AHM v Republic (Criminal Appeal 22 of 2021)
[2023] KEHC 18774 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18774 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 22 OF 2021

PN GICHOHI, J

MAY 31, 2023

BETWEEN

AHM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence and conviction delivered in Kisii S.O. No 58 of 2017, R v AHM on 2{{^nd}} November 2021 by Hon. S.K Onjoro (SRM))

JUDGMENT

1. The Appellant herein AHM appeared before the Chief Magistrates Court in Kisii on 29th November 2017 where he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the night of 6th and 7th November 2017 in Kisii Central District within Kisii County, he intentionally and unlawfully caused his penis to penetrate the anus of DN (name withheld), a child aged 11 years.

3. He was also charged with an alternative count of committing indecent act with a child contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the night of 6th and 7th November 2017 in Kisii Central District within Kisii County, he intentionally and unlawfully caused his penis to come into contact with the anus of DN (name withheld), a child aged 11 years.

4. He pleaded not guilty to the charges and the went for hearing. After hearing both the prosecution and defence case, the trial magistrate rendered his judgment on 2nd November 2021 where he found the Appellant guilty of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He then sentenced the Appellant to serve life imprisonment.

5. Aggrieved, the appellant has appealed to this Court against both conviction and sentence and in the petition of appeal filed on 31st May 2022 through Kwamboka Mongare Advocate, he raised five (5) grounds as follows;

    1. The learned trial magistrate erred in law and fact in convicting the appellant on testimony of the complainant without proper corroborative evidence.
    2. The learned magistrate erred in law and fact by failing to consider the inconsistencies in the prosecution evidence.
    3. The learned magistrate erred in both law and fact by holding that the prosecution had proved its case beyond reasonable doubt while evidence on record did not support such finding.
    4. The learned magistrate erred in law and fact by failing to take cognizance of the fact that the alleged neighbour whom the victim opened up to did not testify.
    5. The learned magistrate erred in law and fact in convicting the appellant on defective charge sheet.

6. In her submissions, the learned counsel Appellant submitted that there was no medical evidence linking the offence to the accused person; the prosecution failed to call key witness that is the neighbour to who Minor opened up to and that the findings of the investigation carried out by PW3 was not placed before court and therefore the omission raises a question as to whether the neighbour could have been the perpetrator of the offence.

7. She further submitted that the Accused person had informed the court that he was HIV positive. She submitted that according to PW-4 who was the medical officer and who had examined the minor 9 to 11 days after the occurrence of the offense, he carried out the HIV test thrice and established that the minor was HIV negative.

8. Further, she submitted that according to PW4 he examined the anal region of the minor and saw a scar and therefore concluded that the minor had been sodomised . She submits that there was no evidence of penetration and the alleged fluid found to be coming from anal region was not ascertained and was not analysed to directly point to the Appellant. That PW3 did not place the beddings and clothes picked from the scene to corroborate that the minor had been sodomised at the appellant's home. Lastly, she submitted that the prosecution failed to discharge of burden of proof beyond any reasonable doubt.

9. In his oral submissions, Mr Mulati opposed the appeal and submitted that the minor was aged 11 years as per the medical report presented before court as exhibit. He submitted that the clinical officer confirmed that there was sodomy. It was further his submission that the victim and the accused person were neighbours. That there was no discrepancy on the record. He invited the court to dismiss the appeal for lack of merit.

10. This being the first appeal, this court has a duty to re-evaluate the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses testify. The court is alive to and cognizant of the principles laid down in the case of *Okeno v. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday* Post 1978) E.A. 424."

7. The evidence before the trail court was that PW1 (herein referred to as the minor) was playing with a friend near their home at about 1.00 pm on 6th November, 2017, when the Appellant asked him to go with him for a walk and he agreed. They had walked up to Kisii town and until it was dark. Along the way they met a brother to the Appellant and he had a motorcycle. When the brother inquired about the minor's identity, the Appellant replied that he was a son to a lady who worked at a construction site. They then boarded the motor cycle to the Appellant's house arriving there at about 9.00 pm.

8. The Appellant placed some pillow case and a mattress on the floor for the minor to sleep on while he slept on the bed. As the minor slept, the Appellant started sodomising him. He felt pain in his buttocks and started bleeding. He tried to scream but the Appellant threatened to stab him severally. The Appellant later stopped and they slept.

9. The minor went home in the morning but he did not inform anyone about the incident as he was afraid. About one week later, he informed his mother (PW2) and she took him to Oresi Hospital but they were referred to Kisii Teaching and Referral Hospital where he was treated and went back home. The matter was later reported to Kisii Police station. He identified the Appellant as the person who sodomised him.

10. His mother (PW2) testified that she worked at construction site at St. Stephen on 6th November 2017 and went home at about 7.00 pm. She did not find the minor. Upon inquiry, her other children informed her that he had gone to Jogoo where they used to stay.

11. The next day she found minor at noon sleeping next to a road at Soko Mjinga, which was near their home. He looked tired. She asked him where he had been and he told her that he had had been with A (Appellant). She tried to ask him what A had done to him but he refused to tell her or the neighbours. PW2 knew A (Appellant) because he was their neighbour. She alerted the neighbours

12. It was on 11th November, 2017 that Minor was interrogated by a male neighbour and he confessed that Abu took him to his house defiled him and threatened to kill him if he told anyone. The neighbour then told PW2 about it but since the minor was circumcised, she could not examine him. He took him to Oresi health centre but they were referred to Kisii Teaching and Referral Hospital where he was treated and given medication to prevent him from HIV infection. She stated that the minor was still complaining of back pains but he had been tested three times since the occurrence and all tests have confirmed he is HIV Negative.

13. The Investigation Officer (PW3) received the complaint from the minor who accompanied by his mother (PW2) on 15th November 2017 and he opened up that he had been defiled by the Appellant who had had lured him to his house. He thereafter took their statements visited the scene of crime. The victim was later issued with a P3 Form which the doctor filled. Upon completion of the investigation the Appellant was traced and arrested and charged.

14. The Clinical Officer (PW4) from Kisii Teaching and Referral Hospital testified that the minor aged 11 years had visited the hospital on 14th November, 2017 with a history of sodomy on 6th November,

2017 at unknown time and by a person that was known to him. He was complaining of pain while passing stool and lower back pains.

15. PW4 examined him and noted that there was a scar at the anal region and tear discharging fluid and that there was a scar at the rectum. Urinalysis test showed nothing significant and syphilis test was negative. From his observation, he concluded that the likely cause of injury was an erected penis and that the injuries were consistent with sodomy.

16. In his sworn statement in defence, the Appellant told the court that he went to the hospital to pick his ARV drugs on 15th November, 2017 as he is HIV positive. After that, he boarded motor cycle and oblivious to him, the rider of the motor cycle had illicit brew. On reaching at Kisii Stadium, they were stopped and arrested. He was then taken to court on 29th November, 2021 and charged with an offense which he was not aware of. He wondered why the minor was not infected with HIV if he indeed the Appellant committed this offense. He contended that the minor could not explain how he was sodomised. In cross-examination, he denied knowing the minor.

Determination

17. After that analysis, the issues that arise for determination are ;

    1. Whether the Appellant was mistakenly identified.

    2. Whether there was corroboration and whether there was need for corroboration of minor's evidence

    3. Whether there was penetration.

18. The Appellant has posed in his submissions as to the effect of calling the male neighbour to who the minor opened to and saying the neighbour may be the one the minor mistook him with. However, that is ruled out by the evidence on record. The Appellant was a neighbour and the minor was referring to him as A. He invited him for the walk during the day. They walked for a long distance. The Appellant even knew where the minor's mother worked. The trial magistrate had this to say in his judgment ;

> b) As to whether the accused person is the perpetrator.
>
> 26) PW1 testified that he knew the accused person well as the accused person was his neighbor. He stated that it was the accused person who inserted his penis into his anus and that he felt pain and as he was screaming the accused person threatened to stab him.
>
> This evidence was not tested by the accused person and thus also remains unshaken in cross examination. The evidence adduced by the accused person also seemed to be an afterthought as it did not arise anywhere in his cross examination.
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> From the demeanour of both the accused person and that of the complainant I also noted they seemed to know each other well. PW2 further corroborated the testimony of PW1 that the accused person was a neighbor to them. I thus have no doubt that the accused person was properly identified by the complainant as the perpetrator of the offence."

19. That reasoning and finding is in line with the evidence on record. There is no chance that this unnamed neighbour is the one who committed the offence. On corroboration Section 19 of oaths Under Section 143 of the *Evidence Act*, no particular number of witnesses is required to prove a fact. In this case, the minor complained of being sodomised. He opened up to the Investigating Officer (PW3). He repeated

it to PW4 who examined him at the hospital and who found him to have been sodomised. That was corroboration and, in any event, this is a sexual offence case and regarding corroboration, Section 124 of the *Evidence Act* provides;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.

20. The charge sheet and the documentary evidence show that the minor herein was aged 11 years at the time of the commission of this offence. The Trial magistrate held ; " a) On the Age of the complainant

> The age of the complainant was not contested. The complainant was said to be aged 11 years old at the time the alleged offence was committed. A health clinic card in that regard was produced as PEX-2 and which indicated the complainant was born on the 14th July 2006. It was thus proven that the complainant was aged 11 years at the time of the alleged offence. "

21. The record shows that the minor gave a sworn statement even though the proceedings do not show if voir dire examination of the child was done. Nevertheless, that failure is not fatal in this case going by the analysis above and the findings on his evidence as captured by the trial court hereinabove. It was not fatal that the beddings that the minor lay in the Appellant's house were not availed in court. It is also not fatal that the neighbour was not called as witness in this case.

22. On the issue as to whether there was penetration , Section 2 of the *Sexual Offences Act* define as follows; "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person." The Appellant is charged with the offence of defilement he committed it through the anus and that is the reason the witnesses referred to the act as sodomy. The penetration was of the; "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus." The examination revealed that the penetration of the minor's anus was an erect penis. The trial magistrate properly captured and analysed the definition of penetration and arrived at the decision that there was penetration and therefore the Appellant defiled the minor.

23. There is no defect in the charge sheet as stated by the Appellant. His argument that there was no penetration fails. It is not material that the minor did not contract HIV. He is not charged with the offence of wilfully infecting the complainant with HIV and therefore this line of argument does not aid him in this case. From the forgoing therefore, I find no reason in interfering with the trial court's finding that the accused person was guilty of the offense he was charged with and thus the same is sustained. The prosecution discharged its burden of prove against the Appellant beyond any reasonable doubt.

24. Even though the appeal is said to be against conviction and sentence, there are no submissions in regard to the sentence. However, the court notes that the Appellant was sentenced to life imprisonment. There is nothing to show that mitigation was done at all, as after delivery of judgment, the trial magistrate held:

> " Sentence

Having convicted the accused person pursuant to Section 8 (2) of the *Sexual Offences Act*, the accused person is sentenced to life imprisonment"

25. Though not stated by the trial magistrate, he was dealing with the mandatory nature of the sentence under that section as it provides that:

> " 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."

26. Emerging jurisprudence is that the courts are no longer tied to the mandatory sentences under *Sexual Offences Act* . In the Constitutional Petition in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Odunga J held :

> " To the extent that the *Sexual Offences Act* prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell foul of article 28 of *the Constitution*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.
>
> Taking cue from the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentence were at liberty to petition the High Court for orders of resentencing in appropriate cases.

27. This court bears in mind that this is an appeal and not re-sentence hearing. However, this Court is bound to do justice to parties in the circumstances. To leave the issue un addressed would only create unnecessary bottlenecks to the Appellant if further dissatisfied with this court's decision. Whereas the life sentence itself is lawful, it is rather excessive. In the circumstances this court finds it justifiable to interfere with it.

28. Further, Section 333 (2) of the *Criminal Procedure Code* provides that:

> " Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

29. From the foregoing:

1. The appeal against the conviction is dismissed.
2. The life sentence is set aside and substituted with a sentence of twenty (20) years imprisonment.
3. The period spent by the Appellant in custody from 20th February, 2019 to 2nd November, 2021 be taken into account in computation of the said sentence.

DATED, DELIVERED AND SIGNED AT KISII THIS 31ST DAY OF MAY, 2023.

P. GICHOHI

JUDGE

In the presence of:

Ms Kwamboka for Appellant

Mr. Ochengo for Respondent

Kevin Isindu, Court Assistant