Charo v Republic (Criminal Appeal E094 of 2021)
[2023] KEHC 1517 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1517 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E094 OF 2021

FG MUGAMBI, J

FEBRUARY 24, 2023

BETWEEN

MACLEANS MWACHIWE CHARO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D. Odhiambo, RM dated 6th October 2021 in Sexual Offence Case No. 110 of 2018 in the Senior Principal Magistrate's Court at Shanzu)

JUDGMENT

1. The appellant was charged, convicted and sentenced to 15 years' imprisonment for the offence of defilement contrary to section 8(1) read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 30th August 2018 at [Particulars Withheld] township, he intentionally and unlawfully caused his penis to penetrate the vagina of SW, a child aged 14 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. During trial the learned magistrate noted that the appellant ought to have been charged under section 8(1) read with 8(3) taking into account the age of the complainant. It was his finding that this was not a fatal defect on the charge sheet. The learned magistrate continued to convict and sentence the appellant under the provisions of section 8(3). This issue has not been raised by the appellant.

3. The appeal is preferred against the conviction and sentence as set out in the Petition of Appeal filed on 21st October 2021 and the Amended Grounds of Appeal. The appellant also relies on his written submissions. The prosecution opposed the appeal through the written submissions of its counsel filed on 18th January 2023.

4. During trial the prosecution called four (4) witnesses. PW1, the complainant, gave sworn testimony after being subjected to a voire dire examination. It was her evidence that she first met the appellant on 30th August 2018 at 8pm as she was walking to her uncle's house. The appellant harassed her to get on to his motorbike which she eventually did. They went to his house and he forced her to have intercourse with him. She stayed at his house for 5 days and had intercourse with him on 5 other occasions until the police came for her. She was taken to the police station where she spent a night and was taken to the hospital the next day. SW also produced her birth certificate that showed her date of birth as 30th August 2005.

5. The mother to SW testified as PW2. It was her evidence that on the night of 30th August 2018, she was at work with SW and her children. SW asked for the house keys from her to go home and take a shower. This was around 8pm. SW returned the keys to her mother and thereafter could not be found. This prompted PW2 to look for her. She reported the matter to Mtwapa Police Station the following day. Days later PW2's husband called her and informed her that he had been tipped off that SW was at Mzambaraoni. She reported the same to the Police and the Appellant was arrested. PW3 was the clinical officer based at Mtwapa Health Center who examined SW. He produced the PRC form and P3 form. PW4 was the investigating officer based at Mtwapa Police Station gender desk.

6. The appellant testified that he did not have sexual intercourse with SW neither did she go to his house. He also denied that she stayed with him.

7. The appeal is premised on 9 grounds of appeal as listed hereunder.

    i. That the leaned trial magistrate erred in law and fact by finding that the offence of defilement was proved beyond reasonable doubt.

    ii. That the leaned trial magistrate erred in law and fact by failing to find that there was no evidence that SW had been defiled or was defiled on 30th August 2018.

    iii. That the leaned trial magistrate erred in law and fact by failing to find that SW had lost her hymen the day before PW3 examined her.

    iv. That the leaned trial magistrate erred in law and fact by failing to find that there was no medical evidence to link the appellant to the offence.

    v. That the leaned trial magistrate erred in law and fact by failing to scrutinize the evidence before coming to the conclusion that the appellant defiled SW.

    vi. That the leaned trial magistrate erred in law and fact by finding that the testimony of SW was corroborated by medical evidence.

    vii. That the leaned trial magistrate erred in law and fact by failing to consider the appellants defence.

    viii. That the sentence of 15 years was manifestly harsh under the circumstances.

    ix. That the leaned trial magistrate erred in law and fact by failing to consider the extenuating circumstances under which the offence was committed as provided for under section 4(1) of the *Probation of Offenders Act*.

8. The respondents on the other hand argue that the ingredients for defilement had been proven beyond a reasonable doubt. It is their further submission that the sentence is just and fair under the circumstances. They pray that this appeal be dismissed.

9. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v Republic* [1972] EA 32). I am also cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) EA 32. Against this background, I have considered and reassessed the evidence before the trial court and taken into account the written submissions and authorities cited by parties. I have formulated these two (2) broad issues to determine all the grounds of appeal.

    a. Whether the offence against the Appellant was proved beyond reasonable doubt

    b. Whether the sentence was lawful, justified and proportionate

A. Whether the offence against the Appellant was proved beyond reasonable doubt

10. The elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are provided under section 8 of the *Sexual Offences Act*. These are:

    i. Age of the complainant,

    ii. Penetration and

    iii. Positive identification of the assailant.

Age of the complainant

11. The evidence required to prove age in sexual offences is now clear. The Court of Appeal stated in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR that: -

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

12. SW produced her birth certificate which shows that she was born on 30th August 2005. She had just turned 14 years old at the time of the offence.

    PW2 also corroborated the evidence of SW. For these reasons I find that the age of SW was conclusively proven.

Penetration

13. It is the appellants submission that the medical evidence of PW3 in totality and in reference to the broken hymen did not prove that SW was defiled or that she was defiled on the night in question. The P3 form that was produced did not also state defilement as a conclusion of the examination and as such the element of penetration according to the appellant had not been proved. He further submits that there is no medical examination linking him to the offence. The rival submissions by the respondents invite this court to find to the contrary, that penetration was proved by the evidence of SW and PW3.

14. Penetration is defined in Section 2(1) of the *Sexual Offences Act* to mean:

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

15. The established principles are that penetration may be proved by relying on the evidence of the victim. Corroboration is not mandatory depending on the circumstances of the case. Where the court finds that the testimony of the victim is believable, it must state the reasons for believing the testimony. In such cases the evidence of the victim is sufficient to convict, even without the need for corroboration. Where there is need for corroboration, the medical examination of the complainant is sufficient even without the examination of the perpetrator. See *JWA v Republic* (2014) eKLR. The same is also provided for under section 124 of the *Evidence Act* which provides as follows:

> Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of an 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."

16. I am additionally guided by the Court of Appeal's decision in *Geoffrey Kioji v Republic*, Nyeri Criminal Appeal No. 270 of 2010. It was stated that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person".

17. SWs testimony remained consistent as she vividly explained how she met the appellant and had sexual intercourse with him on the night of 30th August 2018 and on the other 5 nights until the Police broke into the appellant's house. I also note from the court records that the appellant did not controvert this evidence in his cross examination. SWs testimony was corroborated by the evidence of PW3 who stated that the labia majora and minora were normal...it does not however mean that nothing happened. The hymen was broken which means that there was penetration. I do not find any contradictions in the evidence of PW3. I have considered the evidence of SW and that of PW3 in totality and I find that the element of penetration was proven to the required standards.

Identification of the perpetrator

18. It was the evidence of SW that she did not know the appellant before the night of 30th August 2018. When she went to his house she stayed there for 5 days and had several sexual encounters with him. By the time of the arrest she had become familiar with the appellant to identify him from recognition. The appellant was also positively identified by PW2 who found SW in his company when the Police arrested him. The appellant did not controvert PW2's evidence during cross examination. There is no

doubt that the element of identification of the perpetrator was also proved and for the reasons that I have stated above, I find that the appellant was convicted on cogent evidence.

B. Whether the sentence was lawful, justified and proportionate

19. The appellant states that the learned trial magistrate ought to have considered a non-custodial sentence under the *Probation of Offenders Act* taking into account his youth. The appellant was sentenced under the provisions of section 8(3) of the *Sexual Offences Act* which provides that: 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.

20. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. In *Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR it was stated that:

> '...To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences

21. In the same vein, sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R*, and *Wilson Waitegei v Republic* [2021] eKLR).

22. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender's responsibility over third parties should affect the sentence. There is a sound argument also for first-time offenders, for instance, who are not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence is hefty enough to punish and deter others from the heinous crime. (See *BW v Republic* KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR, *Christopher Ochieng v Republic* KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014).

23. The appellant was provided an opportunity to mitigate in the trial court. He begged for the courts leniency. He stated that he was in his youth and trying to make ends meet and take care of his family and that he was also a first offender. The trial record shows that the mitigation was taken into account in his sentencing. I therefore find no reason to depart from the trial courts determination.

24. The upshot of this is that I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the prosecution against the appellant. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI(VIRTUALLY) THIS 24TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE