Njiru v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 18333 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E051 OF 2022

LM NJUGUNA, J

MAY 31, 2023

BETWEEN

MWANIKI KITHINJI NJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein filed the petition of appeal on 11.10.2022 wherein he has challenged the conviction and sentence by the trial court in Principal Magistrate's Court at Siakago in Sexual Offence Case No. 44 of 2021. The trial court convicted the appellant of the offence of defilement contrary to Section 8(1) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The appellant was tried and convicted of the offence of defilement contrary to section 8(1) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve fifty (50) years imprisonment.

3. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as enunciated on the face of the amended petition of appeal.

4. At the hearing of the appeal, the parties chose to rely on their written submissions to argue the appeal.

5. The appellant submitted that the trial court failed to note that the evidence by the prosecution was insufficient to form the basis of a conviction. That the age of the complainant is an essential ingredient of the offence of defilement and the same forms a vital part of the charge. It was argued that there was no proof that the complainant was aged eleven years at the alleged time of the commission of the offence herein. Reliance was thus placed on the case of Kaingu Elias Kasomo Vs Republic Criminal Appeal No. 54 of 2010.

6. It was argued that the charge sheet was defective as it did not have the O.B Number and further, the charge itself could not be properly understood. The appellant relied on the case of Richard Wahome Chege Vs Republic Criminal Appeal No. 61 of 2014 and Hillary Nyongesa Vs Republic Criminal Appeal No. 123 of 2009. Further, it was submitted that the appellant herein was arrested prior to the offence herein being reported since the medical examination report gave a different date from the date of arrest. That the discrepancies herein were material and fatal to the prosecution's case.

7. In the same breadth, it was submitted that the charges herein were tramped up as there is bad blood between the appellant and PW2. It was stated that the charges were as a result of nonpayment of rent by the appellant to PW2. This court was therefore urged to allow the appeal herein.

8. The appeal is opposed by Ms. Gakuo, the Learned Prosecution Counsel who submitted that the same is devoid of merit and thus, it should be dismissed. The respondent submitted that all the ingredients of the offence of defilement were proved and relied on the case of Simiyu & Another Vs Republic (2005) eKLR. It was submitted that penetration was proved as the complainant vividly described what happened on diverse dates between 01.07.2021 and 26.07.2021 and further, PW5 who examined the complainant produced the P3 and PRC Forms which shows the absence of hymen and a whitish vaginal discharge which was evidence that indeed the complainant had been sexually assaulted. That PW1 indicated during the voir dire that she was eleven (11) years and further, an age assessment report also ascertained that indeed the complainant was aged eleven years but unfortunately, the same was not produced in court. That in as much as the exact age was not established through physical evidence, the evidence before the court showed that the complainant was a child. Reliance in support of the said proposition was paced in the cases of Homa Bay High Court Criminal Appeal No. 4 of 2015 Stephen Ouma Vs Republic and Moses Nato Raphael Vs Republic CA CRA No. 169 of 2014. The respondent reiterated that the trial court in ascertaining the age of the complainant considered the evidence of the witnesses and the observation of the complainant and ascertained that the complainant was a child of tender years. In relation to sentence, it was submitted that the appellant was charged under section 8(4) of the SOA which anticipates the age bracket of 16 and 18 years and provides for minimum and mandatory sentence of fifteen years. That the charge sheet captured the complainant's age as eleven years while the evidence presented also was in consonance with the complainant's testimony that she was eleven years. It was contended that the correct section of the law ought to have been 8(2) of the SOA which provides for a minimum and mandatory sentence of life imprisonment. It was submitted that, in as much as there was an error in drafting the charge sheet, the appellant was conscious of the accusations levelled against him and he diligently cross examined the witnesses and therefore, he was not prejudiced in any way. Reliance was thus placed on the case of Danson Karange Muchunu Vs Republic [2015] eKLR and section 382 of the CPC. This court was thus urged to dismiss the appeal herein.

9. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on both conviction and sentence wherein the appellant contends that his conviction was not safe and further that, his sentence was harsh and excessive.

10. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in Okeno Vs Republic [1972] E.A. 32 and re-stated in Kiilu and another Vs R [2005] 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter, the court should draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See Gunga Baya & another Vs Republic [2015] eKLR).

11. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

12. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington Vs DPP 1935 AC 462 and Miller Vs Minister of Pensions 2 ALL 372-273.

13. In the case that was before the trial court, the appellant 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. In Charles Wamukoya Karani Vs Republic, Criminal Appeal No. 72 of 2013,

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

14. The question therefore is whether the above elements were proved to the required standards.

15. It is not disputed that the complainant at the time of the commission of the offence, was a minor as the same could be ascertained from the evidence produced before the trial court (specifically P3 Form and the evidence by the complainant herself).

16. In the case of Edwin Nyambaso Onsongo Vs Republic (2002) eKLR, in which the court cited the case of Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held 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, guardian or medical evidence among other forms of proof.....

17. As such, I am satisfied that the complainant was a minor which satisfies the legal requirement.

18. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

19. In this case, the complainant testified how the appellant got into their room at night while she was asleep, picked and took her to his bed and defiled her and thereafter, dressed her and then took her back to her bed. The complainant gave a graphic account of all that transpired. Even without corroboration her evidence was cogent enough for the court to return a verdict of guilty. It is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. (See George Kioji Vs R Nyeri Criminal Appeal No. 270 of 2012 (unreported). The court was of the view that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an

accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

20. Further, PW5, the clinical officer produced P3 and PRC Forms which were filed by Dr. James Mureri who examined the complainant herein. He testified that upon examination of the complainant, she was found to have been defiled and that there was a whitish discharge from the vagina of the complainant and the hymen was absent. PW4 who was the investigating officer also testified that on 04.10.2021, he recorded a report of a child who had allegedly been defiled by the father. It was his evidence that he interrogated the complainant and she told him that her father used to have sex with her and he had done it more than three times. He asked PC Minnie to take her to hospital for examination and the following day they got an age assessment report indicating that the complainant was 11 years old.

21. On positive identification, the appellant herein was the father of the complainant and the same was not controverted. I am guided by the decision hereunder that the way to approach the evidence of visual identification as was succinctly stated by Lord Widgery, CJ in the well known case of Republic Vs Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

22. It is my finding that the appellant in the instant case was properly and positively identified by the complainant for he was the father to the complainant.

23. That the age of the complainant is an indispensable ingredient of the offence of defilement and the same forms a vital part of the charge. It was argued that there was no proof that the complainant was aged eleven years at the alleged time of the commission of the offence herein; on the other hand, the respondent contended that PW1 during the voir dire stated that she was eleven (11) years and further, an age assessment report also ascertained that indeed the complainant was aged eleven years in as much as the same was not produced in court. That in as much as the exact age was not established through physical evidence, the evidence before the court showed that the complainant was a child. The respondent reiterated that the trial court in ascertaining the age of the complainant considered the evidence of the witnesses and the observation of the complainant and ascertained that the complainant was a child of tender years and thus eleven years.

24. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

25. A child is defined as a person under the age of eighteen years. Is the complainant herein a child?

26. The complainant testified that she was aged eleven (11) years and was in class one (1) at [Particulars Withheld] Primary School. Further, the trial court in its judgment noted that the child was presented before the court and the court formed a view that indeed the complainant was a child.

27. On this question of age, I am content to cite the case of Fappyton Mutuku Ngui Vs Republic [2012] eKLR where it was held:

> .. That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

28. I therefore find the age of the complainant was 11 years old as per the evidence adduced before the trial court, age assessment and the observation by the trial court.

29. On whether the evidence and the defence of the appellant was not considered; from the record, the appellant in his sworn evidence mainly denied the allegations and as correctly noted by the trial magistrate in her judgment, the appellant herein did not cast any doubt on the evidence by the complainant. That identification was by way of recognition and further, that she was convinced that the complainant was talking the truth; as such, the ground fails.

30. On the ground that the charges herein were instigated by bad blood between the appellant and PW 2, it is important to note that the alleged bad blood if at all, it existed, the same was between the appellant and PW2. But be as it may, the charges herein were as a result of the offence allegedly perpetrated by the appellant against the complainant and not PW2. In my considered view, PW 2 would not have had any reason to give false testimony against the appellant and especially against the appellant's own daughter. Further PW 1 herself evidence gave in graphic details how her father (the appellant) herein used to defile her not once not twice but three times.

31. The appellant further submitted that the trial court meted out a harsh and excessive sentence which was disproportionate to the charge. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owoura Vs Reginum (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James Vs R., (1950) 18 E.A.C.A 147:
>
> > "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
> >
> > To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R Vs Shershewky, (1912) C.C.A. 28 T.L.R. 364."

32. Reliance was thus placed on the case of Danson Karange Muchunu Vs Republic [2015] eKLR and section 382 of the CPC.

33. In reference to the above, I am guided by the decision in JMA Vs R [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney Vs State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:-

> " Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

[Also See Isaac Nyoro Kimita & another Vs R [2014] eKLR]

34. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

35. Looking at the record and the evidence as a whole it cannot be said that the appellant did not understand the nature of the charges against him. It is quite clear from his cross examination that he understood he was accused of having inappropriate sexual contact with J.M. and therefore I find that the same was curable under section 382 of the CPC. [See the Court of Appeal decision in Benard Ombuna Vs Republic [2019] eKLR].

36. Section 8(2) states 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.

37. It is trite that sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.

38. In the case herein, the trial court sentenced the appellant to serve 50 years imprisonment which this court considers to be harsh and excessive for reason that indeed the mandatory sentences are not unconstitutional in the sense that they may still be imposed but in deciding what sentences to impose, the courts must ensure that whatever sentence is imposed upholds the spirit of *the constitution* and further, regard to the surrounding circumstances fully taken into consideration. [See Court of Appeal decisions in Dismas Wafula Vs Republic [2019] eKLR and Eliud Waweru Wambui Vs Republic [2019] eKLR].

39. In the given circumstances therefore, I hereby set aside the fifty (50) years imprisonment and substitute the same with thirty five (35) years imprisonment to run from the time the trial court imposed its sentence.

40. It is ordered.

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

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent