Hassan v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 23625 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E042 OF 2022

JN ONYIEGO, J

SEPTEMBER 29, 2023

BETWEEN

MUSA ADEN HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. D.W. Mbuteti (R.M.) delivered on 12.11.2021 Sexual Offences Case No. 5 of 2021 CM'S Court at Garissa)

JUDGMENT

1. The appellant herein was charged 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.

2. The particulars were that on 15 .02.2021 at around 1200hrs in Garissa Township within Garissa County, unlawfully caused his genital organ namely penis to penetrate the genital organ namely, anus of MAH, a boy child aged 6 years old.

3. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 with particulars being that on 15 .02.2021 at around 1200hrs in Garissa Township within Garissa County, intentionally touched the anus of MAH, a boy child aged 6 years old.

4. The trial court upon considering the law and facts in the case, reached a determination that the appellant was guilty of the said offence and therefore imprisoned him to serve life imprisonment. The appellant having been aggrieved by the conviction and the sentence of the court filed the appeal herein citing the following grounds:

    i. That the trial court erred in law and fact by holding and finding that the prosecution proved its case to the standard required.

ii. That the trial magistrate erred in law and fact by shifting the burden of proof to the appellant.

iii. That the trial magistrate erred both in law and fact by failing to attach regard to the appellant's defence and the need to outline reasons before rejecting or disregarding the same.

iv. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence in the circumstances herein.

5. When the matter came up for directions, parties agreed to file submissions to dispose of the.

6. It was the appellant's submission that the age of the complainant was not proved by a dentist report or a certificate of birth for the reasons that the certificate that the trial court relied on was neither clear nor readable. Further, that the alleged offence occurred on 15.02.2018 while the appellant was arrested on 16.02.2018 and the birth certificate was issued/registered on 15.02.2018. He relied on the case of *Hadson Ali Mwachongo* [2016] eKLR where the importance of proof of age of a victim of defilement was emphasized.

7. The trial magistrate was faulted for having failed to properly consider the evidence by the prosecution witnesses and that of the defence thus reaching a wrong conclusion that the case was proved beyond a reasonable doubt. It was his contention that there were numerous inconsistencies and discrepancies in the evidence by the prosecution that were material yet the same was never considered by the trial court. Reliance to support the same was placed *inter alia* on the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR where it was held that not every contradiction would cause the evidence of a witness to be rejected. He therefore urged this court to allow the appeal herein.

8. Mr. Kihara for the respondent adopted his submissions filed on 23.05.2023. Learned counsel stated that prosecution did prove sufficiently the salient elements of the offence inter alia; age of the victim; penetration and identity of the perpetrator. On age, it was submitted that the age of the victim was a crucial element that determines the sentence of a perpetrator of a sexual offence. The respondent relied on the case of *Hadson Ali Mwachongo v Republic* [*supra*] to support that proposition.

9. On penetration, it was submitted that the same was established through the evidence of the victim as well as the medical evidence. Regarding identification, it was submitted that the appellant was clearly identified being a person previously well known by the victim. On sentence, the respondent contended that the trial court properly exercised its discretion and sentenced the appellant to life imprisonment having considered the circumstances of the case. This court was therefore urged to dismiss the appeal in its entirety and sustain the sentence by the trial court.

10. This being a first appeal, I am mandated to re-analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour". [See *Pandya v Pandya* (1957) EA (336].

11. PW1, MAH in his unsworn testimony testified that day and time he went for Duksi classes when the appellant grabbed him, took him inside the mosque and thereafter defiled him. That he told him not to tell anyone of the incident as he would beat him up. It was his evidence that he was later taken to the hospital where he was treated.

12. PW2, BAK testified that on the material day, PW1 had gone for Duksi classes but arrived home late while carrying ball gums in his hand. That PW1 looked as if he had been crying and upon being asked, declined to mention anything. She stated that she later observed blood stain on his clothes and upon enquiry, PW1 stated that the appellant had defiled him. That she took PW1 to the hospital and later on to the police station where they were given a P3 form which they took back to the hospital to be filled by the doctor.

13. PW3, Hawa Ahmed testified that he was the investigating officer in the case and that upon PW2 reporting of the incident herein, he together with PW2 took PW1 to the hospital for treatment and thereafter recorded their statements. He reiterated the evidence of PW1 and PW2. That PW1 was aged six at the material time. In support of the same, he produced a birth certificate as Pex 1.

14. PW4, Isaac Abdalla Yatich testified on behalf of the medical officer who examined PW1 wherein he stated that upon examination, it was found that PW1 had difficulties in movement and that he had lacerations around the anal region. That the bruises were on the 6th and 7th o'clock on the anus region and that there was a foul (smell) discharge. He concluded that PW1 was sexually defiled. He produced the P3 Form and treatment notes as Pex 2(a) and (b) respectively.

15. Upon being put on his defence, the appellant denied committing the offence herein thus dismissing the same as baseless. On cross examination, he stated that in as much as he was not a worker at the mosque, he could sometime assist people for prayers when the 'mwathini' was not there.

16. DW2, Mohamed Amer merely stated that on 15.02.21, being a children's officer, he was patrolling the area looking for children living with disability when he met the appellant. That he met with the appellant standing at a barber shop who told him of some children with disability who were living at the kinyozi junction. That while there, police officers emerged and arrested the appellant. On cross examination, he stated that he did know why the appellant was arrested.

17. DW3, Siyat Hussein stated that he was present when the appellant was arrested but only learnt of the charges herein later on. It was his evidence that on 15.02.2021 at 1200hrs, he was at home and not at the mosque.

18. Having considered the record of appeal, grounds of appeal and parties' submissions, the key issue for determination is whether the prosecution proved its case beyond reasonable doubt by establishing; the age of the complaint; penetration of the complainant's anus; identification of the perpetrator and whether the sentence meted out was excessive.

19. As already noted above, the appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As was correctly held in *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013, the critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the *Children's Act* No 8 of 2001 as "...any human being under the age of eighteen years."

21. In the case of *Edwin Nyambaso Onsongo v Republic* (2002) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No 24 of 2015 (UR) it was held that:

> "...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof...".

22. In the instant case, the appellant argued that the age of the complainant was not proved by a dentist report or a certificate of birth for the reasons that the certificate that the trial court relied on was neither clear nor readable. Further, that the alleged offence occurred on 15.02.2018 while the appellant was arrested on 16.02.2018 and the birth certificate was issued/registered on 15.02.2018. The court has perused the record and finds that indeed the said birth certificate was issued on 18.02.2021 while the offence herein was allegedly committed on 15.02.2021.

23. The above notwithstanding, the Court of Appeal case in *Edwin Nyambaso Onsongo v Republic* (2016) eKLR reiterated that age can be proven by documents, evidence such as a birth certificate, baptism card or oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible and reliable forms of proof.

24. In the instant case, PW1 testified that he was 6 years and the same was corroborated by PW2, the complainant's mother and PW3 the investigating officer who also testified that the complainant was 6 years old at the time of the alleged commission of the offence. In the same breadth, the trial court also noted on its record that it noticed that the complainant was very confident and the demeanour was excellent.

25. I am thus satisfied that the complainant was a minor aged 6 as found by the trial court. There is nothing wrong in processing a birth certificate after the commission of the offence. The trial court using its general observation was clear in its mind that the victim was a minor. There is no way and its common sense that a child aged 6years could not be mistaken for an adult.

26. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

27. In the case of *Alex Chemwotei Sakong v Republic* [2108] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> "Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJA) in the case of *Mark Oiruri v Republic* Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
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> > "...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. 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..."

28. From the medical evidence adduced, there was evidence that the victim sustained bruises on the 6th and 7th o'clock on the anus region and that there was a foul smell discharge. PW1 testified that the appellant penetrated his anus and when he cried, the appellant told him that he has done the same to other boys too but they never cried. PW4 produced the medical report confirming that indeed, PW1 was defiled.

29. On identification, PW1 gave a graphic account of all that happened. He stated that the appellant put his male organ in his anus and when he started screaming, the appellant told him that he had done the same to many children and they never screamed. That later, the appellant gave him ball gums. The trial court also noted the general demeanour of the victim by observing that, '...the witness was very confident and clear with his testimony, his demanour was excellent'. From the above, the court gave reasons as to why it believed the complainant. In that regard, Section 124 of the *Evidence Act* comes to play to the extent that, a court can safely convict based on the evidence of a single witness in a sexual offence as long it cautions itself that such witness is truthful. In this case the court observed that pw1 was a truthful witness hence his evidence did not mandatorily require corroboration.

30. Further, this was an incident that happened during the day and therefore, it would not have been difficult for PW1 to identify his aggressor a person he knew before. It therefore follows that identification was by way of recognition. See the case of *Anjononi & Others v Republic* [1989] KLR where the court held;

> " Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another".

31. In my humble view therefore, even without corroboration the complainant's evidence was cogent enough for the court to return a verdict of guilty. It is now well established that oral evidence of a single witness is indeed sufficient to warrant a conviction. [See *George Kioji v R* Nyeri Criminal Appeal No 270 of 2012 (unreported)] where te court was of the view that:

> " 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."

32. On the ground that the trial magistrate erred both in law and fact by failing to attach regard to the appellant's defence and the need to outline reasons before rejecting or disregarding the same, I have perused through the determination of the trial court and I find that the trial court indeed considered the evidence of the appellant herein and gave reasons as to why he believed the child as opposed to the evidence of the appellant.

33. On sentencing, the same was stated succinctly by the East Africa Court of Appeal in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 where it was held as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R*, (1950) 18 EACA 147:
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> > "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, (1912) CCA. 28 TLR. 364."

34. The Court of Appeal also pronounced itself in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal N0. 12 of 2021, as follows:

> " We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved".

35. In the above quoted case, the appellant who had been previously charged with the offence of defilement of a child aged 41/2 years and had been sentenced to life imprisonment which was later confirmed by the High Court, the Court of Appeal had this to say while substituting the life imprisonment with a 40-year imprisonment:

> " ...We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence".

36. Further, the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No 84 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 3 of the SOA, substituted the 20-year imprisonment sentence with a 15-year imprisonment sentence to run from the time the trial court imposed its sentence.

37. In the instant case, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment. While sentencing the appellant, the trial court noted that the appellant was not remorseful for his actions if the trial court record is anything to go by.

38. In the given circumstances therefore, considering the mitigation on record and the fact that the appellant was a first offender, I am inclined to substitute life imprisonment with 30 years' imprisonment to run from the time the trial court imposed its sentence.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER 2023

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J.N. ONYIEGO

JUDGE