SKY v Republic (Criminal Appeal E045 of 2021)
[2023] KEHC 20432 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E045 OF 2021

RL KORIR, J

JUNE 29, 2023

BETWEEN

SKY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 8 of 2017 by Hon. B. K. Kiptoo in the Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was convicted by Hon. B. K. Kiptoo Senior Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the Charge were that on diverse dates between August 2016 and 16th May 2017 in Konoin Sub-County within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of DC, a child aged 15 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*. The particulars of the charge were that on diverse dates between August 2016 and 16th May 2017 in Konoin Sub-County within Bomet County, he intentionally and unlawfully touched the vagina of DC a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Accused and he was put on his defence.

5. At the conclusion of the trial, the Accused was convicted of the offence of defilement and sentenced to serve 10 years in prison.

6. Being dissatisfied with the Judgment dated 10th July 2019, the Accused appealed to this court on the grounds reproduced verbatim as follows:-

   i. That I pleaded not guilty at trial.

   ii. That the trial magistrate erred in law and in fact by convicting the Appellant on the present charge without considering that the burden of proof was not established beyond doubt to warrant the conviction thus contravening Sections 107 as read with Section 109 of the *Evidence Act*.

   iii. That the trial magistrate erred in law and fact by relying on the evidence that had massive invariance and contradictions which were not corroborated with other evidence thus contravening Section 153 as read with Section 154 of the *Criminal Procedure Code*.

   iv. That the trial magistrate erred in law and in fact without detecting that there was no medical evidence to link the Appellant with the alleged offence. No DNA report was presented during trial to prove that the Appellant was the biological father to the new born baby.

   v. That the sentence of 10 years was too excessive in that the trial court did not consider the Appellant's mitigation and that he suffered from a chronic respiratory tract infection.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This duty was succinctly stated by the Court of Appeal for Eastern Africa in *Pandya v. Republic* (1957) EA 336 where it stated: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled DC (PW2). PW2 testified that on the material night, 16th May 2017, she had spent the night with the Appellant where they engaged in unprotected sex. Martin Shikuku (PW3) testified that he met the Appellant and PW2 at 6.30 a.m. the following day as he reported to work and reported the matter to the management of Finlay Tea Company.

9. MC (PW1) who was DC's mother testified that DC had been missing from home from 16th May 2017 and that she found her in the house on 17th May 2017 at 8 p.m. That when she asked her where she had been, she refused to answer. It was PW1's further testimony that she took DC to Kericho District Hospital where it was discovered that she was one month pregnant. That afterwards, DC told her that the Appellant was responsible for the pregnancy and that they had been having sexual intercourse severally.

The Appellant's Case.

10. The Appellant, SKY testified that he worked with PW1 at the nursery. That they had differed at work as he advised the manager to dismiss PW1 from work since she was old. That PW1 accused him of being an outsider and she promised to ensure that he did not last on the job. It was the Appellant's case that he had differed with PW3 at work and the case was a frame up to fix him.

11. On 18th October 2022, I directed that this Appeal be dispensed off by way of written submissions.

The Prosecution's/Respondent's Submissions.

12. The Prosecution submitted that the victim was 15 years old and it was proved by the production of P.Exh1. That this evidence was not challenged by the Appellant and it remained uncontested.

13. It was the Prosecution's submission that it was clear from the victim's oral testimony that there was penetration. It was the Prosecution's further submission that PW5 noted that the victim was pregnant and that his opinion was that there had been penetration. That the P3 Form and Treatment Notes were produced in support of PW5's evidence. They relied on *Eric Onyango Odeng v R* (2014) eKLR.

14. The Prosecution submitted that the issue of identification was not in doubt. That the Appellant and the victim were in a relationship for a long time and engaged in sexual intercourse for over 9 months. The Prosecution submitted that the Appellant and the victim were not strangers to each other.

15. It was the Prosecution's submission that the Appellant's defence of being framed by PW1 was an afterthought. It was the Prosecution's further submission that the trial court erred in issuing a 10 year sentence instead of a 20 year sentence. The Prosecution urged the court to dismiss the Appeal and enhance the sentence.

The Appellant's/Accused's Submissions.

16. It was the Appellant's submission that a DNA test was not conducted to ascertain whether he was responsible for the pregnancy. That the allegation that PW2 got pregnant as a result of the defilement was not enough. That the court ought to have applied section 36 of the *Sexual Offences Act* for the truth to be known.

17. The Appellant submitted that the Prosecution failed to prove its case beyond reasonable doubt and that the evidential gaps in their case ought to be reconciled in his favour. That his conviction was therefore unsafe.

18. It was the Appellant's submission that he did not commit the offence and that he was being framed by the Prosecution witnesses. That the evidence of PW2 and PW3 was a fabrication and could not be believed. It was the Appellant's further submission that PW2's evidence was coached.

19. The Appellant submitted that in passing the sentence of 10 years, the trial court did not consider his mitigation. The Appellant further submitted that he lost his mother in the year 2005 and had been taking care of his siblings. That he had done several courses including sitting for KCPE. The Appellant further submitted that he suffered from a chronic respiratory infection. In his further mitigation in open court, he prayed that he be released so that he could go and use traditional medicine.

20. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal, the Amended Memorandum of Appeal filed on 17th November 2022, the Appellant's Written Submissions dated 17th November 2022 and the Respondent's Written Submissions dated 21st November 2022 and the following issues arise for my determination:-

i. Whether the Prosecution proved its case beyond reasonable doubt.

ii. Whether the Defence places doubt on the Prosecution case.

iii. Whether the Sentence was harsh and excessive.

i. Whether the Prosecution proved its case beyond reasonable doubt.

21. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

22. The Accused was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. Section 8 (1) of the *Act* states that any person who commits an act which causes penetration with a child is guilty of an offence of defilement. A child is defined in the Children's Act no. 8 of 2001 as any human being under the age of eighteen years.

23. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic*(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

(See also Court of Appeal case of *Reuben Lukuru v Republic* (2019) eKLR)

24. The English case of *R v Turnbull* (1977) QB 224 is useful in this regard:-

> " If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".

25. DC (PW2) testified that the Accused was her boyfriend since 2016 and they had sexual intercourse severally. That on the material day, 16th May 2017, she went to the Accused's place after school where she spent the night and had unprotected sex up to 4 a.m. This testimony was not challenged by the Accused in cross examination. It is the view of this court that the complainant would not fail to recognize a person with whom she had sexual intercourse regularly. It is my finding therefore that the Accused was positively identified as the one who had sexual intercourse with DC on the night of 16th May 2017.

26. For the charge of defilement to be sustained, penetration has to be proved. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital

organs of another person. The Court of Appeal expressed itself in *John Irungu v Republic* (2016) eKLR as hereunder:-

> " Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

27. In the case of *Bassita v Uganda S. C* Criminal Appeal Number 35 of 1995, the Supreme Court of Uganda held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

28. Michael Cheruiyot (PW5) testified on behalf of Dr. Koros who had examined the victim D.C. He stated that upon examination, there was a whitish discharge from the vagina and that there was no bleeding and bruises on the external genitalia. He further stated that the hymen was torn. It was PW5's opinion that there was evidence of defilement and that DC was pregnant. PW5 produced the P3 form that was marked as P.Exh3 which supported his testimony.

29. It is an uncontested fact that PW2 became pregnant. It is salient however to note that pregnancy was required to prove penetration as was stated by the Court of Appeal in Evans Wanjala Wanyonyi v. Republic [2019] eKLR, that: -

> " An essential ingredient in the offence of defilement is penetration and not impregnation."

30. The Appellant contended that a DNA test had not been conducted to establish a link between him and PW2 and whether he was the biological father of the new born baby. The Appellant further contended that the trial court ought to have applied section 36 of the *Sexual Offences Act* to ascertain the truth. Section 36(1) of the *Sexual Offences Act* provides that:-

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

31. While discussing section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of Robert Mutungi Mumbi v Republic (2015) eKLR, held that:-

> " Section 36 (1) of the *Act* empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved." (Emphasis mine)

32. Similarly, in *George Kioji v. Republic*, Cr. App. No. 270 Of 2012 (Nyeri), the Court of Appeal addressed itself on medical evidence touching on sexual offences thus:-

> " 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."

33. A court is allowed to convict purely on the evidence of the victim if it is convinced and the same is recorded that the victim was telling the truth. Section 124 of the *Evidence Act* provides:-

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

34. I have not had the benefit of seeing PW2 testify. However, I have carefully gone through her evidence and I have noted that she stated that the Accused was her boyfriend with whom they had several sexual encounters and as a result she became pregnant. In the present case, the court has an added advantage of medical evidence which confirmed that there was defilement. I am convinced based on the testimony of PW2 (DC) and PW5 (Michael Cheruiyot) that there was penetration.

35. The final element in any sexual offence is age. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* (2016) eKLR, as follows: -

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v. Republic* Cr. App 203 of 2009 (Kisumu) this Court stated as follows:-
>
> In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

36. Similarly in the case of *Eliud Waweru Wambui v. Republic* (2019) eKLR, the Court of Appeal reiterated that:-

> " There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and

the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."

37. PW2 testified that she was born on 10th November 2002 and that she was in standard 7. MC (PW1) who was D.C's mother testified that she was 15 years old at the time of the offence. No. 79169 CPL John Owuor (PW4) who was the investigating officer produced an Immunization Card marked as P.Exh 1 which indicated that PW was born on 10th November 2002.

38. In analysing the evidence above, a mother's evidence regarding the daughter's age is sufficient to prove age. In the case of *Richard Wahome v Republic* (2014)eKLR, the Court of Appeal remarked:-

> " What better evidence can one get than that of the mother who gave birth".

39. It is equally comforting that the Prosecution produced an Immunization Card (P.Exh1) which indicated that PW2 had been born on 10th November 2002. I agree with the sentiments of Aburili J. in the case of *JOA v Republic* (2019) eKLR where she stated as follows:-

> " It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

40. By simple calculation, by the time of the alleged offence occurred on 16th May 2017, PW2 was aged 15 years old, which I hereby find.

41. Having established the age of the complainant, proof of identification and penetration, it is my finding that the Prosecution proved its case against the Accused beyond reasonable doubt.

ii. Whether the Defence places doubt on the prosecution case.

1. I have considered the Appellant's defence in which he denied committing the offence. The Appellant stated that PW1 had a score to settle with him due to work related issued and that they had also differed with PW3. His whole defence was that he was being framed by PW1 and PW3.

43. The Appellant brought up this information in his defence and not during cross examination where he had a chance to question PW1 and PW3 on the alleged disagreements or allegations of a set up. This defence in my mind is an afterthought and does not place any doubt on the prosecution's case.

iii. Whether the Sentence was harsh and excessive

44. The principles which guide an appellate court in sentencing were set out in *S v. Malgas* 2001 (1) SACR 469 (SCA). In this persuasive authority, the Supreme Court of Appeal of South Africa held that:-

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court

is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

45. Similarly, in *Mokela v. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:-

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

46. The penal section for a defilement case for a child of 15 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-

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.

47. The above Section is couched in mandatory terms as it provided for a mandatory minimum sentence in the event of a conviction. Mandatory minimum sentences are not illegal and the same was clarified by the Supreme Court in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) it was held that:-

> " We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute".

48. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle. The above position was enunciated by the Court of Appeal in the case of *Ogolla s/o Owuor v. Republic*, (1954) EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

49. The Appellant was sentenced to 10 years instead of the mandatory minimum sentence of 20 years. The trial magistrate misapprehended the law when he issued a sentences which was not supported by the law.

50. The Prosecution submitted that the trial court erred in issuing the sentence of 10 years. They urged this court to enhance it to 20 years. Section 354 (3) (a) of the *Criminal Procedure Code* provides that:-

The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

51. In the case of *OC v Republic* (2020) eKLR, Mwangi J. held that:-

> " The correct procedure where the Director of Public Prosecutions (DPP) seeks substitution of a conviction or enhancement of sentence under the provisions of Section 354(3)(ii) or 354(3)(iii), is for the prosecution to file a notice expressing its intention to seek substitution of the conviction and/or enhancement of sentence imposed on an appellant in a particular case. The foregoing must however be done as soon as the Office of the Director of Public Prosecutions has been supplied with the Record of Appeal.
>
> Once the said notice has been filed, the appellate court is duty bound to inform the appellant of the consequences of such a notice. Doing so forewarns him that his appeal might take a turn for the worse. It therefore prepares the appellant psychologically for any outcome once the notice is filed, the DPP can then canvass the issue of substitution of the conviction and/or enhancement of sentence in its written submissions. When an appellant is served with a notice early enough, it gives him sufficient time to decide whether or not he should pursue the appeal and for him to prepare adequately for the hearing of his appeal."

52. In expounding on the contents of section 354(3) of the *Criminal Procedure Code*, the Court of Appeal in *JJW v Republic* (2013) eKLR, held that:-

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by
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> warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

53. There is no evidence to show that the Prosecution filed a notice expressing its intention to seek enhancement of sentence. This court did not also warn the Appellant before the commencement of his Appeal that his sentence may be enhanced.

54. In the final analysis and guided by the above case law, I am reluctant to interfere with the sentence issued by the trial court.

55. In the end, the Accused's Appeal is dismissed. I uphold the conviction and the Sentence and in accordance to Section 333 (2) of the *Criminal Procedure Code*, the Sentence shall run from the date of his arrest being 18th May 2017.

56. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JUNE, 2023.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant acting in person, Mr. Njeru for the Respondent and Siele (Court Assistant)