Koech v Republic (Criminal Appeal E024 of 2021)
[2023] KEHC 20985 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E024 OF 2021

HM NYAGA, J

JULY 27, 2023

BETWEEN

ANDREW KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment dated 29th September, 2021 by Hon. R.Yator, Principal Magistrate at Molo Sexual Offence Case No. 64 of 2019)

JUDGMENT

1. Andrew Koech, the appellant, was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on May 16, 2019 in Kuresoi South Sub-County within Nakuru County, he intentionally caused his Penis to penetrate the vagina of BC a child aged 14 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars to that charge are that on the same date, place and time as above, he intentionally touched the vagina of BC with his penis.

3. The appellant denied the charges and the case proceeded to full hearing. At the end of the trial, he was found guilty and was convicted. The trial magistrate then proceeded to sentence him to 20 years' imprisonment.

4. He was aggrieved by the judgment and filed this appeal raising the following Amended grounds: -

    1. That the Learned Magistrate erred in law and fact the Learned Trial Magistrate erred in Law by convicting and sentencing the Appellant to 20 years' imprisonment

    2. That the Learned Trial Magistrate misapprehended the Application of Section 124 of the *Evidence Act*

3. That the Learned Magistrate erred by failing to consider the Appellant's defence alongside the Prosecution Evidence.

Summary of the Prosecution's case

5. At the trial, the prosecution called four witnesses. The first witness for the prosecution who testified as PW1 was the complainant, BC.

6. She narrated that on the material date being the May 15, 2019 she had been sent home from school to fetch school fees. On her way home, she met the Appellant who was from Sagaitim with another youth. She never knew the Appellant before then. She said the route she used to her home was in the middle of the forest. That the other youth that was with the Appellant went ahead while she was playing with another child and then he told them that he had lost his cap and that if they find it they give it to one Samuel and went away. She told the other child to go to her home and she ran past the Appellant but he pulled her aside then removed his trouser saying that his penis was not big and that he will insert it in her vagina and if it does not penetrate he will remove it. She said the Appellant promised to give her money to buy oil and clothes and also pay her school fees. He showed her money and asked her to be herding sheep in the forest so that they could meet, have sex and in turn he would pay her. She said thereafter the Appellant removed his jacket and spread it on the ground and she lay on it. Then he removed her pants and "did bad manners to me, that is had sex". She said she felt pain but she couldn't scream because the Appellant had covered her mouth using his hand. She said the Appellant never wore a condom when he defiled her. Afterwards she went to her auntie's place and informed her about the incident. On Friday she was taken to the hospital where she was treated and later she reported the matter to the police station. She told court that Nyumba Kumi Leaders organized a meeting which the appellant attended. That in that meeting 100 men and 41 women were paraded and she was asked to identify the person who defiled her. She managed to positively identify the Appellant.

7. In cross examination, she stated that the other youth were three in number. She said the Appellant remained behind and he is the one who defiled her.

8. In re-examination, she stated that while heading to her auntie's place the four youth were also on the same road but branched ahead. She said the accused who was among them, remained behind saying that he had lost his cap. She clarified that the incident happened on 15th of May and not on 16th as she had recorded in her statement.

9. PW2, was SC, the Complainant's Aunt. She did not know the Appellant. She said the complainant told her that she had been defiled on May 15, 2019 in the forest. On the same day, she took her to the hospital and later reported the incident at [particulars withheld] Police Station. She said according to the outpatient card issued to the Complainant, the complainant was treated on May 17, 2019.

10. In cross examination, she said the complainant was defiled on May 13, 2019 and she told her about it on May 14, 2019 and on May 15, 2019 she took her to the hospital. She stated that the appellant had no land dispute with the complainant's mother at Misop as each one of them own their own property.

11. PW3 was PC Kalen stationed at [Particulars withheld] Police Station. He was the investigating officer in this matter. He recalled on May 17, 2019 the complainant went to the station accompanied by PW2 and her uncle one Jeremiah Chelule and reported that the Appellant had defiled her on May 15, 2019. He interrogated the complainant who told him that while she was heading to her auntie's place she met four men in the middle of a bushy road. That the appellant was among them and that they were coming from the opposite direction. He told court that PW1 further said that the other three men continued with their journey while the appellant remained behind and pulled her into the bush. He

then unzipped his trouser and showed her his penis. She screamed and the appellant asked her not to scream promising to give her Ksh.500. He then laid her on his jacket that he had put on the ground and defiled her. When he was done he warned her not to report to anyone then escaped. That the complainant went to her auntie's place and the following day she was taken to the hospital. He said later the accused was traced by members of the public and Nyumba Kumi leaders and taken to the police station. He said the complainant was 15 years old as per the age assessment report done at Molo Hospital and that she was born on August 28, 2004 as per her birth notification card. He produced the age assessment report and the said notification card in evidence. He said the complainant positively identified the Appellant when he was taken to the police station.

12. In cross examination, he clarified that the offence was first reported on May 15, 2019 and not on May 16, 2019.

13. PW4, was Judith Chepngeno a clinical officer from {particulars withheld] Sub County. She said the complaint went to the hospital on 17th May, 2019 alleging that she had been defiled and that on being examined it was noted that her external genitalia were normal but her hymen was freshly broken with no discharge. She said the examiner formed an opinion that she had been defiled. She produced the P3 form, PRC report and outpatient card as exhibits before court.

14. In cross examination, she stated that that when the complainant visited their facility on May 17, 2019 she informed the doctor who examined her that she had been defiled two days before. It was her testimony that as per the history of this matter, the complainant's hymen was broken by a penis.

Evidence for the Defence

15. At the close of the prosecution case the appellant was put on his defence. He elected to give a sworn evidence and did not call any witness.

16. In his testimony, the appellant recalled that he had a disagreement over a land with his female neighbour. He said on May 16, 2019 while he was in his shamba, one Kiprono called him saying that he was needed by elders. He left the shamba and proceeded there where he found elders and the said neighbour. He said the elders informed him of the aforesaid disagreement and that it had been resolved that he goes to the police station. He complied. On arrival at {particulars withheld] Police Station he was placed in the cell. The following day he was arraigned in court and charged with the offence herein.

17. In cross examination, he stated that he knew the complainant's mother and her aunt. He said he had a land dispute with them but had never reported to the police.

18. In her judgement, the Learned Trial Magistrate found that the age of the complainant was proved and that she was a child aged 15 years. As regards identification, she held that the appellant was a person well known to the complainant and that the incident happened during the day and the complainant had sufficient time to look and positively identify the appellant. In regards to penetration, it was the Court's finding that from both the evidence of the complainant and the medical examination documents, it was established that the complainant was defiled.

19. The trial magistrate found the evidence of the appellant unsatisfactory and disregarded it. It was further found that the testimony of the complainant was true and that indeed the offence occurred on 15th May,2019.

20. The Court therefore found that the prosecution had proved the charge beyond reasonable doubt and found the appellant guilty of the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No3 of 2006.

Appellant's Submissions

21. The Appellant submitted that the charge was not proved against him. He referred the court to the testimony of the complainant and stated that the term tabia mbaya used by the Appellant did not imply sexual intercourse and that the court erred in finding so.

22. The appellant also argued that the trial court failed to consider that the complainant in her testimony stated that there were only two individuals in the forest on the material day.

23. The appellant contended that evidence of PW1 regarding identification of the perpetrator was not conclusive. The appellant also faulted the trial court on relying the evidence of PW4 to find that penetration happened. According to him the evidence of PW4 was contradictory as she stated that penetration could also be caused by other things. He also averred that PW4's evidence did not establish the age of the injuries and the weapon used to cause penetration.

24. The appellant submitted that Section 124 of the *Evidence Act* allows the court to take uncorroborated evidence if it is satisfied that the minor was stating the truth. He submitted that the trial magistrate did not comply with the provisions of this section as it did not give reasons why she believed the complainant.

25. The appellant also contended that his defence was not considered by the trial court.

26. In regards to sentence meted against him, the Appellant submitted that his mitigation was not considered by the trial court. He urged the court to set aside the same. To buttress his submissions, he relied on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

Respondent's Submissions

27. The respondent, in opposing the appeal, submitted that the charge against the appellant was proved beyond reasonable doubt. As regards the age of the victim, reliance was placed on the birth notification.

28. In regards to penetration, reliance was placed on the evidence of PW1 and PW4. On identification, the respondent concurred with the trial court's finding on the same as stated above.

29. Regarding Section 124 of the *Evidence Act*, the respondent submitted that the evidence of the complainant was satisfactory and that there are number of decisions affirming that in sexual offences where a victim is a minor corroboration is not mandatory. He cited the cases of *J.W.A vs Republic* [2014] eKLR and *Mohamed vs Republic* [2006] 2 KLR 138 in this regard.

30. The respondent submitted that the defence of the Appellant was considered as unsatisfactory and full of mere denial.

Analysis and Determination

31. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (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 finding and conclusion; 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] E.A 424."

32. Similarly, in *Kamau Njoroge v Republic* [1987] eKLR, the Court of Appeal stated:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

33. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law and beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

34. These ingredients were restated in the case of *Dominic Kibet Mwareng vs Republic* Criminal Appeal No 155 of 2011, the learned judge noted that:

> " The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant"

35. I will proceed to consider whether the ingredients of the charge were proved.

i. Age of the Complainant:

36. Age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age, a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances.

37. In *Francis Omuroni v Uganda*, CR. A 2/200 it was held:

> " 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 a birth certificate, the victim's parents or guardian and by observation and common sense. …."

38. In the instant case the age assessment done established that the minor was 15 years old. The age assessment report was produced in evidence. The trial magistrate found that age of the complainant was proved beyond any reasonable doubts.

39. The appellant never contested the age of the complainant. The prosecution therefore discharged the burden to prove that the complainant was a child aged 15 years.

ii. Whether there was penetration

40. The *Sexual Offences Act* at Section 2 defines 'penetration' as:

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

41. In *Mark Oiruri Mose v R* (2013) eKLR the Court of Appeal stated thus:

> " 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"

42. Further, the same court, differently constituted, in the case of *Erick Onyango Ondeng v Republic*]2014] eKLR in this respect noted: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "

43. This position is further fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs Republic* Criminal Appeal No 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga& A. K. Murgor JJA citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the court stated that:

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

44. In this instant case the complainant testified that the Appellant defiled her. PW4 testified that complainant was examined on allegation of defilement and examination establish that her hymen was freshly broken. She stated that as per the history of her case, penetration was caused by penis.

45. Relying on the evidence tendered, I find, and in agreement with learned magistrate, that Penetration was proved beyond reasonable doubt.

iii. Identity of the Perpetrator

46. The appellant argues that since the conviction was secured on the evidence of only one witness and that the same is not safe. He said the trial court failed to comply with the provisions of Section 124 of the *Evidence Act*.

47. With respect to the evidence on recognition of the perpetrator, the general rule is that even without considering the presence of corroborating evidence, identification can be proved by oral evidence of a victim only.

48. It is trite that the evidence of a single witness can be used to secure a conviction in sexual offences. See *Kassim Ali vs Republic* [2006] eKLR.

49. PW1 told the court that the offence happened during broad day light. The appellant, before defiling the complainant, had a conversation with her promising to give her money and to pay her school fees. PW1 said she couldn't scream as the Appellant had covered her mouth. She admitted prior to the incident she did not know the Appellant. From her testimony it is clear she spent considerable time

with the Appellant and she was able to see him. She testified that she was also able to positively identify the appellant before the elders.

50. PW3 told the court that the complainant positively identified the Appellant at the police station. I associate myself with the sentiments of the trial magistrate on identification. The appellant was a truthful witness. Her detailed evidence left no doubt that she was attesting to a factual scenario as opposed to an imagined one. PW1 was very consistent both during the time she made the report of the incidence as told by PW3 and in court. From her evidence, it is clear she not only positively identified the appellant but also properly placed him at the scene of crime.

51. The complainant's contradiction on the number of youths present prior the commission of the offence does not, in my view, go into the root of the matter. The victim was graphic on how, where and when the incident occurred and there was nothing to suggest that he was defiled by someone else other than the appellant.

52. In the case of *George Kioji v R* Nyeri Criminal Appeal No 270 of 2012 (unreported) as cited *S C N vs Republic* [2018] eKLR;

> " 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."

53. Considering the above holding, the court can convict based on the evidence of the complainant. She did give a concrete evidence of what transpired on the material day and her evidence of identification of the appellant stand unchallenged.

54. In *John Mutua Munyoki v Republic* [2017] eKLR;

> " What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"

55. In this instant case, the court had cogent reasons to believe the victim. In this case, the Learned Trial Magistrate expressed herself as hereunder:

> ''the girl confidently explained to the court how the accused pulled her into the bush before removing her clothes and defiling her. In fact, in cross examination, she insisted that the accused was among four men but he remained behind.....the accused in his submissions and defence insists that there was a land dispute between him and mother of the child, however this is not convincing enough as the girl keenly elaborated on how the offence occurred..."

56. It is therefore clear that not only did the court find that the complainant was truthful but also recorded the reasons for the said belief. The testimony of the complainant sufficiently proved that the appellant was the perpetrator.

On The Appellant's defence

57. The Appellant intimated that he could have been framed by the Complainant's mother in respect of this offence as they had a land dispute. He has stated that the lower court did not consider his offence. That is not correct. The trial court found his evidence unsatisfactory. I also hold the same view since the was no evidence of the alleged land dispute and no witness corroborated the testimony of the Appellant. The complaint's case vis a vis the Appellant's case was watertight.

58. Accordingly, I find and hold that the complainant positively identified the appellant as the person who defiled her.

59. Consequently I find that the evidence adduced at the trial was sufficient to convict the appellant. I uphold the conviction.

Was the sentence manifestly harsh or excessive?

60. As regards the sentence, Section 8(3) of the *Sexual Offences Act* provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years.

61. The issue of mandatory minimum sentences in the Sexual Offence Act has been outlawed by various decisions by superior courts following the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (See Christopher Ochieng v R [2018] eKLR and *Jared KoitaInjiri v R* [2019] eKLR).

62. The appellant has urged this court to exercise its discretion and review his sentence.

63. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act* as follow:

> " [We] hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.

On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

64. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislature position that offences of defilement are serious offences and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

65. The *Sentencing Policy Guidelines* require the court, in sentencing an offender, to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten

or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender.

66. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

67. In the case of *Wanjema v Republic* [1971] EA 493 the court laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

68. The appellate Court must however not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

69. In this case the trial magistrate stated that the minimum sentence provided is 20 years. It is apparent that the trial magistrate proceeded on the footing that her hands were tied by the minimum sentence and failed to exercise discretion in sentencing. On this finding the appeal on sentence must succeed.

70. The Appellant in mitigation told court that

> " I have a family that depends on me and I have three children in secondary school and my wife is not able to take care of the children and pray court considers a non-custodial sentence"

71. I have considered the above mitigation and also the fact that the Appellant was a first time offender.

72. I have considered other authorities on similar cases of defilement. For instance in *DS vs Republic* [2022] eKLR the court dealt with an accused who had been convicted for defiling a girl aged 15 years. The court revised the sentence downwards from 20 years to 15 years imprisonment.

73. Another example is *Republic vs Nicholas Wambogo* [2022] eKLR where the appellant had been sentenced to three (3) years imprisonment for defiling a 14 year old girl. The State appealed against the sentence and the High Court revised the sentence upwards to 15 years imprisonment.

74. It is thus apparent that the trend has been to mete out sentences less than the "mandatory" sentence, unless there are aggravating circumstances. In this case there were none, in my opinion. Therefore, I proceed to order as follows: -

    i. The appeal on conviction lacks merits and is dismissed.

    ii. The sentence of 20 years is set aside and substituted with a sentence of 15 years which will run from the date the appellant was first remanded in lawful custody, and as correctly ordered by the trial court, on June 3, 2019

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 27TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

Murunga for state

C/A Jeniffer

Appellant present