RKR v Republic (Criminal Appeal E032 of 2021)
[2023] KEHC 1401 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1401 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E032 OF 2021

RL KORIR, J

FEBRUARY 28, 2023

BETWEEN

RKR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence by Hon. Lilian Kiniale PM in Bomet Magistrate's Court in S.O. Case No. E017 of 2021)

JUDGMENT

1. 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 of the charge were that on diverse dates between 1st day of January 2021 and 21st day of February 2021 in Bomet township location within Bomet County, intentionally caused his penis to penetrate the vagina of FC, a child aged 5 years.

2. The Appellant was also charged with an alternative charge of committing an incident act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 1st day of January 2021 and 21st day of February 2021 in Bomet township location within Bomet county, intentionally touched the vagina of FC, a child aged 5 years his penis.

3. The Appellant took plea on 29th April 2021 and pleaded not guilty to the main and alternative charges. The matter proceeded to a full trial with the Prosecution calling 5 witnesses. At the close of the Prosecution's case, the trial court found that the appellant had a case to answer and placed him on his defence. He opted to give unsworn testimony and called no witnesses.

4. By judgement dated 15th September 2021, the trial court convicted the appellant and sentenced him to life imprisonment. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal through a Petition of Appeal filed on 28th September 2021 in which he raised 7 grounds.

5. The Appellant later filed an amended memorandum of appeal on 18th August 2022 where he raised 3 grounds as follows:

   (i) That the learned trial magistrate erred in law and fact by not observing that evidence brought forward by the Prosecution fell too short of the standard needed in law and that the evidence was based on theory and conspiracy and thus, the said offence was not proven beyond reasonable doubt by the Prosecution witnesses.

   (ii) That the learned trial magistrate erred in law and in fact by not considering the Appellant's mitigation and gave out the mandatory minimum sentence which was unconstitutional.

   (iii) That he prayed to be present during the appeal.

6. The parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant filed his submission dated 18th August 2022. He submitted that there were no investigations conducted on the matter and that the evidence of PW1 and PW2 was not cogent to sustain a conviction. He submitted that the testimonies of the Prosecution witnesses raised doubt as to whether he was the one who actually committed the said act because PW1 and PW2 reported the incident two months after they had stayed with the victim. He urged that the Court should re-evaluate and re-examine the evidence and independently arrive at a finding that he was not responsible for the offence of defiling his niece.

8. The Appellant submitted that his conviction was premised on fabricated evidence and that the subsequent conviction did not consider the circumstances of the case. He submitted that the sentence meted by the trial magistrate was unconstitutional and that this Court should consider that he was a first offender who cared for his old parents and had not married.

The Prosecution's Submissions

9. The Prosecution's submissions were filed on 18th October 2022. They submitted that the victim was a child of tender years as observed by the trial magistrate and as testified by PW1 and PW2. They also submitted that the Appellant did not challenge the age of the victim in his Appeal.

10. The Prosecution submitted that the victim properly identified the appellant as the one who pierced (meaning defiled) her using his penis. That she also called the Appellant by name. They submitted that the Appellant himself confirmed that the victim was his niece therefore, it was unlikely that the victim could identify the wrong person.

11. The Prosecution submitted that PW2 noticed the foul-smelling discharge from her private parts and that the victim informed her that her uncle the appellant had defiled her. They also submitted that PW3 the clinical officer confirmed that the victim's hymen was absent and that she had a foul-smelling discharge. That PW3 concluded that the minor had a sexually transmitted disease as a result of penetration and this fact was not challenged by the appellant.

12. On sentencing, the Prosecution submitted that the trial court had no other option than to sentence the Appellant to the mandatory sentence as provided by section 8(2) of the *Sexual Offences Act*. They submitted that the appeal lacked merit and should be dismissed.

13. It is the duty of a first appellate court, to re-evaluate the evidence given at the trial court. This duty was succinctly stated by the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] E.A. 336 where it stated thus: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

Issues for Determination

14. I have perused the trial Record, the Petition of Appeal and the parties' respective submissions. The two issues for my determination are: -

    (i) Whether the offence of defilement was proven to the required standard.

    (ii) Whether the sentence was legal and appropriate

I. Whether the offence of defilement was proven to the required standard

15. The offence of defilement is provided for under section 8(1) of the *Sexual Offences Act*. It provides that:

> Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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.

16. For the offence of defilement to be proven, the Prosecution must prove three ingredients. In the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 the court outlined the ingredients as follows: -

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

Age

17. The age of a victim can be proven through documentary evidence or through the evidence of the parent or guardian. In *Kaingu Elias Kasomo v R*, Malindi Cr. App. No. 504 of 2010, the Court of Appeal stated that:-

> " the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard..."

18. In this case there was no doubt about the age of the victim. It was proved both by oral and documentary evidence. PW3 the clinical officer produced an age assessment report dated 28 April 2021 (P.Exh3) which indicated that the victim was between 4-5 years old. I also noted that the trial court observed that the victim was a minor of tender years. I find that the age of the victim was adequately established and that she was a minor of tender years between 4 and 5 years.

Penetration

19. Section 2 of the *Sexual Offences Act* defines penetration as: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

20. It was the evidence of the victim that the Appellant pierced her with his penis. PW3 also testified that during the medical examination at Longisa, he found the victim's hymen had been broken. The P3 Form (P.Exh1) also indicated that the victim had foul-smelling whitish discharge which suggested penetration. From the above evidence, I find that, the victim's testimony that she was penetrated coupled with the medical examination, proved beyond reasonable doubt that she was penetrated.

Identification

21. The appellant submitted that he was not adequately identified as the person who defiled the complainant because PW1 and PW2 reported the incident two months later. Needless to state, the positive identification of an accused must be proven before a conviction is entered.

22. It was the Prosecution's evidence that PW4 the victim in this case was able to identify the Appellant as the person who pierced her. That PW4 stated in her evidence that she knew the Appellant by name and identified him in court. There were no other witnesses who identified the Appellant. It follows then that it is only the victim's testimony which linked the Appellant to the said act. In the premise, this Court finds guidance in the case of *Oluoch v R* [1985] KLR 549 where it was held that:

> " It is trite that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care.

23. Section 124 of the *Evidence Act* states thus:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

24. At this point, it is necessary to evaluate the sole evidence of the child in respect of identification. I have considered her testimony alongside the defence of the appellant. The appellant confirmed that the victim was indeed his niece and that she had lived with him for a long time. I have noted also that during the voire dire, the trial magistrate stated that the minor was able to express herself well and answered questions promptly.

25. The trial magistrate indicated on the record that the victim's evidence was honest as she stated in Kalenjin language which was her mother tongue that the appellant pierced her with his penis. In my view, barring any inadequacy in interpretation, the words used by the victim to describe the act done to her make her evidence believable in that, while she could not state clearly that she was defiled, she was clear that she was pierced by the penis of R who was her uncle and therefore a person well-known to her. I am satisfied that she was telling the truth and that her identification of R the Appellant was inerrant.

26. In his defences the Appellant's told the trial court that he was a boda boda rider. He said that he arrested on 28th April, 2021 after one Florence told him to go and check on his sister's child who was at the police station. That upon arriving at the police station he was arrested and placed in custody while being accused of defiling her. He confirmed that the complainant was his niece and denied having defiled her. He said that the owner of the boda boda framed him because he had not remitted the boda boda money for 2 days.

27. I have considered the appellant's defence. I find it a mere denial. Other than admitting that the complainant was his nephew, he said nothing to displace the prosecution case or even cast any doubt. He alleged that his employer had framed him but did not show any relationship between the employer and the victim. I dismiss the entire defence.

28. It is my finding that the offence of defilement was proven against the Appellant to the required threshold. I uphold the conviction of the trial court.

II. Whether the sentence was legal and appropriate

29. The trial court sentenced the Appellant to life imprisonment as stipulated by section 8(2) of the *Sexual Offences Act*. The wording of this provision is mandatory in nature as it employs the use of the word 'shall'.

30. Mandatory sentences have often been criticized for fettering judicial discretion because the courts in sentencing a convicted person must take into account various factors. These include the age of the offender, whether they are a first offender, the nature of the offence, aggravating circumstances amongst others. It follows then, that a trial court should not be compelled to mete out the mandatory sentences as prescribed by the law without considering mitigating circumstances.

31. In the famous case of *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 [2017] eKLR, the Supreme Court set out factors to be considered in a sentence hearing as follows:-

"(71) To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

32. The factors set out above equally apply to any offence. In the present case, the appellant stated in the trial court that he had children and an old mother who depended on him. The Prosecution also stated that he was a first offender. The trial court however noted that the appellant was not remorseful for the offence he had committed.

33. The purposes of sentencing were outlined in the *Judiciary Sentencing Policy Guidelines* of 2016 at page 15, paragraph 4.1. as follows:-

> " Sentences are imposed to meet the following objectives:
>
> (1) Retribution: To punish the offender for his/her riminal conduct in a just manner.
>
> (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
>
> (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
>
> (5) Community protection: To protect the community by incapacitating the offender.
>
> (6) Denunciation: To communicate the community's condemnation of the criminal conduct.

34. Guided by the above, I have considered the circumstances of this case. It is apparent I have arrived at the finding that such an offence would call for a combination of the above objectives. I have considered that the victim was a child of tender years whose innocence was snatched from her by a person who ought to have been the one to protect her. I have further considered the Medical Examination Report (P.Exh.1) which revealed that the minor had been infected by a sexually transmitted disease. I consider these to be aggravating circumstances.

35. It is my view that the trial magistrate who had the benefit of hearing and seeing the demeanour of the witnesses on a first account correctly and legally applied the law in sentencing the appellant. Having considered the circumstances of this case including the very tender age of the victim, this Court must be reluctant to interfere with the said sentence. I find guidance in the case of *Wanjema v Republic* [1971], Criminal Appeal No. 204 of 1971, E.A. 493, 494, where the court laid down the general principles for consideration by an appellate court in sentencing an appellant. It stated thus:-

> " An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

36. It is therefore my finding that the said sentence was not only legal but appropriate under the circumstances.

37. In the end, this Appeal lacks merit and is dismissed. I uphold both the conviction and sentence.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2023.

R. LAGAT-KORIR

JUDGE

Judgement delivered virtually in the presence of the Appellant (Virtually present at Naivasha Maximum Prison), Mr. Njeru for the State and Siele (Court Assistant).