Amuno & another v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 19586 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E006 OF 2022

RE ABURILI, J

JUNE 29, 2023

BETWEEN

RAPHAEL JUMA AMUNO ..... 1ST APPELLANT

DANIEL ODHIAMBO ODHIAMBO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. C.N. NjajaleE on the 18.7.2016 in the Senior Principal Magistrate's Court in Winam in Sexual Offence Case No. 1124 of 2013)

JUDGMENT

Introduction

1. The appellants herein were jointly charged with the offence of defilement contrary to section 8(1)(4) of the *sexual Offences Act* No.3 of 2006. The particulars of the charge were that on diverse dates between October 29, 2013 and November 2, 2013 in Kisumu East District within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of NAW a child aged 15 years old. The 2nd appellant on the other hand is said to have defiled MOO a child aged 16 years. The date, place and time is the same as the one for the 1st appellant herein. The two appellants were faced the alternative charges of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The appellants pleaded not guilty to the charges and the matter proceeded to trial where the prosecution called five (5) witnesses to establish a prima facie case against the two appellants. At the close of the prosecution's case, the appellants were placed on their defence and they gave sworn testimonies denying the charges brought against them.

3. In her judgement, the trial magistrate found that the prosecution proved its case beyond reasonable doubt and after considering the appellants' mitigation plus the fact that the 1st appellant was a first-time

offender, proceeded to pass a sentence of 20 years' imprisonment on him. As against the 2nd appellant, she imposed a prison term of fifteen (15) years.

4. Aggrieved by the trial court's finding, the appellants filed their petitions of appeal dated February 16, 2022 on the February 21, 2022. The appellants' petitions of appeal raised the following similar grounds of appeal:

    i. That the trial court failed to observe that the investigation tendered was shoddy.

    ii. That the trial court failed to consider that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.

    iii. That the trial court failed to consider that the sentence imposed was against the weight of evidence adduced.

    iv. That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.

    v. That we be served with the certified copy of the trial court records to enable us erect more grounds of appeal

5. Whereas the appellant elected to file written submissions, the respondent stated that it would rely on the evidence on record in disposing of the appeal.

The Appellant's Submissions

6. The appellants submitted that the trial court came up with a decision that was inclined in favour of the prosecution despite contrasting and conflicting issues in question that rendered the evidence weak and undeserving of such a harsh sentence. The appellants faulted the testimonies of the two complainants PW1 and PW2 stating that their character was grossly questionable.

7. It was the appellants' submission that the trial court failed to determine the ages of the complainants as there was neither documentary evidence in the form of Birth certificates, Birth Notifications or Baptismal Cards nor was there medical evidence in the form of age assessment and further that the complainants' parents also never testified to confirm the ages of the children.

8. The appellants submitted that the sentences meted out on them were mandatory minimums that were unconstitutional as was held in the case of *Jared Kiti Njiri v Republic* Criminal Appeal No. 93 of 2014.

9. The appellants further submitted and urged the court to let their sentences run from the day of arrest in compliance with the provisions of section 333 (2) of the *Criminal Procedure Code*.

10. The respondent's counsel urged the court to examine the evidence on record and uphold the conviction and sentences imposed on the appellants.

Role of the Court

11. This being a first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and reach its own independent conclusion bearing in mind that it neither saw the witnesses nor heard them

testify as to see their demeanour. This duty was espoused by the Court of Appeal in the case of *Mark Oiruri Mose v Republic* [2013] eKLR, in the following words:

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Evidence before the Trial Court

12. PW1 NAW, the 1st complainant testified on oath after voire dire examination that she was a class six pupil. She recalled that on the 29.10.2013 she was in the company of PW2 on their way to school when they met a lady called Nyapap who told them to go to school and informed them that she could get them jobs in Kisumu. It was her testimony that they boarded a vehicle to Kisumu and alighted at the bus park where they met a hawker who was to take them where they would get jobs but they disagreed and the hawker called the appellant.

13. PW1 testified that they went with the appellant to a residence in Nyamasaria where they spent the evening. She further testified that she slept with the appellant who defiled her that night and in the morning the appellant and his friend left for work. The 1st complainant testified that they were subsequently rescued by a community health worker and taken to hospital. PW1 reiterated that it was the appellant who defiled her. PW1 reiterated her testimony in cross-examination.

14. In cross-examination, by the appellant, PW1 reiterated that it was the appellant Raphael who defiled her on the bed although he did not force her.

15. PW2, MAO. testified on oath after voire dire examination that she was 17 years old and in class 7. She recalled that on 29.10.2013, she was in Sondu with PW1 on their way to school when PW1 informed her that there was a lady who wanted to take her to do some work and so she travelled to Kisumu with PW1. It was her testimony that at Kisumu, they met a person named Peter who in the company of the appellant took them to their residence and Peter defiled her. PW2 testified that they stayed in Peter's house for 3 days and that one Daniel defiled her after Peter and Raphael took her and PW1 to Daniel's house the following day after Raphael's wife appeared, found them in his house and collected household items and left.

16. In cross-examination PW2 stated that the appellant was the one who took her to Daniel's house.

17. PW3 Patricia Nancy Otuto, a Community Policing Officer within Manyatta are testified that on the 31.10.2013 at 10am, she rescued PW1 and PW2 from the appellants' respective houses and took them to Kosawo Hall and later recorded her statement at the police station. In cross-examination, PW3 stated that PW1 and PW2 had been defiled by the appellants as they had been living with the appellants as husband and wife.

18. In re-examination, PW3 stated that the appellants failed to make a report that they had found the lost girls, PW1 and PW2, and further that the complainants' uniform were found in the accused persons' houses and further that the complainants informed her that they had been defiled in the appellants' respective houses.

19. PW4, Dr. Makreeni Adhiambo, a medical officer at Russia Hospital produced the P3 forms for PW1 and PW2. She produced the P3 form for PW1 as PEX1 and noted that there was vaginal penetration with no condom used. It was her testimony that on physical examination of PW1, she found that the

child had a bath, short call and long call and further that the clothes she had on at the time of the assault were not given to the police.

20. PW4 testified that on genital exam of PW1, the outer genitalia appeared normal but there was a whitish like discharge. She further testified that the hymen was absent and anus intact and that on vaginal swap, the epithelial cells were present though no spermatozoa was found. PW4 further produced PRC for PW1 as PEX3. PW4 also testified and produced the P3 form and PRC form for PW2 aged 16 years old. The hymen was absent, epithelial cells were seen, no spermatozoa present.

21. In cross-examination PW4 stated that on examining the minors, she saw that they had been defiled.

22. PW5 Corporal Roselyne Nanjala testified that on the 2.11.2013, the appellants herein were taken to Kondele Police Station together with two minors, PW1 and PW2 who had been rescued by a social worker. She testified that she recorded the statements of the witnesses and escorted the complainants to Russia hospital where they were examined and treated. It was her testimony that she conducted her investigations and charged the appellants.

23. In his defence, the 1st appellant denied both the main and alternative charge and testified that on the 24.10.2013 he received a phone call from his wife Dorine Atieno who informed him that their child had been admitted to hospital and so he proceeded to hospital and took care of the child until 31.10.2013 when he was discharged. It was his testimony that on the 2.11.2013, he left his home to go and see his friend, Daniel, and that is when he was arrested and taken to Kondele Police Station where they were identified by two girls as having defiled them.

24. In cross-examination, the appellant denied that any of the complainants were housed in his house and further stated that the person who complained against him was one Patricia Ogero Otude. The appellant denied having sexual intercourse with either of the complainants.

25. The 2nd appellant testified that he did not now the case and that on 26th October 2013 he had gone to Busia to visit a friend and stayed there for 6 days. That when he returned, and went to see his friend the 1st appellant herein, and as the two sat on 31/10/2013, up to around 9.30am, they went to the stage and the 2nd appellant went to buy credit but when he returned, he never found Raphael who later appeared in a Landcruiser and that is when a lady in the Landcruiser pointed him out to the police who arrested him after slapping him and they were taken to Kondele Police Station. That at the police station, the lady was asked to bring the two girls and she left and returned with the girls whom he did not know. Later he was taken to court and charged with the offence. In cross examination, he denied any knowledge of any events of 29th October 2013 and or knowing who the two complainants were.

Analysis and Determination

26. I have considered the appellants' grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. The issues for determination emanating therein are:

    a. Whether the prosecution's case was proven beyond reasonable doubt and

    b. Whether the sentence imposed on the appellants was excessive and harsh.

    Whether the prosecution proved its case against the two appellants beyond reasonable doubt

27. The appellants were charged with the offence of defilement contrary to section 8 (1) as read with Section 8(4) of the *Sexual Offences Act* and an alternative charge of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

28. This being a case of defilement, it is trite law that the ingredients of an offence of defilement be proved, which are; identification or recognition of the offender, penetration and the age of the victim.

29. The appellants pleaded and submitted before this court that the complainants (PW1 and PW2's) ages were not established by the prosecution as neither documentary evidence in the form of Birth certificates, Birth Notifications or Baptismal Cards nor was there medical evidence in the form of age assessment and further that the complainants' parents also never testified to confirm the ages of the children.

30. The 1st complainant did not state her age but testified that she was in Class 6 at [Particulars Withheld] Primary School. The 2nd complainant testified that she was 17 years old and in class 7 PW5, the investigating officer testified in cross-examination by the 1st appellant that PW1 was 14 years old but in re-examination she stated that the age of the minor was 15 years old. The P3 forms produced as exhibits 1 and 2 in respect of the 2 complainants showed that they were 15 years and 16 years old respectively.

31. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR it was held that:

> " ... 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."

32. In the case of *Joseph Kieti Seet v Republic* [2014]eKLR, H.C. at Machakos, Criminal Appeal No. 91 of 2011, Mutende, J. held as follows:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:
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> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."
>
> The foregoing holdings are applicable in the instant case in various ways. At the trial, P.W. 2, the complainant herein stated that she was 12 years old. Both P.W. 3 and P.W. 4 who were the complainant's biological parents stated that the complainant was aged 12. On the other hand, the charge sheet indicated that the complainant was aged 12 as well the P3 form that was produced in court as P. Exhibit 1.
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> Furthermore, the trial court which had the opportunity of seeing P.W.2 did not doubt her age. P.W.2's age was also not set on a borderline. I would have no reason to doubt that that was her age."

33. In this case, the complainants' estimated ages as recorded in the charge sheet, P3 form and PRC forms were stated as 15 years old and 16 years respectively. Further, it was the testimony of PW5, the Investigating Officer that PW1 was 14 years while PW2 was 15 years old. Further, the appellant did not dispute the age of the victims whom the trial court had the opportunity to see and observe and conclude that they were of the age as estimated.

34. I am thus satisfied that the ages of the complainants were proved to be 15 years old and 16 years old respectively as at the time of the incident.

35. On penetration, section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person." See the case of Mark Oiruri Mose v R [2013] eKLR.

36. PW1 testified that they were living in the house with the appellant and that on the evening of 29.10.2013, she spent the night with the appellant and that the appellant defiled her that evening. Her testimony was corroborated by that of PW2, the 2nd complainant who testified how they started living with the appellant and one Peter who defiled her and later the 1st appellant took the 2nd complainant to the house of the 2nd appellant who also defiled her.

37. Further corroboration came from the testimony of PW4 who examined PW1 and PW2 produced medical evidence that showed that examination of the PW1's outer genitalia appeared normal but there was a whitish like discharge and further that the hymen was absent. It was her testimony that on vaginal swap, the epithelial cells. PW4 produced PW1's P3 form for as PEX1 and her PRC form as PEX3. PW4 also examined the 2nd complainant and found that she had been defiled. The rewash no hymen and that epithelial cells were present.

38. In their respective defences, the appellants denied committing the offence and gave alibi that they were not present on those named dates. The 1st appellant stated that he was in hospital tending to his admitted child from the 24.10.2013 to the 31.10.2013. the 2nd appellant claimed that he had gone to Busia on October 26, 2013 and returned on 31/10/2013 and on 2/11/2013 when he went to see his friend who had called him, he was arrested.

39. Section 124 of the *Evidence Act* Laws of Kenya provides that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where 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, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

40. Despite the provisions of section 124 of the *Evidence Act*, the complainants' testimonies remained unchallenged and was corroborated by PW4 the Doctor who examined the minors at the hospital at JOOTRH, and PW3, the social worker who rescued both PW1 and PW2.

41. I acknowledge that the appellants gave alibis as their defenses. In the case of *Kiarie v R* [1984] KLR The Court of Appeal laid down the following principle this:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

42. It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court. However, in relying on an alibi defence, nevertheless the entirety of the prosecution direct

or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellants and the decision to raise alibi defenses at a later stage of the proceedings should not escape scrutiny of the court.

43. In support of this proposition, the court in *R v Sukha Singh S/o Wazer Singh & Others* [1939] 6 EACA 145 held as follows:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

44. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellants.

45. Turning to the statements of defense on their whereabouts at the time described by the complainants, the appellants never disclosed in their answers to the prosecution case. On the basis of the above authorities and the testimonies by the two complainants who were not children of tender ages, I am not persuaded, just as the trial court was not, that the appellant's alibi defenses addressed significant aspect of the charges against them of defiling the complainants herein. In my view, the said alibis raised by the appellants was an afterthought.

46. As was stated in the persuasive case *R v Mahoney* [1979] 50 CCC

> " The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."

47. I thus find that the prosecution proved penetration of the respective complainant's genitalia beyond reasonable doubt.

48. As to whether the appellants were the perpetrators, the complainants PW1 and PW2 testified that they spent the evening with the appellants and that they saw their assailants with PW1 stating that "I still remember the faces of the accused." PW2 stated how she stayed with Daniel for three days after telling him that she could stay with him as husband and wife and that she did not want to stay with him but she had no choice and that Raphael and Daniel were neighbors. I note that the appellants and the complainants spent about three days together prior to the complainants' rescue and as such the appellants must have become well acquainted and recognizable to the complainants. From the trial court record, it is evident that the appellants were well known to the complainants as they indeed lived as husband and wife for those three days.

49. The appellants further alleged that their conviction was based on evidence that was contrasting and conflicting. In my view, the evidence presented by the prosecution corroborated each other. No material contradictions were pointed out to this court. The Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR where it stated interalia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

50. Accordingly, I find that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's and this court's mind as to the appellants' guilt. Consequently, this ground fails.

51. I the end, I find that the prosecution proved the identity of the appellants beyond reasonable doubt.

52. The upshot of the above is that the prosecution proved their case beyond reasonable doubt against both appellants.

Whether the sentences imposed on the appellants was excessive

53. The punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a sentence of 20 years or more. The evidence in this case discloses that the 1st victim was in that age bracket. On the other hand, the 2nd complainant was aged 16 years. Punishment prescribed under section 8(4) of the *Sexual Offences Act* is a minimum of 15 years imprisonment.

54. Albeit the charge sheet brought against the 1st appellant indicated that the charge was brought pursuant to section 8 (1) (4) of the *Sexual Offences Act*, this is curable in pursuant to the provisions of section 382 of the *Criminal Procedure Code* and did not occasion any failure of justice on the appellant.

55. In his mitigation, the 1st appellant stated that he had children who depended on him and further that he had been in Kodiaga Prison for a period of two years. The trial court considered the mitigations and the fact that the 1st appellant was a first offender and the nature of the offence committed and sentenced him to serve a mandatory minimum of 20 years imprisonment.

56. In respect of the 2nd appellant, he mitigated that saying that he had been in prison for two years and that the court should give him sentence which he can serve and return home to his family. The trial court considered all these factors and sentenced him to serve 15 years imprisonment.

57. Sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R. and Wilson Waitegei v Republic* [2021] eKLR).

58. In this instance, the effect of the offence on the minors are long lasting and the psychological effect is even worse. I find the sentence of twenty years' imprisonment and 15 years imprisonment lawful.

59. However, as the punishment section uses the term 'liable to,' I am satisfied that the trial court had discretion to impose lesser sentence than what appears to be the mandatory minimum sentences under sections 8(3) and 8(4) of the *Sexual Offences Act*. She however did not exercise that discretion. The Court of Appeal in Criminal Appeal No. 479 of 2007 *Daniel Kyalo Muema v R* [2009]eKLR referred to the phrase "shall be liable" in regard to its construction. The court cited section 66 (1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

> "Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".

60. Section 26 (2) and (3) of the *Penal Code* captures the spirit of the above section as follows:

> "(2) Save as may be expressly provided by the law under which the offence concerned in punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term."

61. From the language of section 26 and 28 of the *Penal Code*, it is clear that those are general provisions of law which apply not only to the offences prescribed in the *Penal Code* but also to offences under other written law. In other words, the phrase 'liable to' does not import a mandatory sentence.

62. In the circumstances, I interfere with the sentences imposed. I set aside the 20 years imprisonment and the 15 years imprisonment imposed on the appellants respectively and substitute the same with ten (10) years imprisonment for each appellant. The said prison terms shall be calculated from the date of arrest of the appellants on 3/11/2013 as they were in prison throughout the trial period. This is pursuant to section 333 (2) of the *Criminal Procedure Code* which 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

63. In the instance case, the charge sheet dated 7/11/2013 show that they were both arrested on the 3.11.2013 and on the 7.11.2013, the trial court granted them bond on the plea day, of Kshs. 200,000 with one surety of similar amount or in the alternative, cash bail of Kshs. 50,000. The trial record reveals that the bond terms were reviewed to Kshs. 100,000 and Kshs. 60,000 respectively.

64. The record further reveals that the appellants were not able to secure their release and so they stayed in custody until their sentence.

65. The Judiciary Sentencing Policy Guidelines provide that:

> " The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

66. The appellants were sentenced on the 18.7.2016.

67. Accordingly, this appeal is only partially successful on sentence reduction.

68. The appeal against conviction is dismissed. The appeal against sentence is allowed as stated above, with the 20 years and 15 years imprisonment imposed on the 1st and 2nd appellant respectively being set aside and substituted with ten (10) years imprisonment to be calculated from 3/11/2013.

69. This file is closed.

70. I so order.

Dated, Signed and Delivered at Kisumu this 29th Day of June, 2023

R.E. ABURILI

JUDGE