Namunyu v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 24025 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 24025 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E040 OF 2022

PJO OTIENO, J

SEPTEMBER 29, 2023

BETWEEN

PETER NAMUNYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. C.N. Njalale SRM in Butali SPMC SO Case No. 33 of 2018 dated 18th May 2022)

JUDGMENT

1. The Appellant was arraigned before the Senior Resident Magistrate at Butali in Sexual Offences Case No. 33 of 2018 charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 17th day of September, 2018 within Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of MJ a child aged 8 years old.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 8(1) of *Sexual Offences Act* No. 3 of 2006, whose particulars read that on the 17th day of September, 2018 within Kakamega County, the Appellant intentionally touched the vagina of MJ a child aged 8 years old.

3. He pleaded not guilty, a plea of not guilty was entered and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses while the Appellant when placed on his defence chose to give own sworn testimony without calling any other witness.

4. Viore dire examination was conducted on PW1 a minor aged eight (8) years and upon the Court being satisfied on her ability to tell the truth and appreciation of an oath, testified that she was a Grade 3 pupil at [Particulars Withheld] Primary School. That on 17/9/2018 at about 1:30 PM she was walking alone

from home to school when the Appellant whom she had seen behind her, walked hastily towards her, held her hand and took her to the sugar plantation where he closed her mouth, removed her clothes and his and then took his thing which he uses to urinate and put it in her thing that she uses to urinate and blood started oozing. The Appellant then warned her not to tell anyone before she wore her clothes and went back to school. Later when she returned home her mother noticed blood stains on her clothes and she asked her about it and she narrated to her what had transpired and the person who did it. The next day her mother took her to [particulars withheld] Health Centre where she was treated and later matter was reported to the police.

5. On cross-examination she stated that she knew the Appellant since he had a shop at [Particulars Withheld] where he sold meat and another shop where he does photocopying and that she was able to identify him at Matete police station where he was placed with other many people.

6. PW2 mother to the victim testified that on 17/9/2018 she returned home at 4PM, milked the cows and went to the market and on returning she found PW1 sitting on the seat with blood on her legs. She checked her school uniform and noticed blood stains on the petticoat and panty. She then examined her and noticed that blood was oozing from her vagina with some having dried up. She took her to a Clinic at the market where she was given a pain killer injection and the next day she took her to Matete Health Centre where they referred her to Lumani Dispensary and later to [particulars withheld] Hospital. After PW1's treatment she reported the incident at Matete Police Station. It was her evidence that PW1 was aged 8 years at the time of the incident and produced her Birth Certificate which showed she was born on 6/8/2009. The Certificate was marked as Exh P4.

7. On cross-examination she stated that PW1 informed her that it was the man who sells kangumu and does photocopying that had defiled her and that she was the one who gave the name Peter to the police.

8. On re-examination she stated that when the appellant was arrested he was arranged among other people and the complainant identified him.

9. PW3 was a Clinical Officer at Lumakanda County Hospital who testified that on 18/9/2018 he received and examined the victim whose vagina had a 1 cm tear from the introitus opening up to the vagina. Her hymen was severely broken and the labia minora and majora were soiled in blood. A vaginal swab showed presence of spermatozoa and epithelial cell to indicate trauma within the vagina and red blood cells to indicate leakage of blood cells in the vagina during the trauma.

10. On cross examination he stated that no DNA was carried on the spermatozoa to link same to the Accused.

11. PW4, No. 238806 PC Moses Mangeni testified on 17/9/2018 he received a report from a child protection volunteer of the defilement of a minor aged 8 years old and he advised him to ask her family to take the minor for a medical checkup and later a report was made at Matete Police Station. The case was assigned to his counterpart by the name of Celine Rioba who conducted investigations leading to the arrest of the Appellant on 19/9/2018.

12. On cross-examination, the witness stated that he was not present at the station when the complainant made a report and that though an identification parade was conducted, the same was not captured in the identification diary. On re-examination he stated that he was not present when the identification parade was done.

13. The evidence of PW4 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the accused person was put on Defence.

14. The Appellant was the only witness in his defence. In that defence, he denied the charges and stated that he had been framed by his business rival who is the complainant's grandfather because they ran a similar cyber café business and that whilst the competitors business collapsed, his business flourished hence jealousy. He further claimed that the complainant's grandfather had previously attacked him on allegations that he had stolen his computer.

15. On cross-examination he stated that he was at his shop the entire day on 17/10/2018. He further claimed that the attack by the complainant's grandfather's goons was resolved by the Chief.

16. In a reserved Judgment, the Appellant was convicted and sentenced to life imprisonment.

17. He was dissatisfied with the Judgment of the trial Court, and lodged this appeal setting out twelve grounds of appeal. In summary, the grounds are that; the conviction was based on scanty circumstantial evidence; the evidence was hearsay and its analysis was erroneous for taking into account irrelevant issues and thus shifting the burden of proof to the Appellant. The other points were that the prosecution case was marred with discrepancies and inconsistencies; failing to properly consider the evidence by the Appellant including his assertion that his rights were violated during the arrest; and lastly that there was never proof beyond reasonable doubt of the critical ingredients of defilement being age of the complainant and the fact of penetration.

18. The Court directed that the appeal be canvassed by way of written submissions and both parties complied.

19. The Appellant, in his Submissions identifies three issues for determination namely;

    i) whether the offence of defilement was proved to the required standard warranting conviction;

    ii) whether the appellant's defence was considered; and

    iii) whether the sentence was manifestly harsh and excessive. From the word go, the propriety of the sentence is not disclosed in any of the grounds but being a first appellate Court, the same falls for consideration in this Judgment.

20. On whether the offence of defilement was proved to the required standard warranting conviction, the Appellant contends that the burden of proof lay with the prosecution to disprove the innocence of the Appellant. He claims that though the element of age was proved, penetration was not proven because it was strange that no bruises or lacerations were noted in the victim yet she was defiled barely a day old. He terms the medical evidence by PW3, a Clinical Officer, shambolic aimed at victimizing the Appellant. It is then argued that it was impossible for the complainant to be defiled and walk back to school with blood stained clothes without anyone noticing, and then questions the evidence of PW2, mother to the complainant, who testified that she noticed the blood stains in her daughter's uniform and decided to go to the market for 3 hours leaving her daughter defiled and in pain.

21. On the identification of the Appellant, they contend that the victim was not clear whether her assailant operated a photocopy or a butchery. They claim that the initial report does not indicate that it was a person named Peter that defiled the complainant and that it was PW2 who gave the victim the name Peter and told him it is the man who operated the photocopy shop contrary to the statement the victim recorded at the police station stating that he did not know the person but could identify him physically. There is also the question how the Appellant was traced using an informer who neither testified nor recorded a statement. They claim he could have been a business rival.

22. On whether the Appellant's defence was considered, they claim that the Appellant's testimony that an identification parade was not conducted and that he did not operate a butchery was not considered.

23. On whether the sentence was manifestly harsh and excessive, It is his Submissions that the sentence was unconstitutional and highly excessive and cited the decision in Maingi & 5 Others v DPP& another (2020) eKLR where the Court held as follows;

> " To the extent that the *Sexual Offences Act* prescribed mandatory minimum 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*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences."

24. For the Prosecution/Respondent it was submitted that the elements for the offence of defilement have been proved in that the PW2, the complainant's mother produced a Birth Certificate to show that the complainant was 8 years old, PW3 a Clinical Officer proved penetration by testifying that on examination of the complainant's vagina he noted she had a 1cm tear from introitus opening to the vagina, her hymen was severely broken and that there was spermatozoa in her. On the element of positive identification of the Appellant, it is their Submission that it was the evidence of the complainant that the Appellant was known to her by face.

25. When it comes to the sentencing, the Respondent contends that sentencing is a matter of the discretion of the trial Court and place reliance on the case of Stephen Kimari Gathano v Republic (2022) eKLR where the court held as follows;

> " Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo - Vs - R., and Wilson Waitegei V Republic [2021] eKLR)
>
> **Was there anything vitiating exercise of discretion by the trial court in imposing a sentence of 15 years' imprisonment?**
>
> Of important consideration: first, the victim of the offence is a child of 9 years. Second; the said child suffered physical injuries. Third, the manner of commission of the offence was cruel and violent- strangled her, violently penetrated her as evidenced by the injuries. The appellant brutally defiled the victim. Fourth, the traumatic experience will linger in her life forever- and as she grows older to know exactly the violation she went through, she will live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Fifth, this is a serious offence of which extreme societal desire to get rid of society of such wickedness and sexual perversion has been expressed publicly and formally through *Sexual Offences Act*. See James Okumu Wasike (2020) eKLR."

26. On account of the age of the victim whose vagina was torn internally and externally, it is argued that a life sentence is justified.

Issues

27. The Court has considered the grounds of appeal, the proceedings of the lower Court and the Submissions by both the Appellant and the Respondent and concurs that three issues arise for determination as isolated by the Appellant.

Analysis

Whether the offence of defilement was proved to the required standard against the appellant

28. Pursuant to section 8(1), *Sexual Offences Act*, there are three elements of the offence of defilement, namely; age of the victim, penetration and proper identification of the perpetrator. The fact that the complainant was 8 years of age at the time of the incident is not in dispute and is admitted in Submissions by the Appellant.

29. That leaves the question of penetration and positive identification of the perpetrator. Section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of the genital organ of a person into the genital organs of another person."

30. Unlike in other cases requiring corroboration, the evidence of a victim of sexual offence on penetration is sufficient by itself by dint of the proviso section 124 of the *Evidence Act*, Cap 80.

31. Here, it was the evidence of the complainant that on 17/9/2018 at about 1:30 PM she was walking alone from home to school when the Appellant whom she saw was behind her walked hastily towards her, held her hand and took her to the sugar plantation where he closed her mouth, removed her clothes and his and then took his thing which he uses to urinate and put it in her thing that she uses to urinate and blood started oozing.

32. The evidence of the complainant on penetration has been corroborated by that of PW3, a Clinical Officer at Lumakanda County Hospital, who testified that on 18/9/2018 he examined the victim whose vagina had a 1 cm tear from the introits opening up to the vagina. Her hymen was severely broken and the labia minora and majora were soiled with blood. He further testified that a vaginal swab of the victim showed presence of epithelial cells as well as spermatozoa. It is the finding by the Court that there was sufficient proof, beyond reasonable doubt that the complainant had indeed been penetrated.

33. On the element of identification, it is trite law that identification is what connects a person to an offence. The appellant contends that he was not properly identified since an identification parade was not conducted as purported by PW4. To this Court not every case demands the conduct of identification parade. Identification parade is desirable where the suspect was unknown to the victim on the date of the incident and a parade is set to see if he can recall the fact of the attacker. Identification parades are not conducted in respect of people who are recognized but in respect of strangers, whom witnesses claim that given a chance, they can be able to identify the perpetrator. Since he claimed to have known the first accused, one wonders the value of the identification parade. See Republic v Valentine Maloba & 2 others [2021] eKLR.

34. Was the Appellant a person known to the complainant to not warrant an identification parade? It was the evidence of PW1, the complainant, during cross-examination that she knew the Appellant since he had a shop at [Particulars Withheld] where he sold meat and another shop where he does photocopying and that she was able to identify him at Matete police station where he was placed with other many people. Here it was also the evidence of PW2, that PW1 informed her that it was the man who sells kangumu and does photocopying that had defiled her.

35. The Appellant in his testimony and Submissions concedes that he ran a cyber café at the market. He was therefore a person known prior to the incident by PW1 by face and even if not by name. It is therefore plausible that the complainant was able to recognize him as the person who attached her. An identification parade was therefore not necessary in the circumstance.

Whether the appellant's defense was considered?

36. I have perused the judgment of the trial court and I have noted that the evidence of the appellant was indeed considered. At page 5, "the accused person is his defence indicated that he is the only one who was running a photocopying machine at the market by then. He alleged that he was framed by the complainant's grandfather who had a similar business at the Nambilima market whom they had a dispute with. However, there was no evidence of such a dispute in court neither was any reported at the police station. The accused was however categorical that there was no dispute between him and the complainant nor the complainant's mother or father. The complainant and her mother also testified that they had no dispute with the accused person herein. There is therefore no evidence on the court record that the complainant and her mother fabricated or rather framed the accused person with the offence herein. Though, the accused person alleged to have been framed by the complainant's grandfather, there is no evidence that it is the complainant's grandfather who reported the matter at the station. His claim of he said dispute is therefore unfounded."

37. It is evident that an advertence was made to the defence offered. However, even if the same had not been done, or done adequately, in its mandate as a first appellate Court, a final re-appraisal is a must. The Court has read the Judgment at page 5, second last paragraph and is fully convinced that the trial Court fully and sufficiently considered the evidence by the defence was adequately, reviewed, considered but discounted as untrue.

Was the sentence harsh?

38. The Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR did set and settle the consideration in sentencing to be settled that;

> "...sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

39. The sentence prescribed for defiling a child below the age of 11 years is prescribed by section 8(2) of the *Sexual Offences Act* No. 3 of 2006 to be life imprisonment. In line with the Supreme Court directions in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court of Appeal sitting at Malindi in Criminal Appeal No. 12 of 2021 Julius Kitsao Manyeso v Republic has expressed itself on that stipulation of the law. It said: -

> "... 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 Page 13 of 18 Judgment- MLD Criminal Appeal No 12 of 2021 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 vs 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."

40. In her sentence, the trial Court was undoubtedly of the view that there was no discretion other than to impose the statutory sentence. That is disclosed in the record where the Court said: -

> " ...The said section gives a mandatory sentence of life imprisonment. This Court cannot in any way depart from the said provisions. I hence sentence the accused person to serve life imprisonment."

41. It is this Court's finding that it was erroneous for the trial Court to abdicate the duty in sentencing by feeling hamstrung and helpless. In doing so, it erred and that error falls for rectification of appeal.

42. Taking guidance from the above decision by the Court of Appeal, the sentence is set aside and going by its mandate to proceed by way of a re-trial, and having given due regard to the age of the Accused and the circumstances surrounding the offence, the Appellant is sentenced to serve an imprisonment term of twenty five (25) years.

43. In conclusion and for the reasons set out above, this appeal partially succeeds in that while the conviction is confirmed and upheld, the sentence of life imprisonment imposed on the appellant is set aside and in its place substituted a sentence of twenty (20) years' imprisonment.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF SEPTEMBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of: -

Appellant in person

Ms. Luyali for the Appellant

Ms. Chala for the Respondent

Court Assistant: Polycap