K v Republic (Criminal Appeal 59 of 2018)
[2023] KEHC 19437 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 59 OF 2018

RB NGETICH, J

JUNE 29, 2023

BETWEEN

DK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence from the Judgment of Honourable V.O AMBOKO (RM) delivered on the 19th of November, 2018 at Kabarnet Senior Principal Magistrate's Court S/o Criminal case No. 15 of 2018)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement of a boy contrary to section 8(1) as read with Section 8(2) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that on the 18th day of April,2018, at around 1200hrs in Baringo central sub-county within Baringo county, the accused willingly and unlawfully caused his penis to penetrate the anus of DN a boy aged 10 years in contravention to the said Act.

2. The accused was charged with alternative charge of indecent Act with a child contrary to Section 11 of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge being that the accused on the 18th day of May, 2018, at around 1200hrs in Baringo central sub-county within Baringo county, willingly and unlawfully caused his penis to touch the anus of DN a boy aged 10 years in contravention to the said Act.

3. The accused denied the charge and the matter proceeding to full hearing with prosecution calling 4 witnesses and the accused adduced unsworn statement and called one witness. Judgement was delivered on 19th of November 2018.The accused was found guilty and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

4. The Appellant being aggrieved and dissatisfied with the decision of the trial court, lodged an appeal through petition of appeal which was later amended on the 2nd March, 2023 and filed in court on the 3rd March, 2023 on the following grounds:-

   i. That the Learned trial magistrate erred in both law and fact in disregarding the Appellant's defence thereby arriving at a manifestly unjust conclusion that the appellant was guilty of the offence.

   ii. That the Learned trial magistrate erred in both law and fact in finding that the age of the complainant had been proved, when there was evidence to the contrary that the clinical officer was not an expert in age assessment.

   iii. That the learned trial magistrate erred in both law and fact in convicting the appellant when there was insufficient evidence presented to sustain a conviction.

   iv. That the learned trial magistrate erred in both law and fact in finding that penetration had been proved.

   v. That the Learned Trial magistrate erred in both law and fact in failing to consider the Appellant's mitigation thereby sentencing the Appellant to a manifestly unjust harsh and unconstitutional sentence of life imprisonment.

Appellant's Submissions

5. The Appeal was canvassed by way of written submissions. As to whether the prosecution proved their case beyond reasonable doubt, the appellant argues that the complainant was taken through voire dire examination and he gave unsworn evidence in camera and the court noted and proceeded to record that PW 1 has sufficient intelligence and understands the importance of telling the truth but further noted that he does not understand the meaning of an oath.

6. The appellant further submits that the evidence of PW 2 was basically hearsay since she reiterated what PW 1 told her and there was no eye witness in the case; further that PW 2 examined the minor but did not see anything and if the minor was defiled as alleged, he would have been in pain noting that he was a very young boy; and there would have been traces of blood or bruises or tears in his anus and would have difficulty in sitting and/or even sleeping hence the prosecution's evidence is doubtful.

7. The Appellant further submits that the evidence of PW 3 was contradictory in that during his examination in chief, he stated that the victim's anal region had no bruises or tears but on cross examination, he stated that his findings were that the victim was sodomised; that this is in complete contrast to his findings that there were no bruises and/or tears in the complainant's anal region.

8. The Appellant submits that PW 4's evidence is hearsay as she did not conduct thorough investigations to establish the age of the minor and the perpetrators of the alleged defilement. That the investigations officer is not a medical doctor to be able to interpret the treatment notes for her to conclude that this was not the 1st time PW 1 was sodomised. That no investigations were conducted in the matter as it is clear that the investigation officer relied on information received from the other witnesses which is hearsay.

9. The Appellant proceeds to argue that in his defence, he denied defiling PW1, but the court totally disregarded his defence yet it was clear that the complainant was a serial liar. That the evidence of PW 2 was disregarded by the lower court to the detriment of the Appellant even though she was in a strong position to assess the truthfulness of the complainant.

10. The appellant submits penetration was not proved. That the prosecution's evidence was inconsistent and contradictory and questioned if there were no tears or bruises and PW 2 checked and did not see anything, how could it have been proved; that there was an allegation that PW 1 had been defiled before on the 9/01/18 as it appears in the treatment notes hence it was not the first time PW 1 had been defiled which does not prove anything against the appellant since the previous case was unreported and further it was not the Appellant who defiled him.

11. Further that there is a possibility that PW1 lied about both defilements. On the 2nd defilement, he stated that he had been assisting complainant with his learning and had been hard on him to achieve better grades which he did. That the trial court erred in arriving at a conclusion that the Appellant defiled the complainant. The Appellant relies in the case of *Abdullahi Sahal Issack v Republic*, Criminal Appeal No. 27 of 2019 (2021) eKLR in support of his case.

12. On the issue of age of the complainant, the Appellant submits that PW 4 could not produce a document that she did not prepare; that she was not the maker of the age assessment report. That the clinical officer is not an expert in the medical field and the said age assessment report does not show who conducted the report, which Hospital conducted the report; that the age assessment report does not prove anything as the same was neither produced by the maker nor was it produced by an expert witness on age assessment.

13. On the issue of identification, the appellant submits that they will not dwell on this issue as the appellant is the complainants' uncle and there was no issue on identification.

14. The appellant further submits that the prosecution did not prove its case beyond reasonable doubt as required as penetration was not proved, age was questionable and the assessment report was not conducted by an expert. The appellant relies in the case of *Martin Karugu Ngaga v Republic*, Criminal appeal No. 20 of 2015 [2020] eKLR

15. The Appellant submits that the trial court completely disregarded the defence evidence particularly the evidence of DW 2 that the complainant herein was fond of telling lies and mischievous.

16. As to whether the sentence is harsh and unconstitutional, the appellant submits that he was sentenced to life imprisonment which is a mandatory sentence provided under section 8(1) of the *Sexual offences Act* No.3 of 2006. It deprives the court discretion to impose appropriate sentence considering circumstances of each case. Further that the trial court failed to consider the Appellants mitigation; that the appellant in his mitigation stated that he was a student in college studying petroleum engineering and his father depends on him as he has a spinal code injury; that he is a father of one child; he provides for his upkeep and helps his mother in food expenses. He urged court to impose a sentence that would enable him look after his parents.

17. In conclusion the Appellant submits that the trial court issued a harsh sentence upon the Appellant considering the kind of evidence on record.

Respondents Submisions

18. Although the Respondents indicated in court that they had filed submissions, the same are not on record.

Analysis And Determination

19. This being a first appeal, the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in *Okeno v Republic* [1972] EA 32:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [1957] EA 570). It is not the function 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* [1958] EA 424."

20. I have considered the evidence on record, the appeal before me together with the written submissions by the Appellant. The major issues for determination in this matter are:-

    a. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.

    b. Whether the sentence meted upon the Appellant is harsh and unconstitutional.

Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

21. The Appellant argues that the prosecution's case was inconsistent and contradictory; that there were no tears or bruises as PW 2 checked and did not see anything; and there were allegations that PW1 had been defiled before on the 9/01/18 as appears in the treatment notes hence it was not the first time that PW1 had been defiled and it was not the appellant who defiled him.

22. The duty of the prosecution as the burden bearer in criminal cases is provided for under Section 107 (1) of the *Evidence Act* which provides:

> " (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

23. The ingredients for a charge of defilement as follows:-

    (a) Penetration of the male genitalia with that of a female genitalia

    (b) That the complainant was aged below 18 years.

    c) That it was the offender alone or with another who committed or had carnal knowledge with the complainant.

(a) Penetration

24. Penetration is defined under Section 2 of *Sexual Offences Act* No. 3 of 2006 defines penetration as follows:

> " Partial or complete insertion of a genital organ of a person into the genital organ of another person."

25. PW1 the complainant herein testified that while herding his grandmother's goats, accused called him; they went into his house where accused asked him to join him (accused/Appellant) in singing and later held him by his arms and drew him on his bed, wore a condom and inserted his penis in his buttocks. The complainant screamed but no one responded to his screams.

26. The appellant warned the boy (complainant) against telling anyone what happened. He went back to herd cattle upto around 6:00 p.m. He said he was feeling pain on his anal opening. He told his grandmother and he was taken to hospital. He was examined, given medication and he later went to police station.

27. PW 2 one PM grandmother to the complainant testified that he left the complainant on the 18/14/18 and later came back in the evening when the complainant told her not to leave him at home. She testified that he asked him what had happened, but did not disclose. They went to sleep and in the middle of the night, she woke up and asked the complainant what had happened but he kept quiet. In the morning, he asked him severally what happened until evening when he disclosed that the Appellant had sodomised him. He took him to Kabarnet District Hospital, where his urine, blood and stool were examined. She stated that the complainant told her that he had back pains.

28. PW3 one Benjamin Kendagor who is a clinical officer at Kaptimbor testified that on the 28/04/18, he received a patient aged 10 years who alleged to have been sodomised by a person known to him in his residence. He testified that he had been treated on 20/04/18. He said on examining the complainant, he had pain on touching the stomach and on the lower back. He found no bruises or tears but there was pain on touch, a digital rectal examination. Upon being cross examined, the witness told the court that from the findings, the complainant was sodomised, that after the act, the patient experienced rectal prolapse; his rectum was treated.

29. From the medical evidence adduced together with the evidence of the complainant and that of his grandmother there is no doubt that the Appellant sodomised the complainant. There is sufficient proof of penetration.

(b) Age

30. The Appellant submits that PW 4 could not produce a document that she did not prepare; that she was not the maker of the age assessment report. That the clinical officer is not an expert in the medical field. That the said age assessment report does not show who conducted the report and which Hospital conducted the report. That the age assessment report does not prove anything as the same was neither produced by the maker nor was it produced by an expert witness on age assessment

31. From the evidence on record, the complainant while testifying in court said he was aged 10 years having been born in the year 2009. PW 5 Pc Electin Nabiswa attached to Kabarnet police station children's and gender desk testified that the complainant's grandmother told her she would avail the clinic cards of the minor but she did not. She sought from the court to be stood down so that they could avail documents to prove the age of the complainant and the request was granted by the court.

32. On the 24/09/18 she proceeded to testify that she requested the grandmother of the complainant to bring the boy for age assessment on the 19.9.18. The boy's age was assessed by the Clinical Officer Kaptimbor who interpreted the x-ray and concluded that the complainant was 10 years old. She produced the age assessment report as Exhibit 3a.

33. The treatment documents from Baringo county Referral Hospital and the P3 Form indicates the age of the complainant as 10 years.

34. The age assessment report which confirmed the age of the minor as 10 years and the complainant having stated that he was aged 10 years, there is no doubt therefore that the age of the complainant was proved beyond reasonable doubt.

35. The Appellant has raised a concern that the investigations officer had no authority to produce the age assessment report; that he was not a doctor and neither was she the maker of the said document.

36. Contrary to the appellant's submissions, the evidence on record shows that the age assessment was done by a doctor. All what the investigating officer (PW4) did was to produce the report and there was no objection from the appellant. In fact, he went ahead and cross-examined the Investigating Officer.

37. In the Ugandan Court of Appeal case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000; it was held that:-

> " 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..."

(c) Identification Of Perpetrator

38. The Appellant in his submissions to court indicates that the Appellant is the complainant's uncle. They live in the same compound and is also PW 2's son. There is no doubt that Appellant was known to the complainant. That from the Appellant's submissions the issue of identification is not contested.

39. The Appellant argue that he denied in his defence that he did not defile PW1, he states that the court totally disregarded his defence yet it was clear that the complainant was a serial liar. That the evidence of PW 2 was disregarded by the lower court to the detriment of the Appellant even though she was in a strong position to assess the truthfulness of the complainant.

40. I have perused the judgement of the trial court, and note that in paragraph 22 of the judgement the trial magistrate stated that as follows:

> " The accused person's defence is a mere denial, his contention that the complainant had ran away after he left the goats, he was grazing unattended is not sufficient reason to believe that the complainant had a motive to lie or implicate the accused person. DW 2's testimony to the character of the complainant is unbelievable as she was not present when the offence occurred and therefore could not give any evidence about the offence".

41. From the aforegoing, this court finds and holds that the trial court considered the Appellant's defence contrary to his assertion. Considering the evidence adduced before the trial court in totality, it is my view that the same pointed to the guilt of the Appellant and the trial court was correct to find so.

(ii) Whether the sentence meted upon the Appellant is harsh, excessive and unconstitutional.

42. Having found that the conviction was safe, I now turn to the issue of sentence. The appellant in his appeal argues that he was sentenced to life imprisonment which is a mandatory sentence provided under section 8(1) of the *Sexual offences Act* No.3 of 2006. That this deprives the court discretion to impose appropriate sentence depending on the circumstances of each case. He submits that the trial court failed to consider the Appellants mitigation; that the appellant in his mitigation stated that he was a student in college studying petroleum engineering; his father depends on him as he has a spinal code injury and he is a father of one child and provides for his upkeep, he helps his mother in food expenses. The appellant proceeds to state that he sought for a sentence that would enable him look after his parents.

43. Further, the trial court stated that section 8(2) of the *Sexual offences Act* provides for a mandatory sentence which is life imprisonment, he submits that this was a harsh sentence and thus places reliance in the case of Criminal Petition No. 70 of 2018; *Morris Mukhebi Muhanya v Republic* [2020] eKLRThe Court of Appeal sitting at Nyeri in the case of *Francis Nkunja Tharamba v Republic* [2012] eKLR held as follows with regards to sentencing:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

44. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor v R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263)."

45. The Appellant argues raises a concern that the sentence of life imprisonment meted upon him which is mandatory sentence provided for under section 8(1) of the *Sexual Offences Act* No.3 of 2006, deprives the court discretion to impose appropriate sentence depending on the circumstances of each case. The Appellant has referred

46. The appellant referred this court to the case of *Morris Mukhebi Muhanya v Republic* [2020] eKLR which stated in its conclusion that, "it therefore follows that the Muruatetu decision applies *mutatis mutandis* to the provisions of section 8(2) of the *Sexual offences Act* which imposes the mandatory life imprisonment for the offence of defilement."

47. However, through directions issued on 6/7/2021, the supreme court clarified that decision in Muruatetu applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the *Penal Code* and not to any other offence. This decision is therefore not applicable to the Appellant's case herein who was charged with the offence of defilement.

48. Section 8 of the *Sexual Offences Act* No.3 of 2006 provides as follows: -

> " 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. 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."

49. From the foregoing, in view of supreme court directions as captured in paragraph 50 above, I will not interfere with sentence imposed by the trial court.

Final Orders: -

52.

1. Appeal on conviction and sentence is dismissed.
2. Period served in remand to be reduced from sentence imposed by trial court.
3. Right of Appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 29TH DAY OF JUNE 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms. Ratemo for state.

Appellant present.