JE v Republic (Criminal Appeal E062 of 2021)
[2023] KEHC 17686 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E062 OF 2021

AK NDUNG'U, J

MAY 24, 2023

BETWEEN

JE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 15 of 2020 – L Mutai, CM)

JUDGMENT

1. The appellant in this appeal, JE, was convicted after trial of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006 (count I). He was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same statute (count II). On October 5, 2021, he was sentenced to life imprisonment in count I. He has appealed against both conviction and sentence.

2. The particulars of the offence in count I were that on March 27, 2020 in Laikipia County, within the Republic of Kenya, unlawfully and intentionally caused his penis to penetrate the vagina of AW a child aged 7 years. In count II it was alleged that on the same date and at the same place, the appellant intentionally touched the vagina of the same complainant with his penis.

3. It is immediately apparent that the offence as charged in count II must have been committed in the course of committing the offence charged in count I. It should therefore have been charged as an alternative to count I, not as a substantive count of itself. As charged therefore, count II was duplex to count I and should not have been allowed by the trial court to stand though the appellant was not convicted of the same.

4. The appellant filed an amended memorandum of appeal challenging the conviction and the sentence. The conviction in count I has been challenged upon the following grounds –

i. That the trial magistrate erred for failing to consider that the evidence on record was null and void in that section 151 of the *Criminal Procedure Code* was not adhered to.

ii. That proof of penetration and identity of the perpetrator was marred with irregularities hence not proved to the required standard.

iii. That the victim and the witnesses demonstrated doubtful integrity and whose evidence remains doubtful.

iv. That the matter was riddled with material discrepancies and contradictions.

v. That the sentence meted was harsh and manifestly excessive.

5. The appellant filed written submissions. He argued that the trial court contravened section 151 of the *Criminal Procedure Code* in that PW1 testimony was not given under oath hence her testimony was null and void. He relied on the case of *Samuel Muriithi Mwangi vs Republic* (2006)eKLR. He submitted that the offence was allegedly committed at night hence the circumstances did not favour a positive identification. That the description that the complainant gave and what PW1 told the court did not tally. That PW1 testified that she was able to identify the appellant through the light from the torch however, the intensity of the light, the time she had the perpetrator on sight and whether there was any impediment was not ascertained.

6. On penetration, the appellant faulted the evidence of the complainant and PW3. On medical evidence, he submitted that the doctor testified that the hymen was broken but the doctor could not tell the approximate age of the injuries or what inflicted the injuries since there are other ways that can break a hymen. Reliance was placed on the case of *Ben Maina Mwangi vs Republic* (2006) eKLR and *Langat Dinyo Domokonyang vs Republic* (2016) eKLR.

7. He further submitted that the evidence of PW1, PW2 and PW3 did not tally, that PW5 was not the first person to treat the complainant yet she examined her, that PW3 stated that there was no penetration yet PW5 stated otherwise, PW1 stated that the appellant put the dudu into her vagina yet she did not express any pain therefore, the witnesses were not credible. He further submitted that the prosecution case was marred with material contradictions, that no investigations that was conducted in respect to his defence which could have established that there existed a grudge between the victim's sister and the appellant. As to the sentence, the appellant relied on a myriad of cases and urged this court to review the sentence imposed by the trial court.

8. Learned prosecution counsel, in written submissions, supported the conviction and the sentence. The counsel submitted that all the ingredients of defilement were proved to the required standard. On the sentence, the counsel submitted that the sentence was lawful and appropriate in the circumstances.

9. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

10. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

11. There are three main ingredients in the offence charged in count I. These are-

i. the age of the complainant;

ii. Penetration; and

iii. identity of the perpetrator.

12. The complainant's age (7 years at the time of the offence) was proved beyond reasonable doubt by her birth certificate (Exhibit P3) which was produced in evidence by her mother (PW3). It says she was born on July 12, 2012. The offence was alleged to have occurred on March 27, 2020.

13. What is in dispute is proof of penetration and the identity of the alleged perpetrator. The evidence on record was as follows.

14. PW1 was the complainant's sister. She testified that on the material day at 7:50 pm she was at home when she heard her small sister (the complainant) talking from outside. She stepped out with a torch and asked the complainant who had escorted her and she said it was uncle of kina J. She stepped outside the gate with the torch and she saw the appellant who was identified by the complainant as the uncle. The appellant informed her that he had been sent by their mother to escort the complainant. He thereafter left with the complainant after delivering the food to her sisters.

15. In the morning, she was contacted by their mother who informed her that she had taken the complainant to the hospital for she was defiled. She testified that she reported the matter to the police and she took the complainant to Nanyuki Teaching and Referral Hospital where she was treated. She told the court that the complainant told her that when she left with the appellant after dropping food, the appellant defiled her.

16. On cross examination, she testified that she saw the appellant outside the gate and that she knew him as their uncle since the appellant's sister is married to their uncle.

17. The complainant testified as PW2. She gave unsworn testimony. She testified that on the material day, she was sent by her mother to deliver food to her sisters. She met the accused by the corridor and he offered to escort her. She agreed. She testified that her sister PW1, saw the appellant at the gate through the fence. She testified that the appellant had a torch as well. On her way back, the appellant asked her to follow him using another route. The appellant then did bad manners to her. She described to the trial court that the she had worn a skirt and a pant. The appellant removed his dudu for urinating, removed her pants, split her legs and did bad things. He pushed his dudu into her vagina-the court noted that she touched her vagina.

18. She testified that nobody else passed by and at this time, the appellant's torch was down. The appellant left her and she went home where she informed her mother. She testified that she saw the appellant well when Agnes, PW1 torched him. She testified that the appellant was a relative.

19. On cross examination, she testified that her and the appellant were together on the material date and that he defiled her by the road side.

20. PW3 was the complainant's mother. She testified that on the material night, she gave the complainant food to deliver to her sister who lived within the adjacent plot which was about five minutes' walk. The complainant returned after 30 minutes but she was shaking. She inquired what was wrong and the complainant informed her that the man who lives at Esther's and who had been to their hotel had done bad manners to her. That she stated that she met him while she was going to deliver the food and on her way back, he defiled her. She testified that she remembered the person as J whom she had known from before, he was a relative to the said E.

21. She examined the complainant and noticed a whitish discharge which she thought it was spermatozoa but she could tell that there was no penetration. She reported the matter to the police and took the

complainant to Segera missionary hospital at the same night. She testified that in the morning, PW1 informed her that she had seen the appellant when the complainant had gone to deliver food. She testified that she had not differed with the appellant.

22. PW4 was the investigating officer. He testified that the matter was reported to the station on March 28, 2020. The appellant was identified to him by the complainant and after investigation, he charged the appellant with the current charges.

23. PW5, was the doctor who examined the complainant. She testified that upon examining the complainant, she had no bruises on her body but the sexual organ was painful, the vagina was red and the hymen was broken. She was also unable to hold urine and her conclusion was that the complainant had forceful sexual encounter. She filled the P3 form, Pexhibit1. She produced the PRC form, Pexhibit2 and the laboratory results as Pexhibit4.

24. On cross examination, she testified that the complainant had been taken to Segera clinic but she was referred to Nanyuki Teaching and Referral Hospital. That she was the first person to attend to her since she was not treated at Segera clinic.

25. The Appellant in his defence testified that he was familiar with the allegations. He testified that he was arrested by the complainant's father and he was taken to police station. He stated that he did not know anything about the material date. On cross examination, he testified that he knew the complaint's parent and that on the material date, he was in his house.

26. That was the totality of the evidence before the trial court. From the material placed before the trial court, it is my finding that penetration was proved to the required standard. The evidence of the complainant was not shaken at all even by the Appellant during cross examination. She was candid and she explained to the court in graphic terms how she was defiled. Her evidence was corroborated by the clinical officer, PW5. She testified that after examining the complainant, the sexual organ was painful, the vagina was red and her hymen was recently broken. The complainant was also unable to hold urine.

27. Her findings were also well captured in the P3 form. The complainant was examined the next day after the ordeal. The appellant submitted that PW5 did not state the age of the injuries which is contrary to the evidence on record since PW5 testified that the hymen was recently broken. The Appellant further argued that a broken hymen is not proof of penetration. He relied on the case of *Langat Dinyo Domokonyang vs R* (2016)eKLR where the court observed that hymen can be broken by other factors.

28. This may be the case and I agree that hymen can be broken by other factors but considering the evidence of the complainant and which is corroborated by that of PW5 to the effect that she found proof of forceful sexual penetration, it is my finding that penetration was proved to the required standard.

29. As to the identity of the perpetrator, the evidence on record reveals that the offence was committed at night. The complainant testified that she met the appellant on the corridor. She testified that he had a torch. She testified that she saw the appellant well when PW1 torched him. She further testified that the appellant was a relative. PW1 testified she asked the complainant who had escorted her and she said that it was uncle of kina J who was outside the gate. She testified that with a torch, she went outside the gate and torched and saw the appellant who was identified by the complainant as uncle. She even conversed with the appellant who told her that he had been sent by their mother to escort the complainant. The appellant left with the complainant. She testified on cross examination that she saw the appellant outside their gate and she knew him as their uncle since the appellant's sister was married to their uncle.

30. PW3, the complainant's mother testified that the complainant informed her that the man who lives at E's and who had been to their hotel had done bad manners to her. Immediately, she knew it was the appellant since he is a relative to the said E. She knew the appellant well from before.

31. From the above piece of evidence, it is clear that the appellant was not a stranger to PW1, PW2 and PW3. Appellant was well known to the complainant by name, uncle of kina J. The appellant did not challenge this description during the cross examination of the prosecution witnesses. According to PW1 and PW2, he was a distant relative. According to PW3, she realized that the complainant was referring to Joseph when she stated that he was the one living with Esther. Esther was a relative to the appellant.

32. The appellant himself in his cross-examination of prosecution witnesses, and in his sworn statement, did not once suggest that the complainant did not know him well or at all. He did not also deny the description as 'the one living with Esther.

33. I therefore find and hold that the conditions prevailing were ideal for the identification of the appellant who was identified by recognition by both PW1 and PW2 at the material day. He was the one who had escorted the complainant.

34. From the totality of the evidence placed before the trial court it was proved beyond reasonable doubt that on the material date and time the appellant had escorted the complainant and on her way back home, he took her by the road side and defiled her. The testimony of the complainant was cogent and clear. The appellant did not cast doubt on the complainant's evidence. The testimony of her sister (PW1) fully corroborated the complainant's testimony in all material particulars; likewise the medical evidence given by the doctor (PW5). Nothing that the appellant stated in his sworn statement, cast any doubt at all upon the prosecution's case. The appellant's defence was properly and correctly rejected by the trial court.

35. The appellant raised some issues in his submissions. One was that PW1 did not take oath before giving her testimony. I have checked both the typed and handwritten proceedings and I have noted that the typed proceedings omitted some part. The handwritten proceedings reveal that PW2 was sworn.

36. As for the sentence, the appellant got life imprisonment as the law provides under section 8(2). It is trite law that sentencing is at the discretion of the trial court and the appellate court cannot easily interfere with this discretion unless it is demonstrated that the sentence imposed is not legal or it is so harsh and excessive to amount to miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously see *Shadrack Kipkoech Kogo v R* Eldoret Criminal Appeal No 253 of 2003 *t Ogolla s/o Owuor v Republic*, [1954] EACA 270,

37. It is however apparent that courts have discretion to interfere with mandatory sentences. This is in line with the now notorious *Muruatetu case*, where the Supreme Court of Kenya declared that the mandatory nature of the death sentence for murder (sections 203 and 204 of the *Penal Code*) is unconstitutional for interfering with the court's discretion in sentencing. The same has been applied to mandatory sentences in sexual offences.

38. Considering the circumstances of this case and the mitigation by the Appellant, and noting the gravity of the offence, the need for deterrence and the trauma suffered by the complainant, a stiff penalty is desirable. However, given the age of the appellant, I find the sentence of life imprisonment excessive.

39. In the result, the appeal against the conviction lacks merit and is dismissed. The appeal on sentence is successful. The sentence of life imprisonment is set aside and substituted thereof with a term of imprisonment for 30 years.

Dated signed and delivered at Nanyuki this 24th May 2023

A. K. NDUNG'U

JUDGE