Ataparus v Republic (Criminal Appeal 67 of 2019)
[2023] KEHC 2595 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2595 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 67 OF 2019

HK CHEMITEI, J

MARCH 30, 2023

BETWEEN

KAPLEKE ATAPARUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal From The Judgement Of Hon.v.o. Amboko Dated 18. 11.2019 In Criminal Case No. 29 Of 2018)

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1), (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 31st day of August 2018 at around 0200 hours in East Pokot sub county within Baringo county intentionally and unlawfully caused his penis to penetrate the anus of CT a child aged 10 years.

2. The alternative charge was Committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 31st day of August 2018 around 0200 hours in East Pokot sub county within Baringo county intentionally and unlawfully touched the buttocks of CT a child aged 10 years with his penis.

3. The appellant after full trial was convicted and sentence to life imprisonment hence this appeal.

4. When the same came up for directions the court directed that it be determined by way of written submissions which the parties have complied.

5. The appellant in particular in his home grown submissions has aligned the same with his amended grounds of appeal which have challenged the issue of identification which in this case according to him was not conclusive taking into account that the incident occurred in the dead of the night.

6. He also submitted that crucial witnesses were not called by the respondent as well as the fact that the respondent did not prove the age of the complainant to the required standard. In essence it was his submission that the burden of prove shifted from the respondent to him. He relied on several authorities which this court need not reproduce them here.

7. The learned state counsel opposed the appeal and supported the findings by the trial court. He submitted that the case was properly investigated contrary to the submissions by the appellant and proper witnesses called.

8. He further submitted that all the ingredients of the offence were proved beyond any shadow of doubt despite the fact that the victim was a minor. He stated that there was an express and corroborated evidence by the witnesses that the appellant confessed to the offence. He therefore prayed for the appeal to be dismissed.

Analysis and determination.

9. The responsibility of this court at this level is to analyse the evidence as presented at the trial court and thereafter come up with an independent decision noting that this court did not have the benefit of seeing the witnesses and their demeanour a benefit only accorded to the trial court. (See *Okeno v Republic* (1972) EA 32.)

10. The now well and generally accepted ingredients of the offence which the respondent was needed to prove against the appellant are the age of the victim, the identity of the perpetrator and penetration.

11. In this regard, the age of the complainant was well established by the respondent. PW8 Dr Mary Mukusa from Baringo county referral hospital produced the age assessment report on behalf of Dr Nduati her colleague who opined that the minor was aged below 12 years. In the absence of any other evidence to the contrary I hold the above evidence to have been conclusive.

12. On the question of penetration, the evidence of the minor that she felt pain and she screamed which attracted the attention of the neighbours was enough prove of the sexual molestation.

13. The evidence of PW2 as well found that there was injury on the minor's anal area and she took her to the hospital. PW5 the clinical officer as well concluded that;

> " she had cuts, deep and superficial on the anal region.... there were cuts on the anal orifice with redness inside. There was marked swelling on the anus."

14. Considering the evidence of the minor which was corroborated by the clinical officer as well as the other witnesses this court is satisfied that the minor was clearly sexually assaulted.

15. Was the perpetrator identified? The evidence of the respondent's witnesses including the complainant showed that the appellant and another person slept under the granary that night. PW1, the complainant saw them before they went to sleep and before the incident.

16. PW6 on the other hand confirmed that he saw the two that evening and advised his wife to give them gunny bags so that they could sleep on. Taking the totality of the above evidence it is clear that in the evening of the material day the appellant and his in-law spent at pw6 home.

17. Was he identified as the defiler of the minor? The minor clearly did not know who defiled her. She was asleep and coupled with the darkness it was difficult to see.

18. The rest of the children seemed not to have heard her scream except PW6 who came to her rescue.

19. The critical witness on this ground is the said pw6. He said in his evidence in chief that he went to the scene and saw the appellant jump from the store/granary to the ground where he was sleeping. His counterpart was on the ground sleeping.

20. On cross examination he said

> " The store is not far from the house. I directed the spotlight from the torch and saw the accused persons face /front part of the body. He had won a Maasai sheet. The torch I was using had a battery. The store is near my house around 10 steps."

21. What followed after the incident was according to the witnesses the appellant pleading for forgiveness. He went ahead and pledged to pay kshs 500 which he later increased to kshs 1000 for the witnesses to be silent but it was refused.

22. It is the finding of this court that although it was night, with the help of the torch PW6 was in a good position to recognise the appellant who in any case had been allowed to sleep there for the night. In other words, he was not a stranger to him. Although the intensity of the light from the torch was not explained, it was sufficient enough to allow him recognise the appellant.

23. The action by the appellant to seek forgiveness cannot be wished away. I doubt if all the witness especially PW6 and 7 would cook up the story yet they were at the scene. There was nothing to suggest any evidence of collusion.

24. It would have been proper to bring in the appellant's brother in law whom they were together that night. Naturally he should have been the other suspect taking into consideration that the minor did not see who had assaulted her. Nevertheless, the witnesses especially pw6 clearly recognised him as he jumped from the store. Despite the allegation that he feint sleep and refused to wake up when called this was simply a ploy to hoodwink PW6 and the other witnesses.

25. The appellants defence was generally *alibi*. This as was clearly found by the trial court, ought to have been raised as a matter of first instance during trial. I have perused the entire cross examination of all the witnesses and the appellant did not raise an issue of his whereabouts that night. The same was an afterthought and in any case his unsworn evidence was of no probative value.

26. For the above reasons this court does not find merit in this appeal and the same is hereby dismissed.

27. On the question of sentencing though the court finds that the sentence meted against the appellant of life imprisonment was within the Act but in my view excessive in the circumstances.

28. This court *suo moto* must tamper with the same. The court finds solace in the resent decisions by this court as well as the Court of Appeal pursuant to the Supreme courts decision in the now famous *Muruatetu* case.

29. The Court of Appeal for example in the cases of *Korir v Republic* Criminal Appeal No 100 of 2019, *Dismass Wafula Kilwake v, Republic* (2019) eKLR and others stated as much on the discretion of the trial court during sentencing. The courts have found that this "gagging" of the courts discretion runs foul against the independency of the court and generally our progressive 2010 *Constitution*.

30. In *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015(Nyeri) the Court of Appeal had this to say.

> " We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the

principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Page 18 of 19 Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. This was well articulated by this Court in *Dismas Wafula Kilwake Vs Republic* [2019] eKLR as follows; "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing." In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. For these reasons we allow this appeal and we set aside the 20- year sentence and substitute it with a 15-year sentence to run from the time the trial court imposed its sentence."

31. Taking cue from the above evidence, the fact that he was a first offender and in his mid-life sentencing him to life imprisonment will not be efficacious for now.

32. In the premises, the appellant's life imprisonment is hereby reduced to 20 years' imprisonment from the date herein.

33. The appeal is otherwise dismissed.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 30TH DAY OF MARCH 2023.

H. K. CHEMITEI

JUDGE