Sao v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 20624 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20624 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E017 OF 2022

SM GITHINJI, J

JUNE 29, 2023

BETWEEN

WASHINGTON ODHIAMBO SAO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 40 of 2017 of the Chief Magistrate's Court at Malindi-Hon. Julie Oseko dated 7th March 2022)

JUDGMENT

Coram: Hon. Justice S. M. Githinji

Ms Mutua for the State

Ms Aoko for the Appellant in person

1. The Appellant was convicted of, and sentenced to serve eighteen (18) years imprisonment for the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge being that on 22nd September 2017 in Malindi Sub-county within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JKK, a girl aged 14 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of which are that on 22nd September 2017 in Malindi Sub-county within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of JKK, a girl aged 14 years with his penis.

3. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

    1. The trial court erred in law and fact by failing to find that the offence of defilement was not proved beyond reasonable doubt.

    2. The trial court erred in law and fact when it ignored to find that crucial witnesses and pieces of evidence were absent and/or not presented in court thereby creating gaps and causing reasonable doubts which ought to benefit the Appellant.

    3. The trial court erred in law and fact when it failed to find that the age of the complainant was not properly established and that an age assessment report is not conclusive evidence of age as it has a high margin error. Further, the procedure for evaluating and/or assessment of age was never presented in court.

    4. The trial magistrate erred in law and fact by failing to find that there were inconsistencies in the testimonies of the prosecution witness thereby causing reasonable doubts in the evidence as was presented.

    5. That the trial court erred in law and fact by meting out an extremely punitive, harsh and excessive sentence without conducting a sentence hearing and/ or inviting submissions from both the Appellant and the Respondent on sentence.

4. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusion bearing in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses during the trial and should therefore make due allowance for that. [See *Okeno v R* (1972) EA 32, *Eric Onyango Odeng' v R* (2014) eKLR.] For this reason, I now revisit the evidence.

The Evidence

5. PW1 JKK was sworn and testified that she was 14 years old and a class four pupil at [Particulars Withheld] Junior School. That she lived with her brother in law, one J at [Particulars withheld] . She stated that on the material date at around 7.00p.m, she was at their home with two of her cousins aged 12 and 7 years when the appellant visited. The appellant told her that he wanted to 'sleep with her'. She declined for reasons that she understood him to mean that he wanted to have sexual intercourse with her yet she was a school going girl. That the appellant then held her by the head, laid her down on the floor and stripped off her skirt and underwear. She described that the appellant removed the suit he was wearing; covered her mouth and inserted his penis into her vagina. She felt so much pain since it was her first time to have sex and kept crying. The appellant threatened to kill her.

6. About a week later, the appellant knocked on her door one evening around 11. 00 p.m. saying that he had been sent. She opened the door for him, and he entered and locked himself inside. Again, the appellant undressed her and put his penis inside her vagina. Moments later, a village elder knocked on the door looking for the appellant. This prompted the appellant to hide under the bed instructing her not to disclose his location. Thereafter, the witness heard one neighbor identified as Ibrahim, asking the appellant's wife of the appellant's whereabout. The said Ibrahim then told the wife that the appellant

was in her [PW1] house. The said wife then sent her nine year old son to check whether it was true. He found the appellant under the bed and informed the appellant's wife/ his mother.

7. The following day, PW-1's brother in law took her to the hospital where she was examined, treated and her age assessed. The witness identified the appellant in court. He was their neighbor.

8. On cross-examination, PW1 told the court that during the act, her two cousins were in the room but asleep. That the appellant lived in room no. 8 with his wife, and her in room no. 7 within the same house.

9. PW2 Moses Rimba, a clinician at Malindi Sub-county Hospital attempted to produce the P3 form on behalf of Dr. Ibrahim but the same was opposed by the appellant.

10. PW3 CKB is the village elder aforementioned and the house caretaker. He testified that on 22/9/2017, one Ibrahim informed him that he had seen the appellant who lived in room no. 8 enter room no. 7 yet the father of the children in that room was not in. He went to room no. 7 where PW1 let him in but did not see the appellant. He went back to his house when the said Ibrahim called him to check again. This time, he entered PW1's room together with Ibrahim and the appellant's son. The appellant's son went under the bed to call his father out. Thereafter, the witness reported to the police after PW1 had told them what the appellant had been doing with her.

11. According to him, he believed PW1's story because the appellant pleaded for forgiveness several times.

12. PW4 JKK, PW1's brother in law, testified that on the material date he was at his work place when he received a phone call from PW3 at around 3.30p.m informing him that the appellant had been found in his house with PW1. PW3 did not disclose any further details. Moments later, he received two messages on his phone from the appellant stating ''Bro I am sorry. I was drunk nikapatikana kwako sikufanya chochote wakati wamenishika nisamehe." In the second message, the appellant pleaded for forgiveness since his wife was shouting at him.

13 The witness however got home the following day. It took his wife's intervention for PW1 to open up. PW1 told them that the appellant had had sexual intercourse with her twice. She also narrated to him how the appellant seduced her through a phone he had bought for her.

14. On cross examination, PW4 told the court that he took PW1 to the hospital on 24/9/2017 together with the appellant and PW3. That as at that time, PW1 had already changed her clothes.

15. The Investigation Officer PW5 CPL Mariam Hussein, stated that on 25/9/2017, PW3 and PW1 filed a report that on 22/9/2017 one of their neighbors, the appellant herein, entered PW1's house at around 10.00p.m and had sexual intercourse with her. She issued a p3 form and recorded PW1's statement on 27/9/2017. Upon investigations, she established that indeed the appellant and PW1 were neighbors and that there was no grudge whatsoever between the appellant and PW1 or his father.

16. On cross examination, PW5 testified that she relied on the statements of PW3 and PW5 to charge the accused.

17. PW6 Ibrahim Abulahi, a clinician at Malindi Sub-County Hospital filled the P3 form. His examination of PW-1 revealed that the hymen was broken but there were no tears or injuries. He produced the medical notes, lab results, age assessment report as exhibits. On cross examination, the witness confirmed that there were no sperms.

18 The doctor's testimony marked the close of the prosecution case. The appellant was put to his defence. He made an unsworn statement and called no other witness.

19. He stated that on 22/9/2018 he had borrowed a charger from PW1's father which he decided to return that same evening after work. That he met the said Ibrahim at the gate and proceeded to PW1's house. He met PW1 and other children eating what he referred to as some strange food. That he spent about five minutes asking about the food and then left for his room. Moments later, the caretaker called him to ask what he had gone to do in PW1's room.

20. The day that followed while he was at his place of work, he was informed that the police were looking for him. As he left for home, he was arrested and taken to the police station where he was told that he had defiled PW1. Regarding the text message to PW4, he told the court that he only texted PW4 to inform him that he had returned his charger. He wondered why he was being accused of defiling PW1.

21. The appeal was canvassed by way of written submissions which I have perused. Having considered the grounds of appeal, the evidence and submissions filed, I identify the following issues for determination; -

    i. Whether the offence of defilement was proved beyond reasonable doubt.

    ii. Whether the sentence meted out is harsh and excessive.

Analysis and Determination

22. The offence of defilement is defined in Section 8(1) of the *Sexual Offences Act*; it reads as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. "

The word 'penetration' is defined in Section 2 of the *Act* as follows:

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

23. Subsections (2), (3) and (4) of section 8 mete out the penalties for the offence of defilement. Of relevance to this case is subsection (3), which provides that where the victim is aged between twelve and fifteen years, the perpetrator is liable to imprisonment for a term of not less than twenty years.

24. It follows therefore that to establish the offence of defilement, the prosecution must prove three elements being the age of the Complainant, penetration and positive identification of the perpetrator. See *Charles Wamukoya Karani v Republic* Criminal Appeal No.72 of 2013.

25. In sexual offences such as the present one, the age of the complainant is crucial for two purposes; Firstly, it is meant to prove that the complainant was below 18 years and was therefore a child hence the offence of defilement, and secondly specific age is necessary for purposes of sentencing.

26. The age of the victim in sexual offences can be proved by the direct evidence of the victim, parents or guardian, Birth Certificate, clinic card, medical evidence or by observation by the court on apparent age. In the case of *Joseph Kieti Seet v Republic* [2014] eKLR, the court explained; -

> " 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:
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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 …."

27. In the instant appeal, although the birth certificate was not produced in evidence, the age assessment report for the complainant gives the estimated age of the victim as 14 years. The appellant did not challenge the production of the age assessment report. The complainant, PW1, testified that she was aged 14 years at the time of giving her testimony. She also stated that she attended [Particulars Withheld] Junior School and was in standard 4.

28. I thus find that the age assessment report which was produced as exhibit 4 given the circumstances as sufficient evidence of proof of the complainant's age and is well corroborated by PW3 who stated that the complainant was aged 14 years.

29. In addition, it should be noted that the *Sexual Offences Act* adopts the definition of a child in the Children's Act. Section 2 of the *Children Act* defines "age" as, "Where actual age is not known means the apparent age". In this case, the trial court was satisfied that PW1 was telling the truth, and that should include also on her age. I also note that her age was estimated as 13years in the treatment notes dated 25/9/2017. This contradiction is insignificant given that both age 13 and 14 falls within the age group provided for under section 8(1) (3) of the *Sexual Offences Act*. In the case of *Gilbert Miriti Kanampius v Republic* (2013) eKLR the court noted as follows;

> " Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in Machakos Hc. Cr. Appeal No. 296 of 2010 *Fappyton Mutuku Ngui v Republic*:
>
> > "… 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."

30. In the circumstances, I find and hold that the age of the complainant was sufficiently proved.

31. The second hurdle for the prosecution was to prove penetration. In determining penetration, courts rely on the evidence of the complainant which may be corroborated by medical evidence as was held in *Dominic Kibet Mwareng v Republic* [2013] eKLR where the court stated that:

> " In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence…"

32. Further, in the case of *Mark Oiruri Mose v R* [2013] eKLR, the Court of Appeal explained; -

> " ...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...."

33. The duty of the prosecution is therefore to prove either partial or full penetration, thus, the medical evidence is crucial. PW6 testified that the examination revealed that the hymen was broken. A perusal of the p3 form reveals that the doctor remarked that there was vaginal penetration. The appellant's argument that hymen could be broken by any other means does not hold water in this case. The medical evidence was corroborated by the complainant, PW1. She recounted how the Appellant requested to have sex with her the first time and when she declined, the appellant held her head and laid her on the floor, undressed her and proceeded to insert his penis into her vagina. The complainant gave a clear narration of both encounters when the appellant penetrated her genital organ with his genital organ. Indeed, the p3 form indicates that the act was habitual (more than once). It should be noted that absence of hymen may portray penetration but is not an ingredient for the offence. Penetration is the ingredient and can partial, not even to a point of breaking the hymen. In the foregoing, I am satisfied that penetration was proved beyond reasonable doubt.

34. All that is now left to be ascertained is whether the appellant was the perpetrator. In the instant appeal, there is no doubt that the appellant is well known to the complainant. The evidence is therefore of recognition. The appellant and complainant lived within the same house albeit different adjacent rooms. The court of Appeal in *Francis Muchiri Joseph v Republic* [2014] eKLR held that:

> " In *Lesarau v R*, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".

34. In the given circumstances, I am equally satisfied that the prosecution surmounted this hurdle. It shouldn't be lost that Section 124 of the *Evidence Act* is clear that no corroboration is necessary in criminal cases involving a sexual offence. A court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and that it was satisfied that the victim told the truth.

35. From the record, the complainant's testimony is logical and consistent. When she was first asked by her sister about what had happened, she described what the appellant had done to her or what he had been doing to her. She told the police officer exactly that. She knew the appellant well as was their immediate neighbor. The appellant himself said so. The appellant testified that when he returned from work on the day that he was seen in PW1's room, he was there to return PW4's charger and he found PW1 and other children eating some strange food which made him linger there for some minutes asking about the food. He therefore placed himself at the scene on the material date.

36. As far as the charger issue is concerned, his allegations are unsubstantiated; and in view of the weight of the prosecution case, unbelievable.

37. In conclusion, the victim was a reliable witness. In the circumstances, the trial magistrate was right in believing the victim's evidence.

38. In the ultimate, I find that the prosecution proved beyond reasonable doubt all the ingredients of the offence of defilement.

39. On whether the sentence is harsh and excessive, it is a well-established principle that sentencing remains pre-eminently within the discretion of the sentencing court. A court sitting on appeal cannot alter a sentence unless it finds that the trial court acted upon wrong principles or overlooked some material factors. [See *Ogolla s/o Owuor v. Republic*, [1954] EACA 270 and *Bernard Kimani Gacheru v. Republic* [2002] eKLR].

40. Section 8 (3) of the *Sexual Offences Act* provides; -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

41. The appellant argued that there was no sentence hearing conducted. That he was not given an opportunity to submit on sentencing. This argument is misguided to say the least; His case was listed for sentencing on 7/3/2022 when he was given an opportunity to mitigate. The trial magistrate aptly considered the appellant's mitigation and other factors; and proceeded to sentence him to serve18 years' imprisonment, which is even a term lesser than what is recommended by the statute.

42. Therefore, I find no reason to interfere with both the conviction and the meted sentence by the trial court. The upshot is that this appeal is in want of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JUNE, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Ms Aoko for the Appellant in Person

2. Ms Mutua for the Prosecution