Amatalo v Republic (Criminal Appeal 44 of 2021)
[2023] KEHC 20922 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 44 OF 2021

JN KAMAU, J

JULY 26, 2023

BETWEEN

WASHINGTON AMATALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (SRM) delivered at Vihiga in Principal Magistrate's Court in SO Case No 2 of 2018 on 8th August 2019)

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the learned trial magistrate, Hon W. K. Cheruiyot, senior resident magistrate who sentenced him to fifteen (15) years imprisonment.

2. Being dissatisfied with the said Judgement, on October 23, 2019, the appellant lodged the appeal herein. His petition of appeal was dated October 18, 2019. He set out nine (9) grounds of appeal.

3. His undated written submissions were filed on June 23, 2022 while those of the respondent were dated 14th November 2022 and filed on November 15, 2022. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

6. Having looked at the appellant's grounds of appeal, his written submissions and those of the respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the charge sheet was defective;

    b. Whether or not the appellant was accorded a fair trial?

    c. Whether or not the Prosecution proved its case beyond reasonable doubt.

    d. Whether or not in the circumstances of this case, the sentence that was meted upon the appellant by the trial court was lawful and/or warranted.

7. The court dealt with the said issues under the following distinct and separate heads.

i. Charge Sheet

8. Ground of appeal no (1) of the petition of appeal was dealt with under this head.

9. The appellant submitted that the charge sheet was defective as section 8(1) (3) of the *Sexual Offences Act* was non-existent and unlawful and that it did not describe the sentence. He urged the court to set him free on this ground.

10. On its part, the respondent submitted that it was clear from the record that the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the charge was read to him in a language that he understood. It pointed out that the appellant was asking the court to set aside his conviction merely on account of a typographical error when all the ingredients of the offence of defilement contrary to section 8(1) as read with section 8(3) were clearly proved beyond reasonable doubt.

11. This court perused the record and found that the charge sheet indicated the offence as defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006. This was erroneous as the charge ought to have been committing the offence of defilement contrary to Section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

12. In the case of *JMA v Republic* (2009) KLR 671, it was held that it was not in all cases where a defect in the charge was detected on appeal would render a conviction invalid because that section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant was not discernible.

13. The applicable test by an appellate court when determining the existence of a defective charge and its effect on an appellants' conviction is whether or not the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.

14. A typographical defect was therefore curable under Section 382 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) which provides that:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."

15. The above statutory curative position is also replicated in Section 214 (2) of *Criminal Procedure Code* which stipulates that:

> " Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

16. Notably, under article 159(2)(d) of the *Constitution of Kenya* , courts have been mandated to administer justice without undue regard to procedural technicalities.

17. This court was therefore not persuaded to find that the typographical error and/or indication of a discrepancy of the provision of the law under which the Appellant had been charged as shown in the charge sheet was not curable and/or that it prejudiced and/or cause him any miscarriage of justice. Suffice it to state that the Charge Sheet contained all the necessary information to inform him of the offence that he had been charged to which he pleaded "Not guilty" whereupon the case proceeded to full trial.

18. In the premises foregoing, Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

ii. Fair Trial

19. Ground of appeal No (2) of the petition of appeal was dealt with under this head.

20. The appellant submitted that he was not accorded fair trial under Article 50(2) of the *Constitution* as he was not given enough time to prepare for the case and/or to be represented by an advocate. He added that at the time of arrest and trial, he was a Form three (3) student and was seventeen (17) years of age but that the learned trial Magistrate ignored that fact and convicted him.

21. On its part, the respondent submitted that the Appellant was not denied an opportunity to engage a counsel of his choice.

22. Article 50(2)(h) of the *Constitution of Kenya,2010* stipulates that:-

> " Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

23. As can be seen hereinabove, the appellant herein was charged with the offence of defilement and an alternative of committing an indecent act with a child. A perusal of the proceedings does not show that he requested the learned trial magistrate to be provided with legal representation and/or demonstrate that he was likely to suffer substantial injustice if the trial proceeded without legal representation. This was therefore not an issue that could be considered on appeal as it was not raised during trial.

24. Be that as it may, this court found it necessary to pronounce itself on the issue of legal representation as the same on appeal. It took judicial notice that provision of legal representation to accused persons at the State's expense as enshrined in the *Constitution of Kenya* is progressive in nature. Indeed, currently, only persons who have been charged with murder and robbery with violence are being accorded such facilities. This court was thus not persuaded that the appellant's constitutional and fundamental rights had been breached by not having been provided any legal representation.

25. In the premises foregoing, ground of appeal No (2) of the petition of appeal was not merited and the same be and is hereby dismissed.

iii. Proof Of Prosecution's Case

26. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR.

27. This court therefore considered if the Prosecution had proved its cases to the required standard, which in criminal cases is proof beyond reasonable doubt under the following distinct and separate heads.

a. Age

28. The Appellant did not submit on the issue of age. On its part, the Respondent submitted that AA, the minor herein (hereinafter referred to as "PW 1") was fourteen (14) years old.

29. A perusal of the Birth Certificate showed that she was born on March 17, 2003. The offence took place on 4th January 2018. She was therefore aged fourteen (14) years and ten (10) months at the material time of the incident and fifteen (15) years old when she was testifying in April 2018 as she had told the Trial Court.

30. As PW 1's age was not controverted and/or rebutted by the Appellant herein, this court found and held that PW 1's age had been proven and that for all purposes and intent, she was a child.

b. Penetration And Identification

31. Grounds of appeal Nos (3), (4), (5), (6), (7), (8) and (9) of the petition of appeal were dealt with under this head. The court also dealt with the issues of penetration and identification as they were intertwined.

32. It was the appellant's submission that a missing hymen was not proof of defilement per se as there are times when the same was broken by other factors other than sexual intercourse. He asserted that the evidence of the Prosecution witnesses was fabricated and thus was not credible. He added that his defence was credible and that the Prosecution failed to prove its case beyond reasonable doubt.

33. He argued that one Orao and the girl whom PW 1 alleged to have gone to look for at the appellant's home were not called to testify and that the trial court was entitled under the general rule of evidence to draw an inference that the evidence of such witnesses if called would have been adverse to the prosecution's case as was held in the case of *Bukenya & Another v Uganda* (1972) EA 549.

34. He added that the evidence of Brain Odera (hereinafter referred to as "PW 2") and Evans Karega (hereinafter referred to as "PW 3") was largely circumstantial to support PW1. In this respect, he relied on the case of Republic v Kipkering Arap Koskei & Another (1949) 16 EACA 135 where it was held that there must not be any co-existing facts which may weaken or destroy that inference of guilt of the accused person.

35. He pointed out that PW 1 was the only single identifying witness and that under Section 124 of the *Evidence Act*, great caution had to be taken by a trial court before a conviction could be based on evidence of a single identifying witness as was held in the case of Oluoch v Republic (1985) KLR 549. He added that the Prosecution's case was based on circumstantial evidence from witnesses whose credibility was questionable resulting to the case being based on suspicion.

36. On its part, the respondent submitted that under Section 124 of the *Evidence Act*, an accused person could be convicted on the basis of the uncorroborated evidence of the victim if the court was satisfied that he or she was telling the truth. It agreed with the Appellant's aforesaid assertion regarding the broken and/or missing hymen but argued that in this case, PW 3's findings that PW 1 was defiled was not sorely based on the absence of the hymen.

37. Whereas the appellant had challenged PW 1's evidence as a single witness, nothing barred a trial court from relying on the evidence of a single witness. Notably, the proviso of Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) states that:-

> " 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 (emphasis)."

38. Having said so, as the Respondent also acknowledged, evidence of a single witness could also be corroborated by some other evidence. This is because in such an instance, it was one person's word against the other. This court therefore found it prudent to analyse the other evidence that was adduced during trial to ascertain whether PW 1's evidence as a single witness was corroborated by other evidence that was tendered in evidence.

39. A perusal of the proceedings showed that PW 1 testified that on the material day, she left home to go to the appellant's home to see her friend Esther who she alleged had refused to attend school. She informed the trial court that when she got there, she met Esther, the Appellant, his sister and his friend called Orao. She stated that she talked to Esther who left thereafter and that when they had remained, Orao took her and the appellant to his house where there was a bed. She told the trial court that the appellant told her to sleep with her because he loved her and that he locked the door, removed her trouser and her underwear, removed his clothes and had sexual intercourse with her.

40. PW 3 was a clinical officer at Emuhaya Sub-County Hospital. His evidence was PW 1 was brought for purposes of carrying out laboratory investigations. The pregnancy test was negative but she had a Urinary Tract Infection (UTI). Some bruises on the labia and a discharge from the vagina that was foul

smelling were noted. The hymen was torn. He concluded that PW 1 had been defiled. He tendered in evidence the P3 Form, treatment notes, Lab results form and the Post Rape Care (PRC) Form.

41. There was a statement in the proceedings that he also indicated that "the child was non-positive who was already on treatment." The handwriting in the hand written proceedings was also not clear. Be that as it may, the statement appeared ambiguous and the court opted not to comment on the same.

42. Having said so, there were certain material inconsistencies that made this court entertain some doubt in its mind as to what exactly happened on that material day. In her examination-in-chief, PW 1 testified that she left home (emphasis court) and went to the Appellant's house where she met him, his sister, one of his friends called Orao and Esther (emphasis court).

43. She stated that she stayed at Orao's house where the defilement occurred incident and she stayed there until 7.00 pm (emphasis court) and escorted her up the road after one Lucas came and told them that the Appellant had been arrested and that people were looking for her. She had indicated that she had stayed at Orao's place because she feared to go home at night (emphasis court). She slept at a neighbour's place and went home in the morning.

44. When she was cross-examined, she stated that she met the Appellant alone at the gate. She said that she did not find Esther at his home because she was at Orao's house (emphasis court). She said that she stayed with the Appellant from 11.00 am- 6.00 pm and she went into a room at 5.00 pm where they had sex for about an hour. She had known him for a week and on this particular day she came from Church to his house (emphasis court).

45. Notably, PW 1 contradicted herself as to where she had come from when she met the Appellant, where she met him and whom she met him with. On the one hand she stated that she was coming from Church and on the other hand she said that she left home where she left her sister. She said that she met the Appellant in the company of others and again said that she met him alone at the gate. She had also said that she was scared of going home at night which was the reason why she was still at his house until 7.00 pm but then again appeared to have overcome her fears and walked to a neighbour's place at night.

46. While these contradictions did not expressly controvert the Appellant's assertions that he did not defile her, they led this court to doubt if PW 1 was a truthful and/or credible witness. She appeared to not have been completely honest on what happened on that material date making this court to take her evidence with a pinch of salt. Indeed, she was left in the room with one Orao and his sister who were not called to testify.

47. Whereas the prosecution retains its prerogative to decide how many witnesses it should call to prove a particular fact, both Orao and his sister were crucial witnessed who could have clarified to the court of what transpired on that day and assisted the Prosecution's case. However, there was a possibility that their evidence may not have been useful and/or valuable as they could have turned into hostile or refractory witnesses as the incident was said to have occurred in Orao's house.

48. The other witnesses who were crucial witnesses were the neighbour where PW 1 spent the night and Esther. It was important for the court to have understood why PW 1 slept at the neighbour's only going home in the morning. What transpired between the time she left Orao's time and the time she got home was pertinent as one could not be certain that she did not have sexual activity with another person other than the Appellant herein.

49. It was also necessary for this court to have understood how PW 1 knew that her friend Esther had left school and wanted to be married by the Appellant herein, a person who PW 1 said, she had only known for a week. The link between the Appellant, Esther and PW 1 was very hazy and left as it was, it was suspect.

50. Going further, there was a gap surrounding the circumstances under which the Appellant herein was arrested. According to PW 1, Orao came and informed her while she was in his house that the Appellant had been arrested but he did not give her the reason for her arrest. It was then that one Lucas came and told her to hide in a certain room as she was being looked for. They then escorted her up the road and she went home.

51. PW 2 said that when he got home, he was informed by his mother that PW 1 who was his niece had not been seen since 11.00 am on the material day. He testified that the Community Policing Youth had seen her at Orao's home. When they went to Orao's house, he told them that PW 1 was there but he was not the one who took her there. They did not find the girl but found her sandal. They went to look for the Appellant herein but he denied having seen her.

52. Notably, the link between the Appellant and PW 1 was unclear for the reason that the persons who saw him with her were not called as witnesses. As she was not found at Orao's house and the appellant was arrested from his house, it was critical for the Prosecution to have shown a nexus between PW 1's defilement by the Appellant and his arrest. The sandal that PW 2 referred to as having belonged to PW 1 that was found in Orao's house was not adduced as evidence before the Trial Court to prove that indeed PW 1 was actually at Orao's house. Even so, as the appellant was not found in Orao's house, the Prosecution had a duty to prove that PW 1 was not only in Orao's house but that the appellant was also there and that he defiled her.

53. The appellant relied on the case of *Mary Wanjiku Gichira v Republic* Appeal No 17 of 1998 (eKLR citation not given) to buttress his point that suspicion no matter how strong could not lead a court to make an inference of guilt. This is a position that this court completely agreed with. Indeed, that guilt had to be proved by tangible, cogent and consistent evidence.

54. A perusal of the proceedings showed that PW 1 knew the Appellant as they fellowshipped together in the same church. She stated that she had known him for a week before the incident. She identified him as the person who had sexual intercourse with her on the material day. She told the Trial Court that the incident happened at 6.00pm when it was not dark and she was therefore able to identify him.

55. The Trial Court observed that she was unshaken when she was cross-examined. It believed her version of what happened as she appeared truthful from her demeanor. It concluded that there could not have been any mistaken identity as the incident occurred during day time.

56. The Appellant denied having known PW 1. From her evidence, it was evident that they were not strangers to each other. Her identification of the Appellant would have been by way of recognition.

57. While this court found and held that PW 1 may have had an opportunity to identify the appellant, this court was not entirely satisfied that she positively identified him as her perpetrator for the reasons that her evidence was inconsistent and was contradictory and there were gaps in the Prosecution's case.

58. While this court could not exonerate the him from the accusations she levelled against him, it could not by the same token determine with certainty if he defiled her as she had contended as doubt had already been created in its mind of her truthfulness and credibility as a single witness.

Conclusion

59. This court thus came to the firm conclusion that whereas the Prosecution had proved that PW 1 was a child, this court was not entirely satisfied based on the evidence that was adduced during trial that he was the perpetrator of the offence. As all the ingredients for the offence of defilement were not proven,

this court found and held that the Prosecution did not prove its case against the Appellant beyond reasonable doubt.

60. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal were merited and the same be and are hereby allowed.

I. Sentence

61. Ground of appeal No (2) of the petition of appeal on the sentencing part was dealt with under this head.

62. Both parties seemed to have focused on conviction and failed to submit on sentencing. Nonetheless, this court noted that the Appellant had been charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* because PW 1 was fourteen (14) years of age at the material time of the incident.

63. Section 8(3) of the *Sexual Offences Act* provides 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."

64. Having convicted the appellant herein, the learned trial magistrate did not therefore err when he sentenced him to fifteen (15) years imprisonment as that was very lenient in the circumstances since the law provided that the sentence should not be less than twenty (20) years.

65. The above notwithstanding, as the appellant had argued that he was a minor age seventeen (17) years at the time of the incident and PW 1 was aged fourteen (14) years, this was a classic case of Romeo and Juliet. Assuming that he actually committed the offence but the Prosecution failed to present a cogent case, this court found and held that a sentence of six (6) years would have been adequate. Indeed, this court was proceeding on the basis of emerging jurisprudence that the mandatory minimum sentences in defilement cases is unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

66. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

67. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

68. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another v Republic* (*Supra*) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

69. However, on December 3, 2021 while the Supreme Court directions of July 6, 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

70. On May 15, 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum

mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

71. In the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* (*Supra*) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

72. It was for that reason that this court came to the conclusion that in the event that it was wrong in its conclusion that the Appellant did not commit the offence but it was found on appeal that he had actually committed the offence, a sentence of six (6) years would have been adequate in the circumstances of the case as it was not clear who between PW 1 and the Appellant defiled each other as they were both under eighteen (18) years of age and in Form 1 and Form 3 respectively.

73. Taking into account the remission period, this would have brought the total of his sentence to four (4) years. He has been in prison since 2019. This is almost four (4) years and he would be due for release from prison.

74. The question of having committed the Appellant to a borstal institution arose in the mind of this court because he was a minor at the time he was alleged to have committed the offence. As the trial courts should consider the age of an offender at the time of committing the offence and not at the time of conviction which could be after such an offender has attained the age of majority while sentencing, age permitting, trial courts ought to consider committing young offenders involved in Romeo and Juliet romances to borstal institutions.

75. Section 5 of the *Borstal Institutions Act* Cap 92 (Laws of Kenya) stipulates as follows:-

> " Before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution."

76. Indeed, Section 6(1) of the *Borstal Institutions Act* further states that:-

> " Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5 of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years."

77. This is a worthwhile consideration to make for young offenders charged with *sexual offences Act* as the emerging jurisprudence permits courts to exercise their discretion in meting out sentences in sexual offences cases.

Disposition

78. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of appeal that was lodged on October 23, 2019 was merited and the same be and is hereby allowed. The appellant's conviction and sentence be and are hereby vacated and/or varied and/or set aside as they were unsafe.

79. It is hereby directed that the appellant be and is hereby set free from custody forthwith unless he be held for any other lawful cause.

80. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26th DAY OF JULY 2023

J. KAMAU

JUDGE