breaching article 27 of the *constitution* which call for benefit and equal benefit and equal protection of the law.

    iii. That the learned magistrate casually accepted the age assessment without taking into account the law governing expert evidence.

    iv. That the learned magistrate erred in law and facts in not finding that the victim's credibility was questionable.

    v. That the sentence awarded was harsh in the circumstances.

Directions of the Court

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions.

4. The appellant submitted that PW3 did not carry out the age assessment on the victim and hence should have applied to be allowed to produce the said age assessment. He was required to give evidence as per the provisions of section 77 of the *Evidence Act*. That the appellant was denied the right to cross-examine Dr. Kimani on facts that he relied on.

5. The appellant submitted that the conduct of the victim is one of an adult. That she is the one who proposed to be married.

6. The appellant submitted that the sentence in regard to the circumstances is harsh. that a baby was born. the best interest of the child has not been taken into account. Further that the sentence did not take into account section 333(2) *CPC*.

7. The appellant relied on the following authorities;

   i. *Hillary Nyongesa v Republic*

   ii. *John Cardon Wagner v Republic*

   iii. *Kaingu Elias Kasomo v Republic*

   iv. *Alfayo Gombe v Republic* [2010] eKLR.

   v. *Dominic Kibet v Republic* Criminal Appeal no 155 Of 2011

   vi. *Mutonyi v Republic* [1982] eKLR

   vii. *R v Tuner*[1975] All Er 70

   viii. Section 77 Of The *Evidence*

   ix. Article 50(4) Of The *Constitution*

   x. *Elijah Njihia Wakianda v Republic* [2016] eKLR

   xi. *Elizabeth Waithiebeni v Republic* [2015] eKLR

   xii. *Eliud Waweru Wambui v Republic* [2019] eKLR Cited In *Kimanyi v Republic* [1979] eKLR 282.

   xiii. *Philemeon Koech v Republic* [2021] eKLR

   xiv. *David Kipkel v Republic*

   xv. *Wilson Kipchirchir Koskei v Republic*[2019] eKLR

The Respondent's Submissions.

8. The respondent relied on the *viva-voce* evidence.

Analysis and Determination.

Court's Duty

9. As a first appellate court, this court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] EA 32

10. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the sentence was manifestly harsh and excessive

The Charge and Particulars

11. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* no 3 of 2006.

12. It was alleged that on diverse dates between august 2016 and 7th October 2017 in Narok North Sub-County within Narok county unlawfully and intentionally caused his penis to penetrate the vagina of SS a child 17 years.

13. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* no 3 of 2006.

14. It was alleged that on diverse dates between august 2016 and 7th October 2017 in Narok North Sub-County within Narok county unlawfully and intentionally touched the vagina of SS a child 17 years.

Elements of Offence of Defilement

15. Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* establishes the offence of defilement as follows:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

16. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

    3) Positive identification of the assailant.

Age of the Complainant

17. Age of the victim of defilement is essential element because; defilement is a sexual offence committed against a child- a person below the age of 18 years (*Children Act*). Notably, also, the age of the child is

an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in *SOA*.

18. Was the age of the victim proved?

19. The appellant states that the age of the complainant was not conclusively proved. The prosecution submitted that the age of the complainant was conclusively proved. What does the evidence unveil?

20. The trial court noted that the complainant was not a child of tender years hence the complainant gave sworn evidence.

21. PW 1 told the court that she was 16 years old and was in class 6.

22. PW2- brother to PW1 testified that PW1 was born around the year 2001 and was about 16 years.

23. Age assessment was also carried out at Narok County Referral Hospital on 13th December 2017. It showed that she was approximately 17 years old. The age assessment report was produced as P Exh 2.

24. PW3-Benjamin Tum, a clinical officer produced the age assessment report signed by Dr. Kimani. The appellant was given the opportunity to cross-examine PW3, but he indicated that he had no questions. There was no specific request that was made during trial for the maker to be called. Nothing- factual or legal- vitiates the production of the age assessment report by PW3. I find the issue of calling the maker of the assessment report to be an afterthought, and has been made too late in the day.

25. Proof of age is not necessarily a certificate. Other evidence may be adduced to prove age (*Fappyton Mutuku Ngui v Republic* [2012] eKLR).

26. On the basis of evidence adduced by the prosecution, I find the age of the victim was 17 years at the time of the offence.

Penetration

27. The next hurdle; whether there was penetration.

28. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as:

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

29. Penetration was succinctly explained by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR 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.".

30. The prosecution submitted that the appellant had ample opportunity to engage in sexual intercourse with the victim from the time he seduced her at her parents' house up to the time that they were cohabiting.

31. PW1 testified that the appellant approached her in the year 2016 and seduced her at her house. She accepted his proposal and the appellant began visiting her when her parents were away. On 7th April 2016, they had sexual intercourse at her parents' house when the parents were away. From June 2016 up to January 2017 they used to meet at the girl's house every weekend and have sexual intercourse. In

May 2017 she discovered she was pregnant and notified the appellant. The appellant took her as wife and took her to his home in Ewaso Nyiro and later to Maasai Mara and back to Ewaso Nyiro where they were finally found by the victim's parents on 7th October 2017 in the appellant's house.

32. PW1 stated that during this time that they lived together they lived as husband and wife, they continued having sexual intercourse.

33. The evidence of PW1 was corroborated by PW3. PW3 examined PW1 on 8th October 2017. He found that her hymen was broken and longstanding. Lab examination revealed that she was approximately five months pregnant.

34. PW2 stated the in July 2017 he had been notified by the school that the victim was unwell and had gone to hospital. In the evening he did not find PW1 at her home. It was only in October 2017 that he received information that the victim was in the appellant's house in Ewaso Nyiro. He went to the appellant's house in the company of administration police officers where they found both the appellant and PW1.

35. PW3 was very clear that penetration did occur. The inevitable conclusion from the analysis of the evidence is that there was a penetration of the genitalia of PW1. I accordingly find that the prosecution proved beyond reasonable doubt that there was a penetration of PW1- a child. But by whom?

Was the appellant the perpetrator?

36. The appellant has not denied having sexual intercourse with the complainant.

37. The prosecution submitted that the identification of the appellant was through recognition.

38. PW1 and PW2 in their testimonies stated that the appellant had been employed by their next-door neighbour as a herder. According to PW2, the appellant had been in their neighborhood for about a year. The appellant is also well-known to PW1.

39. The appellant in his unsworn evidence confirmed that he knew PW1 well. He stated that he had taken her as a wife as her mother had given her away into marriage. He only laments that, this case emanated from the dissatisfaction of the PW2 with the bride price.

40. The appellant submitted that the conduct of the victim is one of an adult. That she is the one who proposed to be married.

41. The appellant merely made statements that the conduct of the victim was of an adult. He did not mount or establish a serious defense under section 8(5) & (6) of the *SOA*, that the child deceived him into believing that she was over the age of eighteen years at the time of the alleged commission of the offence; and that he reasonably believed that the child was over the age of eighteen years. The belief is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant. No such deception or belief or circumstances were established by the appellant to warrant the defense. Therefore, the defense fails.

Marrying Off Children

42. This piece of evidence requires unreserved rebuke from the court. It appears the appellant is trying to justify penetration of the minor herein because he had taken her for a wife.

43. It be known that marrying a child away is unconstitutional as well as criminal act. It is unconstitutional because it is an infringement of the right of the child enshrined and protected in the Bill of Rights and international instruments. It is criminal because the girl is exposed to sexual intercourse which

will cause penetration with a child- defilement contrary to the *Sexual Offences Act*. Such act is in law intentional and unlawful because it is committed in respect of a child- a person who is incapable of giving consent to or of appreciating the nature of sexual intercourse- penetration- which causes the offence of defilement. See section 43 of the *Sexual Offences Act*. Accordingly, I sound a stern warning to those traditional cultures which marry away children- girls- that by admiring and marrying and engaging in sexual intercourse with a child; they indulge in the prohibited in law; and they will surely tremble in the right place; the prison for a long time or life. Parents or guardians who give children to marriage should also be charged in a court of law. To eradicate this vice, we require collective efforts- both soft and hard- through education of the public of the offence as well as punishment of the offender.

44. Back to the main. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant.

45. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

46. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On Sentence

47. The appellant submitted that the learned trial magistrate convicted and sentenced him to life sentence without exercising discretion. But this submission is misleading because he was sentenced to 15 years' imprisonment.

48. The trial court applied Section 8 (4) of the *Sexual Offences Act* to convict. The section provides:

> 8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

Of Mandatory or Mandatory Minimum Sentence

49. I have always posed as food for thought; whether, except section 8(2) of the *Sexual Offences Act*, all the other penalty clauses in *SOA* which have adopted the use of phraseology liable upon conviction to imprisonment prescribe a mandatory or mandatory minimum sentence as it is widely-albeit erroneously- believed.

50. My view has always been that the erroneous belief arises from the incongruous use of the phrase 'liable upon conviction to imprisonment' together with 'not less than...'

51. It is not necessarily that the trial court believed only one sentence is prescribed in law; when he stated, thus: -

> ...the offence attracts a minimum mandatory sentence. I sentence the accused to serve fifteen (15) years imprisonment.

52. I take into account that the accused was a first offender. But the offence is serious and the manner and circumstances it was committed require real deterrent sentence. I do note that the girl was in school- in class 6 and aged 17 years- yet, the appellant seduced her. As a consequence, the victim became pregnant, dropped out of school, and, the appellant started to cohabit with her as his 'wife'. These unlawful

acts by the appellant forced her to became a teenage mother, thus, decimating her opportunities in education and other growth appurtenant thereto. This is a long-life forcible confinement of a minor into undesired motherhood by the appellant. I repeat; you admire, marry and defile the prohibited-a child-; you will surely tremble in the right place; the prison, for a long time or life. The appellant seemed to be justifying his action; that she was his 'wife' and that the parents were just unhappy with the bride price. What a shameless excuse?

53. In these circumstances, a sentence of 15 years was quite lenient. Nonetheless, it is capable of acting as a deterrent measure on these debauchery sexual attacks on children, yet, giving him an opportunity to be reintegrated back into society and be a productive citizen. I therefore see nothing upon which I may interfere with the sentence imposed of 15 years' imprisonment. Accordingly, I dismiss the appeal on sentence.

Of Section 333(2) CPC.

54. The appellant urged this court to take into consideration the time spent in custody prior to conviction.

55. I have perused the trial court record and found that the appellant was first arraigned in court on 9/10/2017. He remained in custody till 19/12/2017 when surety was approved. However, he absconded and on 13/4/2018 his bond was canceled. But, in light of the lenient sentence imposed upon him given the circumstances of the case, I deem he got advantage of section 333(2) of the *CPC*.

Conclusion and orders

56. The appeal is dismissed. The appellant to serve sentence imposed by the trial court.

57. It is so ordered

DATED, SIGNED, AND DELIvERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF FEBRUARY, 2023.

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. Ms. Mwaniki for DPP

3. Kasaso – CA