Shauri v Republic (Criminal Appeal 61 of 2013)
[2023] KEHC 1314 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1314 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 61 OF 2013

FG MUGAMBI, J

FEBRUARY 24, 2023

BETWEEN

HAMISI SHAURI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. L.K. Gatheru, RM dated 11th April 2013 in Sexual Offence Case No. 411 of 2012 in the Principal Magistrates Court at Mariakani)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8(1) read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on September 26, 2012 at about 19:20hrs in Kinango District of Kwale County within Coast Province, he intentionally caused his penis to penetrate the vagina of MM, a child aged 15 years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.

2. The Appellant now appeals against the conviction and sentence as set out in the Petition of Appeal dated April 26, 2013. The Appellant also relies on his written submissions filed on May 24, 2022. The Prosecution is opposed to the appeal. They filed written submissions on January 18, 2023.

3. During trial the Prosecution called five (5) witnesses. PW1, the complainant testified that she was 15 years old, born in 1998 and was a class 6 pupil. It is her testimony that on September 24, 2019the appellant begged her to accompany him to his house. She agreed and they went to his place where they had intercourse on his bed. She left theappellants house the next day in the morning and found her father at home. Her father called her mother who took her to the Police Station and to Mariakani District hospital. PW1 also testified that the appellant was well known to her. They were friends and

that they had previously had sexual intercourse but she was not aware that she was doing anything wrong.

4. PW2, the mother to PW1 confirmed PW1s testimony that she was 15 years of age at the time, and was born on May 4, 1998. It was her evidence that when she did not see PW1 she suspected that she had gone to the appellants house since she had been told by PW1s sibling that PW1 used to visit the appellant. A child took her there and she also knocked the appellants house with no success. That night she reported the matter at the AP Camp. The next morning, she had left for work and was informed by a neighbor that PW1 had returned. She went back home and took PW1 to Mariakani Police Station.

5. PW3 was a Senior Clinical Officer who examined PW1 and produced the P3 form. PW4 was the investigating officer based in Kinango District, Kalalani AP police post. He is the one who arrested the appellant. PW5, a Sergent attached to Mariakani Police Station gender and children office accompanied PW1 to hospital.

6. The appellant was put to his defence. He gave sworn testimony. It was his evidence that onSeptember 25, 2012he went to work until 6pm. When he got home he found people unknown to him who arrested him and he was charged with defilement.

7. There are two (2) grounds raised in this appeal:

   i. Whether the Appellant is entitled to the defence in section 8(5) of the *Sexual Offences Act*

   ii. Whether the sentence was harsh and excessive taking into account the offence

8. 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.

9. PW1 and PW2 testified to PW1s age. Of proof of age of the complainant, 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.”

   I find that the age of the complainant was conclusively proved.

10. The different incidences of penetration are also not in dispute. The complainant testified that she had visited and had intercourse with the Appellant at other times. The appellant states in his submissions that

    > When I approached the complainant with sexual advances for the first time, she was already a friend of mine who had given all indications that she was prepared for any such advances and my proposal was welcomed.

PW3, a medical doctor confirmed that there was penetration. Finally, on identification, PW1 identified the Appellant based on recognition. I therefore find that the offence of defilement was proved on cogent evidence.

ii. Defence under section 8(5) of the *Sexual Offences Act*

11. The appellant states in his submissions that the trial court should have applied the defence in section 8(5) of the *Sexual Offences Act*. It is his case that the fact that he did not expressly raise it at trial does not negate its existence in his case. The appellant also urges this court to find that the admission by PW1 that she used to visit the Appellants house and that the sexual encounters were voluntary, as a mitigating factors. It is his averment that he believed the appellant to be above 18.

12. Section 8(5) of the *Sexual Offences Act* provides as follows:

> 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."

13. This section requires that an accused person raises this defence at his trial. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence the evidential burden shifts on him to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable.

14. The upshot of this provision is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond.

15. The appellant did not raise the defence during the trial. He has raised this defence on appeal. He cannot allege on appeal that he was deceived by the complainant. The defence cannot be considered at this stage. The ground therefore fails.

iii. The sentence

16. The jurisprudence on sentencing and the need for court discretion has been discussed in many cases. The Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR summarizes the emerging jurisprudence in the following words:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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 stated is shown to exist." (emphasis mine).

17. The appellant was sentenced to 20 years' imprisonment... being the minimum sentence imposed by law. As stated above, courts are no longer bound by minimum or mandatory sentences. I find that the trial court did not direct itself sufficiently to the discretion of the trial court reserved in sentencing and based the sentence on the minimum provided under the Act. The trial magistrate did not also mention whether the time spent by the accused person in custody was taken into account as required under section 333 of the *Criminal Procedure Code*.

18. For the reasons stated above, I uphold the conviction and set aside the 20 years' sentence and in lieu thereof sentence the appellant to 12 years' imprisonment. The sentence will run from the date he was arrested which is September 29, 2012.

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

F. MUGAMBI

JUDGE