Waweru v Republic (Criminal Appeal 53 of 2022)
[2023] KEHC 21968 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 53 OF 2022

GL NZIOKA, J

AUGUST 30, 2023

BETWEEN

SAMUEL BUSH WAWERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in the decision of; Hon. E. Mburu, Senior Resident Magistrate, delivered on, 26th October, 2022, vide PCriminal Case S/O No. E021 of 2021, at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court charged vide Criminal Case S/O. No. E021 of 2021, with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") and an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act.

2. The particulars of the charge (s) are that on 3rd February 2021 in Naivasha Sub-County, Nakuru County, he unlawfully and intentionally caused his penis to penetrate and/or come into contact with the vagina of the complainant EMM aged 9 years.

3. The appellant pleaded not guilty to both counts and the case was fully heard. The prosecution case was led by the evidence of PW1 EMM (herein "the complainant') who testified that on a date she could not recall, she was sent by her aunt to buy charcoal from the appellant. It was 4.00pm. That the appellant held her and pulled her into his house which was near the place he was selling the charcoal. That there was no one else on the road.

4. That he removed her trouser and pant then removed his trouser and defiled her. The complainant stated that he put: "kitu yake ya kukojoa akaweka kwa yangu ya kususu.

5. That after he finished, he washed her and threatened her that, if she screamed or told anyone what had happened he would kill her. He then washed her and let her go home. She went home but did not tell anyone what had happened.

6. However, on February 3, 2021, the complainant was visiting at a neighbours' house, known as "Mama Triza" and as she sat on the floor, she was asked to sit on the chair but she looked hesitant and when her aunts and the neighbour noticed that she seemed to have a problem sitting on the chair, they picked her up and checked on her private parts and noticed that the was discharging a whitish substance.

7. That the discharge had penetrated the short she was wearing which was wet. She was then taken to the hospital and medical examination revealed that she had been defiled. The matter was reported to the Police Station for investigation. Upon being asked who defiled her, the complainant was initially hesitant but later stated that it was "Wa Dan" the charcoal seller. That he had defiled her on three (3) different occasions. The appellant was identified as being "Wa Dan" the charcoal seller. He was arrested and charged accordingly.

8. At the close of the prosecution case, the court ruled the appellant had a case to answer. He told the court that he would give an unsworn statement and simply stated that "I will not be giving any evidence I shall await the courts judgment".

9. The matter was then set down for judgment on March 6, 2022 but was not delivered as the appellant absconded proceedings and was arrested seven (7) months later. The Judgment was delivered on October 26, 2022, wherein he was found of the offence of defilement and sentenced to serve life imprisonment.

10. However, he is aggrieved and appeals against the decision of the trial court on both conviction and sentence on the grounds here-below as verbatim reproduced.

    a. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were NOT conclusively proved.

    b. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    c. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.

    d. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the evidence of identification by recognition of the appellant was not positively proved.

    e. That I pray to be supplied with a copy of the original trial court's proceedings and its judgment.

    f. That further grounds shall be adduced at the hearing of this appeal.

    g. That I wish to be present during the hearing and determination of this appeal.

    h. That this petition is filed and annexed with an affidavit by the name Samuel Bush Waweru

11. However, the respondent did not file any grounds of opposition. The appeal was disposed of vide written submissions. The appellant submitted that mandatory minimum sentences are unconstitutional. That, sentencing being a function of the judiciary, the mandatory minimum sentences by the legislature mandates the judiciary to impose sentence and are therefore a threat to the doctrine of separation of powers and the independence of the judiciary. He relied on the case of; *Liyanage v The Queen* [1967] A.C. 259 where the Privy Council invalidated a Ceylonese law providing a minimum mandatory jail term on the ground that it infringes on the principle of principle of separation of powers in the Ceylonese.

12. He also relied on the persuasive case of; *S v Mchunu and another* (ARA 24/11) [2012] Zakzphe 56 Kwa Zulu where the High Court stated that discretion in sentencing vests with the trial court to consider what is fair and appropriate, and that the while the sentence imposed must have a deterrent and retributive force, it should not be excessive that it does not serve the interest of justice and those of the society.

13. The appellant further cited the case of; *Dismas Wafula Kilwake v Republic* [2018] eKLR where the Court of Appeal held that the court should not be constrained by the sentences provided for under section 8 of the *Sexual Offences Act* but the provision must be interpreted in a manner that does not to take away the discretion of the court in sentencing. That, in appropriate cases the court freely exercising jurisdiction should be able to impose any of the prescribed sentences if the circumstances so demand.

14. The appellant placed reliance on the case of; *Paul Ngei v Republic* [2019] eKLR where the Court of Appeal set aside the mandatory sentence of twenty (20) years and substituted it with a sentence of twelve (12) years' imprisonment.

15. That in the case of; *Sammy Wanderi Kugotha v Republic* [2021] eKLR, the High Court applying the provision of section 7 of the transitional provisions in the Sixth Schedule of *Constitution of Kenya, 2010*, interpreted the provision of section 8 (2) of the *Sexual Offences Act* to read the "may" instead of shall and proceeded to set aside the life sentence and substituted it with a term of twenty (20) years imprisonment.

16. Further, in the case of; *Guyo Jarso Guyo v Republic* [2018] eKLR, the Court substituted a life imprisonment with a sentence of (20) twenty years; while in *Paul Odhiambo Mbola v Republic* [2020] eKLR substituted a life sentence with a term of imprisonment of (10) ten years.

17. Lastly, the appellant submitted that the trial magistrate did not comply with the provisions of section 211 of the *Criminal Procedure Code* as they are not recorded in the proceedings. He prayed that the conviction be quashed, sentence be set aside and he be set at liberty.

18. However, the respondent in its submissions dated and filed on March 27, 2023, argued that the prosecution proved the ingredients of the offence through its evidence which was consistent, direct, clear and without doubt.

19. That, the age of the complainant was proved after an age assessment was conducted and indicated that the complainant was eight years and six months old. Further, penetration was proved by the evidence of the complainant that was corroborated by the medical evidence adduced by PW4 Benjamin Kuria Gachiri.

20. That, the complainant positively identified the appellant who she knew well as she used to buy charcoal from him and called him as" Wa Dan", which evidence was corroborated by PW2 Jane Kajuju. Furthermore, the offence occurred at 4:00 pm during the day when the complainant was able to see the appellant clearly.

21. Lastly, it was submitted that the trial court duly analysed the evidence and was satisfied that the appellant committed the offence. That, the decision was well reasoned and urged that the conviction was safe and that there is no basis to interfere with the same hence the appeal should be dismissed and conviction and sentence upheld.

22. Be that, as it may, I note that, as the first appellate court, the role of the court is to examine the evidence adduced afresh, and/or re-evaluate it, and arrive at its own decision, taking into account the fact that, the court did not benefit from the demeanour of the witnesses. This role was well articulated in the case of; *Okeno v Republic* [1972] EA 32, where the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

23. Having considered the appeal in the light of the material placed before the court, I find that, the main issue to consider is whether the prosecution proved all the ingredients of defilement. It is settled law that, for the charge of defilement to be proved, the prosecution must prove: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse as outlined in the case of; *Agaya Roberts v Uganda*, Criminal no. 18 of 2002, and *Bassita Hussein v Uganda* Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda

24. In the instant matter, the particulars of the charge sheet indicates that, the victim was aged 9 years at the time of the offence. The prosecution had to prove the same. In proof thereof, the prosecution through the evidence of PW2 JK, grandmother to the complainant gave evidence that she was 8 years old but clearly stated that she did not have a birth certificate. The child herself was not sure of her age. However, the prosecution took the child for age assessment and produced a report from Naivasha County Referral Hospital, described as a medical certificate of age, showing the age complainant was eight (8) years and six (6) months

25. The question is does the discrepancy of the six months prejudice the appellant. I don't think so. The essence of proof of age of the victim in such case is a two-fold; to prove the victim is a child as defined under the *Children Act*, and to assist the court determine the appropriate sentence under section 8 of the Act. In this case, there is no dispute that the complainant was a child and whether aged 9 of 8½ years, she is a child and covered under the age bracket of section 8(2) of the Act whose ceiling is up to a maximum of 12 years. Therefore 9 and 8½ still fall under that category. The age element was properly proved.

26. As regards, penetration, the prosecution adduced evidence through PW1 the complainant, who testified that the appellant inserted his organ of urinating into her organ of urinating. She thus stated; "that he put it inside the legs". That all this happened after he undressed her.

27. In addition, PW4 Benjamin Kuria Gachiri produced a P3 and PRC forms filed by Dr. John Kariuki on February 8, 2021, which indicates that, the hymen of the complainant was broken as there was no membrane tissue. That, there was whitish discharge which the witness explained, was abnormal for a

9-year-old to have such discharge. That, it comes out of sexual intercourse, or broken hymen and/or pus cells and that the medical finding was consistent with the history of defilement.

28. It suffices to note that, the Act, defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Therefore based on the evidence of the complainant as supported by the medical evidence I find that the element of penetration was proved.

29. The last issue to determine is whether it is the appellant who committed the offence. The complainant testified that, the appellant is a charcoal seller. In her evidence in chief she stated as follows: -

> " I know the person in court. He is called "WaDan", he sells charcoal at Kabati. It was near where I used to live and we moved away. My aunt used to send me to buy charcoal. I bought it at "Wa Dan" accused. One day I was sent to go and buy charcoal. He held me, it was about 4.00pm. It was near his house door. That is where he sells charcoal. He pulled me in the house and there was nobody else in the house"

30. The complainant went on to testify how the appellant removed her clothes and his trouser and defiled her. During cross-examination, the appellant asked her among other issues; what day and time the incident took place, clearly testing the complainant version of his action.

31. The complainant also reiterated that, she tried to scream but the appellant threatened to kill her. That she could not recall the exact date, he defiled her, the 2nd time but on the 3rd day, he still threatened her. Eventually she stated that, she knew the appellant before she went to purchase charcoal because they were neighbours.

32. PW2 JK corroborated the complainant's evidence that she knew the appellant as one "Wa Dan" as they lived near each other in the plot. Further he used to sell to charcoal to them, and that, on the 3rd day of February 2021, she sent the complainant to go and buy charcoal and when she returned she noticed something was wrong.

33. That, although the complainant did not initially disclose the perpetrator, the following day she narrated how she used to go and buy charcoal and the appellant would hold her hand, take her inside his house, put her on the bed and defile her.

34. During cross-examination, the appellant asked her several question concerning the incident and she maintained that, she gave the complainant, Kshs 30 to go and buy charcoal. She reiterated that the complainant cloth was soiled with whitish discharge. She denied the appellant's allegation that, she borrowed money from him to pay school fees for the complainant and when she refused to refund she developed a grudge against him. She also denied the allegation that, she had an issue with the appellant's wife and stated that she did not know her.

35. PW3 No. xxxx PC Alexon Lesoutet confirmed that when he visited the appellant's residence, he found that, his house was next to the place he was selling charcoal. That he got inside the house and confirmed what the minor said, as he observed a bed in the house and the charcoal next to the house. Further, he established that the appellant was known by the name of "Wa Dan"

36. It suffices to note that against this evidence, the appellant's defence in a single sentence testified that, he had nothing to say and left the decision to court. Obviously, there was no defence to the prosecution case and therefore, the court was left to decide the matter on the evidence and which it did. As such it is not tenable that the appellant wants to tear into the prosecution case at an appellant stage when he squared his opportunity during the trial.

37. Having considered the grounds of appeal against the evidence adduced and the resultant conviction I find the grounds hold no water. The ingredients of the offence were proved, there was no tangible defence to consider and the issue of identification and/or recognition does not arise based on the finding that the victim was well known to the appellant and the incident took place on three (3) different occasions, the last one described as having taken place in broad day light at 4pm.

38. The upshot is that, the conviction was safe and I sustain it. As regards sentence, I find that section 8(2) of the Act provides a sentence of life imprisonment. The appellant was sentenced to life imprisonment. Therefore it is a lawful sentence and I decline to interfere with it. Therefore, the appeal is dismissed in its entirety.

39. It is so ordered. Right of appeal in 14 days explained

DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF AUGUST 2023

GRACE L. NZIOKA

JUDGE

In the presence of

The appellant in present, virtually

Ms. Rukunga for the respondent

Ms Ogutu: court assistant