Ibrahim v Republic (Criminal Appeal 8 of 2022)
[2023] KEHC 23703 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL 8 OF 2022

JN ONYIEGO, J

SEPTEMBER 29, 2023

BETWEEN

ALI ABDIWAHAB IBRAHIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Cosmas Maundu in Sexual Offences Case No. 22 of 2018 in the CM's Court at Garissa and delivered on 02.02.2022)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences* Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 14th and 15th of June 2018 within Garissa Town in Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of MAS, a child aged 16 years.

2. He was also charged with 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 with particulars being that, on 14th and 15th of June 2018 within Garissa Town in Garissa County, he intentionally touched the vagina of MAS, a child aged 16 years with his penis.

3. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the trial, the appellant was found guilty of the main count and subsequently sentenced to serve 18 years imprisonment. Aggrieved by the said conviction and sentence, he preferred the instant appeal citing the following grounds:

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

ii. That the trial magistrate erred in law and fact by convicting the appellant yet the prosecution's evidence was riddled with gross contradictions.

iii. That the trial magistrate erred in law and facts by not considering his defence.

4. When the matter came up for directions, parties agreed to file submissions to dispose the appeal. The appellant represented by the firm of J.O. Magolo Advocates filed submissions dated 29.03.2023 in which he submitted that the prosecution did not prove its case beyond any reasonable doubt. That the trial court relied on evidence in relation to identity and penetration being vital yet the medical evidence confirmed that there was no recent sexual activity since there were no bruises, tenderness or any form of friction.

5. It was therefore the respondent's submission that the aspect of penetration was not proved satisfactorily. It was the appellant's contention that he was framed up as there was inter alia; pressure for him to marry the complainant or make a payment in reference to the compensation of the offence herein. This court was therefore urged to allow the appeal and set the appellant at liberty.

6. Mr. Kihara for the respondent submitted that it was required of the respondent to establish the age of the victim, penetration and identity of the perpetrator. On age, learned counsel submitted that the complainant was aged 16 years. Reliance was placed on the holding in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR whereby it was held that the age of a defilement victim can be proved through either medical evidence, evidence from the victim or parents, court court's observation or common sense.

7. On penetration, it was submitted that PW1 testified that the appellant penetrated her and the same was corroborated by medical results produced before court by PW4. On identity, it was argued that the appellant was a person well known to the complainant as the duo had previously been in a relationship.

8. This being a first appeal, I am mandated to analyze and re-evaluate the evidence afresh and arrive at an independent decision or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their general demeanour. See *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 court 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].

9. PW1, MAS, testified that she was in a relationship with the appellant. That on the material date, the appellant took her to a lodging where they had sex. That in the course of making love, the appellant penetrated her vagina with his penis. That after they were done having sex, the appellant's phone rang and so he answered it but thereafter, immediately took his bag and left. It was her case that she was later on taken to the hospital where she was examined and thereafter prescribed for some drugs. She stated that she had been in a relationship with the appellant for a period of two months prior to the occurrence of the incident herein.

10. PW2, AHM testified that PW1 was like a daughter to her as she was living with her. It was her case that she noticed the complainant talk on phone a lot and so she asked her daughter to monitor the complainant. That one day, she left in the company of another daughter of hers but failed to return and upon asking her daughter, she was told that the complainant had gone behind the police station

where she hired a room in a lodge. That this became a routine and one day when the complainant failed to return home in company of her sisters, PW2 sent the complainant's brothers and it was discovered that she was in a lodge with a man.

11. PW3, Francis Ikihu testified that he was the operator and manager [Particulars Witheld]. That on 14.06.2018, he called one Gitau to help him out and upon resuming duty, Gitau informed him that room 102 had been booked for two days and that he had issued a receipt. That on the same day, a man went there and informed him that he would wish to go with the keys for the said room and given that he had a bandage on his face, he did not manage to see the man properly. It was his case that on the next day, a girl dressed in a bui bui and with a ninja on her face, went to the guest house and enquired about the said room 102. That he did not know the girl nor the man in the said room.

12. PW4, Jeremiah Mosobei testified that he examined the complainant's genetaria and found that her hymen was broken with old scars. That upon carrying out a high vaginal swab, it revealed numerous red blood cells and epithermal cells. He concluded that the complainant was penetrated although he could not tell whether the hymen was broken on the material date or earlier. He however added that he could not make a conclusive finding as the victim was in her monthly periods.

13. PW5, Dalmas Momanyi stated that while at home, the appellant requested for some money from him. That the appellant gave him a number wherein he was to send the money. It was his case that he sent him Kes. 1000/= but later on, he received a call from the OCS Garissa informing him that he was required to present himself at the station. He stated that his phone was later tracked and was found that he was in Nairobi. He stated that he knew the complainant as the appellant was in a relationship with her despite his warnings.

14. PW6 Harun Tuva the investigating officer, reiterated the evidence of the prosecution witnesses confirming that he was present at the lodge when the complainant was found locked in the lodge. That the appellant had promised the complainant marriage in return. He stated that he took the complainant to the hospital for examination and treatment. He stated that after carrying out investigations, he charged the appellant with the charges herein; He further produced the complainant's birth certificate thus confirming that she was a minor.

15. The prosecution closed its case and the trial court found that the prosecution had made a prima facies case against the appellant.

16. In his defence, the appellant testified that he was not responsible for the complainant's defilement and further, that the complainant was defiled by PW5 instead. He contended that there was a plan to frame him as he knew the complainant to be PW5's girlfriend. He argued that during the material he was attending a course and therefore he could not be at the place where he was allegedly arrested from.

17. I have considered the record of appeal herein, grounds of appeal and parties' submissions. The main 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 vagina; the identification of the perpetrator and whether the sentence meted out was excessive.

18. As already noted above, the appellant was charged with the offence defilement contrary to section 8(1)(4) 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."

19. 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."

20. The Court of Appeal in the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR expressed itself 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.

21. The complainant testified that she was aged 16 years. Her evidence was further corroborated by production of her birth certificate confirming that she was born on 10.04.2002. It was alleged that the offence herein was perpetrated on diverse dates of 14th and 15th of June 2018. A simple arithmetic therefore shows that PW1 was aged roughly 16 at the time the alleged offence was committed.

22. 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.

23. 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 JJ A) in the case of Mark Oiruri vs. 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..."

24. The complaint testified that while at the lodging, they kissed and thereafter the appellant inserted his penis into her vagina. Further, from the medical evidence adduced, there was evidence that the complainant's hymen was broken with old scars. That on high vaginal swab, the same revealed numerous red blood cells and epithermal cells. As a consequence, he reached a conclusion that there was defilement.

25. On identification, PW1 gave a graphic account of all that happened. She narrated how the appellant took her to the lodging being her boyfriend. She stated that the appellant put his male organ in her vagina and that they had dated for a period of two months as the appellant had promised to marry her. Pw5 on Momanyi also confirmed that he knew the appellant and complainant as lovers and that he had warned the appellant against that relationship.

26. In my considered view, the appellant and the complainant had been together as boyfriend and girlfriend for a relatively long period of time hence she could not fail to identify him. It therefore follows that

identification was by way of recognition. See *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."

27. From the direct evidence available and circumstances under which the victim was rescued from a lodging and the arrest of the appellant, I have no doubt that it was the appellant who took pw1 to the lodging and had sex with her. I have no reason to doubt the evidence of pw1 in this case and that she had no reason to fabricate this case.

28. On the ground that the prosecution's evidence was riddled with contradictions, it is trite to note that in the case of *Philip Nzaka Watu v. Republic* [2016] eKLR the Court of Appeal had this to say:

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

29. In this case, no disparities or inconsistencies have ben pointed by the appellant to warrant this court's attention. The ground therefore is unfounded.

30. On the ground that his defence was not considered by the trial court, this court has independently reviewed the lower court record and from the judgment of the trial court, it was clearly noted that the complainant appeared truthful when she identified the person who defiled her. In my view, the defence of the appellant was considered but only that the trial court found that the same was displaced by the evidence of the prosecution.

31. On sentencing, it is trite that the same is at the discretion of the court to which an appellate court can only interfere with if it is excessive or arrived at based on wrong principles of the law by considering irrelevant factors. See *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the court of appeal stated;

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

32. The appellant in his prayer urged this court to set aside the sentence meted out by the trial court in as much as he did not submit on the same.

33. In the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal N0. 12 of 2021, the appellant 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. In interfering with the said

sentence, 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".

34. In the case herein, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to imprisonment for a term of not less than fifteen years.

35. Considering the mitigation on record, the age of the victim, and taking into account that the victim had also condoned the act of defilement by hiding in the lodging with the appellant, I find the sentence of 18 years excessive in the circumstances. Accordingly, Iam inclined to substitute the sentence of 18-year imprisonment with 7 years imprisonment to run from the time when sentence was imposed.

ROA 14 days.

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

J.N. ONYIEGO

JUDGE