Chepkwony v Republic (Criminal Appeal E008 of 2022)
[2023] KEHC 1168 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E008 OF 2022

RL KORIR, J

FEBRUARY 24, 2023

BETWEEN

BRIAN CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Conviction and Sentence by Hon. Jackson Omwange, SRM in Sotik Magistrate's Court Sexual Offence Number 30 of 2020)

JUDGMENT

1. The Appellant was charged and convicted at Sotik Law Courts of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on July 6, 2020, at [Particulars Withheld] village in [Particulars Withheld] sub-county within Bomet County, intentionally and unlawfully caused his penis to penetrate the vagina of IC a child aged 14 years.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on July 6, July 2020 at [Particulars Withheld] village in Konoin sub-county within Bomet County, intentionally and unlawfully touched the vagina of IC a child aged 14 years with his penis.

3. The Appellant pleaded not guilty to the main and alternative charges. The matter proceeded to full trial and the Prosecution called five (5) witnesses in support of their case.

4. At the close of the Prosecution case, the Appellant was placed on his defence. He gave sworn testimony and called one witness DW2, His wife, in his defence.

5. At the conclusion of the trial, the Appellant was convicted on the main charge and was sentenced to serve 20 years in prison.

6. Being dissatisfied with the conviction and sentence, the Appellant filed a Memorandum of Appeal on February 2, 2022 where he raised six grounds of appeal reproduced verbatim as follows: -

    1. That he pleaded not guilty at the trial and still maintained the same.

    2. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.

    3. That the learned trial magistrate erred in both law and fact by relying on evidence adduced by the Prosecution side which was inconsistent, contradictory and full of irregularities.

    4. That the learned trial magistrate erred in law and in fact by failing to analyze the entire evidence which was manufactured, manipulated and framed to meet the predetermined goal of fixing him.

    5. That the trial court erred in law and in fact by failing to analyze the entire evidence adduced by Prosecution hence he was not medically examined, and DNA was not done as stipulated under section 36(1) of the *Sexual Offences Act* No of 2006.

    6. That he prayed to be present during the appeal.

7. The Appellant later filed an amended Memorandum of Appeal dated September 5, 2022 in which he raised the following grounds: -

    1. That the learned magistrate erred in law and fact by failing to consider the grudge which existed between the Appellant and the family of the complainant which led to him being convicted and sentenced for 20 years.

    2. That the learned trial magistrate did not employ his judicial discretion and only gave mandatory minimum sentence of 20 years imprisonment which did not reflect the spirit of the *Constitution* of Kenya 2010.

8. The duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and come to its own conclusion. This duty was aptly stated by the Court of Appeal in *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, thus:-

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

9. The parties canvassed the appeal by way of written submissions pursuant to the Court's direction issued on July 27, 2022.

The Appellant's Submissions.

10. The Appellant filed his submissions on September 5, 2022. It was the Appellant's submission that his case was based on a grudge between himself and the complainant's mother concerning a past quarrel between their children which the trial court failed to consider. He also submitted that the trial court violated his rights under Articles 24(1) and 27 of the *Constitution*. That he was a first offender and the trial court failed to call for a Probation Report to aid in sentencing. The Appellant finally submitted that he was well behaved for the period in which he was in custody and had acquired skills which he would employ if released. He stated that he was a young man with a young family which depended

on him and therefore the Court ought to exercise its discretion in considering his sentence should the conviction stand.

The Prosecution's Submissions.

11. The Prosecution filed its submissions on October 18, 2022. They submitted that they opposed the Appeal on the grounds that the three ingredients of the offence of defilement were adequately proven. Firstly, that the victim's age was proven by the testimony of her mother PW3 and the clinic card P.Exh2 which indicated that she was 13 years old at the time of the incident.

12. Secondly, the Prosecution submitted that the Appellant was well known to the victim because they were neighbours and that this was not the first time he had had sex with the victim. They submitted that two other people, PW4 David Kirui and Charles Murungu found them at the scene and were able to properly identify the Appellant.

13. Thirdly, the Prosecution submitted that the victim's testimony that the Appellant defiled her was corroborated by the testimony of PW4 David Kirui who found them having sex and that of PW5 the Clinical Officer who confirmed that she had been penetrated. That the Appellant himself admitted that he had defiled the minor and asked to be pardoned before he was taken to the police station. It was their submission that the defence evidence did not in any way challenge the overwhelming Prosecution case.

14. On sentencing, the Respondent submitted that the law provided for a sentence of not less than 20 years and therefore the sentence meted was proper and lawful. They urged the Court to find that the Appeal lacked merit and to dismiss it.

15. I have perused the trial Record and considered the amended Memorandum of Appeal filed on September 5, 2022 alongside the Appellant's submissions filed on the same date and the Respondent's submissions dated October 18, 2022. I have taken into consideration the fact that the Appellant is unrepresented and therefore proceeded to consider the grounds that he had raised in his earlier Memorandum of Appeal as the same raise pertinent issues regarding the findings of the trial court. In summary, I find two issues for determination as follows:-

    i. Whether the offence of defilement was proven by the Prosecution to the required standard.

    ii. Whether the Sentence was appropriate and lawful.

Whether the offence of defilement was proven by the Prosecution to the required standard.

16. Section 8 of the *Sexual Offences Act* No 3 of 2006 provides:-

    8. 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.

    3. 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.

    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.

5. It is a defence to a charge under this section if—

   a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

   b. the accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

7. Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap 92) and the *Children Act* (No 8 of 2001).

8. The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

17. From the law above, it is clear that the offence of defilement carries with it three ingredients as follows:-

   a. The age of the victim

   b. That there was penetration

   c. That there was positive identification of the perpetrator.

18. In the case of *Charles Wamukoya Karani vs Republic*, Criminal Appeal No 72 of 2013 the court held:-

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

19. The standard of proof must be beyond reasonable doubt as properly explained by Lord Denning in *Miller vs Minister of Pensions* (1942) A C where his Lordship held thus: -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

20. The burden of proof is vested on the Prosecution. This was the principle aptly espoused by the Federal Court of United States in the case of *United States V Smith*, 267 F. 3d 1154, 1161 (D C Cir 2001) (Citing In re Winship, 397 U S 358, 370, 90 S Ct 1068, 1076 (1970) (Harlan, J, concurring) where it stated thus:-

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either

from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

21. With the above principles in mind, I now consider the elements of the offence as follows:-

Age of the victim

22. The age of a victim is a critical component in defilement cases. In *Kaingu Kasomo vs Republic* Criminal Appeal No 504 of 2010, the Court of Appeal stated thus:-

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

23. In the present case, the victim testified that she was in class seven and was 13 years old. She stated that her date of birth was June 30, 2006. The victim's mother PW3 produced a copy of her clinical card (P Exh 2) which I have examined and confirmed the date of birth as previously testified by the victim. I have found that at the time of the said incident, the victim was 14 years old and still a minor in law. It is my finding therefore that, the Prosecution adequately proved the ingredient of age.

Penetration

24. Penetration is the second ingredient that must be proven by the Prosecution. It is defined under section 2 of the *Sexual Offences Act* as follows: -

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

25. This was the victim's testimony in respect of penetration: -

> " ....He asked me to do bad manners with him. We went into the plantation, and we did bad manners. I was wearing a tight and a panty which the accused removed. He was wearing a black trouser which he only unzipped and removed his penis which he used to penetrate my vagina...."

26. PW5 Daniel Too the Clinical Officer testified that he examined the victim on July 7, 2020 but was unable to conduct a High Vaginal Swab (HVS) on the victim because she was irritable. He however testified that upon examination, he noted that the hymen was freshly broken and there was tenderness with bruises on the left side of the orifice (entrance to the labia minora). He stated that his findings were consistent with penetration. He produced the P3 Form and Treatment notes as P Exh 1 and P Exh 3 respectively.

27. I have considered the Prosecution's evidence in respect of penetration. It leaves no doubt that the minor IC had been freshly penetrated. The testimony of the victim was corroborated by medical evidence produced by PW5 the clinical officer. Further, there was the evidence of PW4 David Kirui an eye witness who found the Appellant having sex with the minor at the plantation.

28. From the definition provided by the law, penetration can be partial or complete. In this case, it is clear that the minor was fully penetrated as PW5 stated that upon examination, her hymen was freshly broken and she had bruises on her private parts. It is the finding of this Court therefore, that the evidence adduced by the Prosecution in respect of penetration was overwhelming and adequate.

Whether there was positive identification of the Appellant.

29. Thirdly, I consider the ingredient of identification. PW1 the victim testified that she knew the Appellant whom she pointed out in the trial court and called him by his name 'Brian'. It was also the testimony of PW4 David Kirui that he saw the Appellant and the victim leave the place where they were plucking tea and together with another worker, Charles Aboko, they followed the two. He testified that on the way, they came across the tea that the Appellant and the victim had carried lying at a certain point. He testified that he and Charles saw the Appellant and the victim who then ran away upon being discovered. He also stated that the ground where they saw the Appellant and the victim run from was disturbed.

30. The Prosecution also called the evidence of PW2 John Kiplang'at Mitei who testified that on the material day, he found 15 staff members complaining that Brian was found defiling a minor. He stated that when he inquired about the incident from the Appellant, he (the Appellant) admitted and asked to be pardoned.

31. From the above evidence, it is apparent to this Court that it was the Appellant who led the victim to the plantation and had sex with her. He was not only identified by the victim but by the other workers when he was found in the plantation. I also find it peculiar that the Appellant would ask to be pardoned if he was not the one responsible for the act. It is the finding of this Court that the Appellant was well known to the victim and the other workers and that he was seen committing the said offence. The identification in this case was free from error and was also adequately proven by the Prosecution.

32. I have considered the Appellant's defence. He said that he was harvesting tea on the material date and went back home to his wife with whom he went to collect milk when he was arrested by his fellow workers on allegations that he had defiled the complainant. From my analysis of this defence, the Appellant did not in any way challenge the overwhelming evidence adduced by the Prosecution and I consider his defence as mere denials.

33. In the premise, I find that the Prosecution proved beyond reasonable doubt that the Appellant committed the offence of defilement. The trial court arrived at a correct finding that the Appellant was guilty of the offence of defilement and properly convicted him.

Whether the Sentence was appropriate and lawful

34. The punishment provided under section 8(3) of the *Sexual Offences Act* is that a person who is convicted of the offence of defiling a child between 12 and 15 years old will be liable to imprisonment of not less than 20 years. Thus, the trial court sentenced the Appellant to 20 years imprisonment. In his submissions, the Appellant prayed that the Court takes into consideration that he was a first offender and that he had a two young children and a wife who depended on him.

35. It is axiomatic that sentencing is a reserve of the trial court's discretion. This is because the trial court is the only court with the privilege of observing the demeanour of an Accused person throughout the trial and can properly appreciate the circumstances of a case. In *S Vs Nchunu & Another/* (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated:

> "It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be."

36. Though it may have meted a different sentence form that of the trial court, an appellate court must be slow to interfere with the sentence of a trial court. The Court of Appeal in *Bernard Kimani Gacheru vs Republic* (2002) eKLR, gave this guidance as follows:-

> "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist".

37. The guidelines of sentencing in Kenya are outlined under the *Judiciary Sentencing Policy Guidelines (2016)*. In sentencing, a judicial officer must take into consideration several factors including the circumstances of a case. Where the law imposes mandatory sentences as in the present case, it has been argued that such mandatory sentences fetter the discretion of the court because the judicial officer is bound to follow what is prescribed by the law. In the *Woodson vs The State of North Carolina* (1976) 428 US 280, the court held that:-

> "…. A statute that prescribes a mandatory sentence on conviction would treat all persons convicted of that designated offence as 'members of a faceless undifferentiated mass'. This would be against the judicial aspect of considering each case individually and in a unique manner by subjecting such convicted persons to the blind infliction of the death penalty.'

38. Thus, in *S vs Malgas* 2001 (2) SA 1222 SCA 1235 para 25 it was stated:

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

39. It follows then that courts should still exercise its discretion by considering the circumstances of a case and mitigating factors, even if the law provides for a mandatory sentence. In this appeal, the Appellant pleaded with the Court to reconsider his mitigation that he was a first offender and had many dependants including his siblings and his own young children who were at the risk of not going to school. He also stated that he has medical issues and pleaded for leniency.

40. On the other hand, I have also considered the age of the victim and her testimony that she escaped into the tea plantation with the Appellant and had quick sex before they were busted and she crawled away to the place where her mother was picking tea. I am persuaded to depart from the mandatory sentence imposed by the trial court and exercise leniency based on the circumstances of this case. I reduce the sentence to 15 years' imprisonment.

41. In the final analysis, I affirm the conviction. I set aside the sentence of 20 years' imprisonment and substitute therefor as 15 year imprisonment from the date of conviction and sentence in the trial court being January 27, 2022.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023

R LAGAT-KORIR

JUDGE

JUDGEMENT DELIVERED IN THE PRESENCE OF THE APPELLANT, MR NJERU FOR THE STATE AND SIELE (COURT ASSISTANT)