JOM v Republic (Criminal Appeal E055 of 2021)
[2023] KEHC 2822 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2822 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E055 OF 2021

JN KAMAU, J

MARCH 29, 2023

BETWEEN

JOM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Temu (SPM) delivered at Nyando in Senior Principal Magistrate's Court in SO Case No 31 of 2018 on 19th October 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon S. O. Temu, Senior Principal Magistrate who sentenced him to twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 3rd December 2021, the Appellant lodged an Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal.

3. His undated Written Submission were filed on 30th September 2022 while those of the Respondent were dated 17th October 2022 and filed on 19th October 2022. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Trial Court took Section 200(3) of the *Criminal Procedure Code* into consideration during trial.

    b. Whether or not the charge was at variance with the facts of the case.

    c. Whether or not the Prosecution proved its case beyond reasonable doubt.

    d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.

7. The court dealt with the said issues under the following distinct and separate heads.

I. Validity Or Otherwise Of The Charge

8. This court noted the Appellant's submissions that there was variance between the Charge and the circumstances of the offence in question regarding the versions and testimonies of the witnesses in terms of dates that the alleged offence took place, identification and the medical evidence. The Respondent did not also submit on this issue.

9. This court did not consider the validity or otherwise of the Charge as the Appellant did not elucidate the same. It was also not a ground of appeal. If he wished to have had the same addressed by the court, then ought to have amended his Petition of Appeal as arguments could not be introduced in the written submissions when they had no leg to stand on in a petition of appeal. This court therefore said no more on it.

II. Section 200(3) Of The Criminal Procedure Code

10. Ground of Appeal No (2) was dealt with under this head.

11. The Appellant submitted that the Trial Court erred in law and fact by failing to adhere to the provisions of Section 200(3) of the *Criminal Procedure Code*. He asserted that the first Trial Magistrate, Hon M.C. Nyigei, SRM, recused herself on 13th February 2020 and was succeeded by the Learned Trial Magistrate herein but that although he explained the aforesaid Section to him, he failed to indicate that he had informed him of his right to demand the re-summoning or re-hearing of witnesses and the choice he was to make as an accused person in the circumstances.

12. On its part, the Respondent submitted that the record showed that the Section 200 of the *Criminal Procedure Code* was explained to the Appellant who responded in Dholuo, that the case could proceed

from where it had reached. It was its case that the Learned Trial Magistrate complied with the said provision. It added that in any event, WCA (hereinafter referred to as "PW 1") who was the only witness who had testified was recalled and the Appellant had the opportunity to cross-examine her.

13. A perusal of the proceedings showed that on 4th March 2019, Hon M.C. Nyigei, took PW 1's evidence that was tendered in examination-in-chief and cross-examination. When the Learned Trial Magistrate herein took over the matter on 13th February 2020, PW 1 was the only Prosecution witness who had testified. He rendered himself as follows:-

> " Court: Section of the CPC is explained to the accused who replies in dholuo.
>
> Accused: The case to proceed from where it had reached."

14. Although, he did not indicate in writing that he had explained to the Appellant the right to re-summon PW 1, the Appellant's answer showed that he had understood the purport of Section 200(3) of the *Criminal Procedure Code* which provides as follows:-

> " Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

15. Be that as it may, the failure by the Learned Trial Magistrate to put down his explanation of Section 200(3) of the *Criminal Procedure Code* in writing did not prejudice the Appellants' rights because on 8th October 2021, he took PW 1's evidence afresh. This court came to the firm conclusion that the Learned Trial Magistrate complied with the provisions of Section 200(3) of the *Criminal Procedure Code* contrary to the Appellant's assertions.

16. In the premises foregoing, this court found and held Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

III. Proof Of Prosecution's Case

17. Grounds of Appeal Nos 3, and 4 of the Petition of Appeal were dealt with under this head.

A. Age

18. The Appellant did not submit on the issue of age. On its part, the Respondent submitted PW 1 was a child. It pointed out that PW 1 testified that she was born on 3rd April 2006, a fact that was corroborated by SOR (hereinafter referred to as "PW 3") and No 83851 CPL David Adundo (hereinafter referred to as "PW 4") who produced PW 1's Birth Certificate indicating the aforesaid date of birth.

19. A perusal of the Birth Certificate showed that PW 1 was born on 3rd April 2006. The offence took place on 9th August 2018. She was therefore aged twelve (12) years at the material time of the incident and thirteen (13) years old when she was testifying in 2019.

20. This court was thus persuaded that PW 1's age had been proven and that for all purposes and intent, she was a child.

B. Identification

21. The Appellant submitted that there was only a single identifying witness. On its part, the Respondent submitted that PW 1 stated in her testimony that the Appellant was a brother to her grandfather and

that she used to go to his house to help with house chores as the wife had left him. It contended that that meant that the Appellant was a person she knew so well and could positively identify him. It was its case that the Appellant was therefore positively identified as the perpetrator.

22. The Respondent summarised the evidence that was adduced by the Prosecution witnesses. It was, however, not necessary to set it out again. Suffice it to state that PW 1 maintained that she knew the Appellant well and that in his unsworn testimony, the Appellant admitted that PW 1 would go to his home and fetch him water. It was therefore clear that the Appellant and PW 1 were not strangers to each other. Any identification of the Appellant by PW 1 was by way of recognition.

23. The question of whether or not he defiled her was a different question altogether.

C. Penetration

24. The Appellant submitted that there was a contradiction regarding the date when the incident was alleged to have taken place. He pointed out that the Charge Sheet indicated the date to have been 9th August 2018, PW 3 testified that it was on 11th February 2018 and that George Mwita (hereinafter referred to as "PW 2") averred that they received PW 1 on 13th August 2018 as per the P3 form yet in his evidence in chief, he stated that he examined her on 13th February 2018.

25. He asserted that the delay in ferrying PW 1 to the hospital affected PW 2's findings given that the Post Rape Care (PRC) Form was dated 11th February 2018 and showed that her genital organ was normal.

26. It was his case that the medical evidence did not support the allegation of defilement and that there was no evidence that the genitalia of PW 1 came into contact with his organs, that there were no injuries on the external part of the organ and that her hymen was not freshly broken. He added that the degree of injury and the probable type of weapon were not ascertained.

27. On its part, the Respondent submitted that penetration was proved by medical evidence and corroborated by the evidence of PW 1 as highlighted in the case of *Charles Wamukoya vs Republic* Criminal Appeal No 72 of 2013(eKLR citation not given). It contended that PW 1 testified that she would go to the Appellant's house to help in cooking and that he defiled her three (3) times. It added that PW 2 examined her and filed a P3 form and a PRC form. It pointed out that the medical examination revealed that PW 1's hymen was broken, there were bruises on the vaginal walls and that she had a whitish discharge from her vagina which was proof that she had been defiled.

28. When PW 1 testified on 4th March 2019, she said that the Appellant was her uncle and that in August 2018, he called her to his house, asked her to remove her clothes and he inserted his penis into her vagina. He asked her not to tell anyone about the incident and gave her a sum of Kshs 10/=.

29. She added that on another day, he called her to fetch water and to cook for him. When she got home her grandparents beat her and to asked her disclose where she had come from. She told them that she had come from the Appellant's house and they had sexual intercourse after he sent her to the shop. She identified the Appellant in court as the person who had sexual intercourse with her. When she was cross-examined, she stated that the Appellant had sexual intercourse with her on three (3) occasions. "PW 3" corroborated her evidence in this regard and explained that it was discovered that she had been defiled after a physical examination was conducted by his wife.

30. Notably, when she testified on 8th October 2021, PW 1 referred to the Appellant as a brother to her grandfather. Previously, she had referred to him as her uncle. Be that as it may, on this day, she reiterated what she had told the first Trial Court.

31. PW 2 adduced in evidence the P3 Form and the Post Rape Care (PRC) Form in evidence. He stated that PW 1 had lower abdominal pains and although her genital parts were normal, her hymen was absent and she had bruises and a whitish discharge from her vagina. He concluded that sexual penetration had taken place.

32. Whereas the Appellant had challenged her evidence as a single witness, nothing barred a trial court from relying on the evidence of a single witness. Notably, the proviso of Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the 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 (emphasis)."

33. Although PW 1 was a single witness, her evidence was scientifically corroborated by the P3 Form and PRC Form that were adduced in evidence by PW 2 of Ahero Hospital showing that there was penetration in her vagina and PW 3's evidence that a physical examination of her vagina showed that she had bruises which a confirmation that she had been defiled.

34. The Appellant's assertion that PW 2 testified that he examined PW 1 on 13th August 2018 was immaterial, irrelevant and was rendered moot because the P3 Form was dated 13th August 2018, The PRC Form referred to the date of the incident having been 11th August 2018. Notably, the P3 Form had indicated that the approximate date of injuries was four (4) days which correlated with the date of 9th August 2018 that was indicated in the Charge Sheet. PW 1 had been defiled three (3) times. This court did not therefore find the evidence as was adduced to have been contradictory and inconsistent.

35. The above notwithstanding, even without the documentary evidence, nothing detracted from the fact that the Appellant defiled PW 1 on the material date and time. She identified him as having been the perpetrator of the offence. His unsworn evidence of alibi did not therefore out-weigh the Prosecution case. In any event, his unsworn evidence had little or no probative value before this court as the veracity of his evidence was not tested.

36. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR.

37. This court came to the firm conclusion that the Prosecution had proved its case against the Appellant beyond reasonable doubt as it had proven that PW 1 was a child, that she was defiled on the material date and that she identified the Appellant as the perpetrator of the offence and that the Learned Trial Magistrate did not err when he convicted him.

38. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (3) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

IV. Sentence

39. Grounds of Appeal Nos (1) and (5) of the Petition of Appeal were dealt with under this head.

40. The Appellant submitted that the nature of mandatory sentences applied with equal force to minimum sentences and were supported by the Kenya Judiciary Sentencing Policy Guidelines. It was his contention that twenty (20) years was a long time to serve where the issues were not clear. He added that apart from the heavy sentence, it was clear that his mitigation was cogent as he was a first offender and was remorseful and prayed for forgiveness. In that respect, he relied on the case of *Philip Mueke Maingi & Others* Petition No E017 OF 2021 without mentioning the holding he relied on therein. He urged the court to set aside his sentence and consider Section 333(2) of the *Criminal Procedure Code*.

41. On its part, the Respondent submitted that the Trial Court sentenced the Appellant to twenty (20) years imprisonment which was a mandatory sentence as provided for in Section 8(3) of the *Sexual Offences Act* and argued that in recent decisions the courts have addressed the issue of the constitutionality of mandatory minimum sentences.

42. In that regard, it relied on the case of *Maingi & 5 Others vs Director of Public Prosecutions & Another* [2022] KEHC 13118 (KLR) where it was held that taking cue from the decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR those convicted of sexual offences were at liberty to petition the High Court for orders of resentencing in appropriate cases. It also cited the case of Nyeri Criminal Appeal No 84 of 2015 *Joshua Gichuki Mwangi vs R* (eKLR citation not given) where it was held that imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers and independence of the Judiciary.

43. It, however, contended that in the matter at hand the sentence meted was safe and justified and this court should be alive to the seriousness of the offence and the circumstances herein as the life of the thirteen (13) year old was changed because of the Appellant's actions. It added that the Appellant being a grandfather to the minor betrayed the trust and responsibility bestowed on him as he was in a position to nurture the young girl and ensure her safety but that instead, hecommitted a heinous crime that forever changed her.

44. It asserted that the Appellant should not be given another chance to deflower another young girl. In that respect, it relied on the case of *Athanus Lijodi vs Republic* [2021] eKLR where it was held that the life sentence imposed and affirmed by the high court was not unconstitutional and could still be meted out on deserving cases. It urged the court to uphold the sentence as it was lawful.

45. In addressing the issue of the appropriateness of the sentence that was meted upon the Appellant, this court took the view that the Appellant ought to have been charged with the offence of incest by male persons contrary to Section 20(1) of the *Sexual Offences Act* because he was a brother to PW 1's grandfather.

46. If the Appellant had been charged and convicted under Section 20(1) of the *Sexual Offences Act*, the sentence that is prescribed therein is a minimum of ten (10) years and a maximum of life imprisonment. As PW 1 was aged thirteen (13) years at the material time, the sentence provided for under that offence was life imprisonment.

47. Notably, Section 20(1) of the *Sexual Offences Act* states that:-

> "Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter(emphasis), sister,

mother, niece(emphasis), aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life (emphasis) and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

48. Having said so, this court took cognisance of the fact that it is a neutral arbiter. As the Respondent had not given the Appellant notice that it would be seeking an enhancement of the sentences or raised the issue of incest in its Written Submissions whereupon this court could have cautioned him of the consequences of proceedings with the Appeal herein so that he could have made an informed decision of whether or not to continue with the same, it opted not to interfere with the sentences that had been meted upon him to avoid what might look like an ambush to him.

49. Turning to the offence of defilement, the Appellant had been charged under Section 8(1) as read with Section 8(4). PW 1 was aged about twelve (12) years of age at the material time of the incident. The correct provision under which he ought to have been charged was Section 8(3) of the *Sexual Offences Act*.

50. The said Section 8(3) of the *Sexual Offences Act* 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."

51. Taking the circumstances of this case into consideration, this court found and held that the Learned Trial Magistrate did not therefore err when he sentenced the Appellant to twenty (20) years imprisonment because that was the sentence that was stipulated by the law.

52. This court therefore left the sentence of twenty (20) years that was meted upon the Appellant herein pursuant to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* undisturbed.

53. In the premises foregoing, this court found and held that Grounds of Appeal No (1) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

Disposition

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 3rd December 2021 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

55. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2023

J. KAMAU

JUDGE