Wafula v Republic (Criminal Appeal E028 of 2021)
[2023] KEHC 23611 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23611 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E028 OF 2021

JN ONYIEGO, J

SEPTEMBER 29, 2023

BETWEEN

PHILIP NYONGESA WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon Mbuteti (R.M.) delivered on 30.07.2021 in Sexual Offences case No. 50 of 2019 CM's Court at Garissa)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that between 02.10.2019 and 18.10.2019 within Garissa County intentionally and unlawfully caused his genital organ namely penis to penetrate the vagina of MN a child aged 15 years.

2. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 with particulars being that on diverse dates between 02.10.2019 and 18.10.2019 within Garissa County intentionally touched the vagina of MN, a child aged 15 years.

3. Upon conviction, the appellant was sentenced to serve twenty years imprisonment. The appellant being aggrieved by the conviction and the sentence of the court filed on 09.08.2021 a petition of appeal on grounds summarized as:

    i. That the learned trial magistrate erred in law and fact in failing to consider his defence and mitigation.

    ii. That the trial court erred in law and fact by holding and finding that the prosecution proved its case without tangible evidence to support the same.

iii. That the trial court erred in law and fact by convicting and thereafter sentencing him without recognizing that he was a minor.

4. At the hearing, directions were given that the appeal proceeds by way of written submissions.

5. The appellant basically submitted that the prosecution did not prove its case to the required standard and that the sentence meted out was harsh in the circumstances. He urged the court to consider the mitigation on record to determine the appropriate sentence.

6. Mr. Kihara for the respondent reiterated his submissions filed on 25.04.2023. He submitted that prosecution did prove the charges in question to the required degree by establishing the age of the victim, penetration and identity of the perpetrator. On age, it was submitted that PW1 testified that she was 15 years old and the same was corroborated with PW4 who also testified and further produced a birth certificate proving the same. The respondent placed reliance in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR whereby it was held that the age of the victim of defilement is an essential ingredient of the offence because the prescribed sentence is dependent on the age of the victim.

7. On penetration, counsel urged the court to uphold the evidence of PW1 as corroborated by PW5 who examined the complainant and reached a finding that the complainant had been penetrated.

8. On identification, Mr. Kihara stated that the appellant was well known and recognized by the complainant as they had spent time together. Touching on sentence, the respondent contended that the same as invoked was not only legal but appropriate bearing in mind the circumstances of the case. He urged this court to dismiss the appeal in its entirety and sustain the sentence by the trial court.

9. 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].

10. Briefly, PW1, MWN testified that on 30.09.2019, her mother sent her to a shop and that she passed through the house of Dismus who called her and thereafter locked her in his house. She stated that after some time, the appellant's wife arrived and thereafter cooked some meal which they all ate. She continued that on the following day, the appellant bought two tickets at the bus station and so they boarded a bus to Garissa. On the following day, the appellant took her to Phanice's house and informed her that she was his visitor. That thereafter, the appellant took her to his house in the farm where he defiled her.

11. PW2, MWB testified that on 30.09.2019 upon arriving at his house, he found his wife cooking but noticed that PW1 was missing. That he was informed that she had gone to buy medicine and therefore, he embarked on searching for her. It was his evidence that together with his wife, they reported the matter to Nzoia Police Station as they continued to search for PW1. That on 13.10.2019, he received a call from a private number prompting him to go back to Nzoia Police Station where he was referred to Bungoma Police Station.

12. That the private number was traced to Garissa and therefore, he was given a letter addressed to Iftin Police Station seeking for help. He recalled that upon reaching iftin, the said number was traced to a

certain house whereupon reaching there, they found one Phillip, Phanice and Alex inside. He stated that he took PW1 to hospital where she was examined and treated.

13. PW3, Alex Wanyonyi testified that on 11.10.2019 upon arrival from work, he found Dismus at his house with PW1. That when he enquired who pw1 was, the appellant shrugged off the question by saying that he was tired and therefore would answer later. That on the next day, he still enquired from the appellant on the identity of PW1 but still, the appellant shrugged off the question. He reiterated that PW1 informed him that Dismuss had promised her a well-paying job. It was his case that he gave PW1 the phone that she used to call her parents.

14. PW4, Phanice Mukwana Kongari stated that on 09.10.2019, while in her house, Dismus and a girl arrived. That when she enquired what they wanted, Dismus responded by telling her not to ask questions. That they asked for water and thereafter left. She recalled that Dismus thereafter left in the company of the girl and that after some few days, the police arrested her together with Phillip and Alex.

15. PW5, Jeremiah Mosibei recalled that on 18.10.2019, he was requested by the OCPD Iftiin Police Station to examine PW1 as she had reportedly been defiled. That upon examining PW1 she found that her hymen was freshly broken although the same showed signs of healing; On pregnancy, the same was negative. Further examination on high vaginal swabs, revealed there was presence of epithelial cells. He produced the outpatient card and the P3 form as Pex 1 and 2 respectively.

16. PW6, Charles Odongo stated he was the investigating officer after PC Kipkemoi Rotich was transferred. That PW2 had reported a matter to wit that her daughter, PW1 was lost. That information was that one of her relatives had eloped with her and brought her to Garissa. It was his further evidence that PC Kipkemboi and Barasa went to a house in Bulla Game where PW1 was believed to be harboured. It was his evidence that after interrogation of one Philip, Alex and Phanice, he established that PW1 was residing at the appellant's house in the farm. He produced the birth certificate for PW1 and thereafter identified the appellant in the dock.

17. The prosecution closed its case and the trial court placed the appellant on his defence after considering the evidence by the prosecution.

18. DW1, the appellant herein denied ever knowing the complainant and further denied defiling PW1. He stated that on the very day, he had gone to fetch his wages after having worked at a construction site at Bulla Mkono. He decried being charged with the offence herein as he claimed that he was wrongly accused.

19. The main issue for determination in this case, having considered the record of appeal, 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.

20. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (3) 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."

21. 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."

22. 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) the Court of Appeal 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...".

23. It is not in dispute that the complainant at the time of the commission of the offence, was fifteen years old. The birth certificate showed that PW1 was born on 21.09.2004 while the offence herein was allegedly perpetrated on diverse dates between 02.10.2019 and 18.10.2019. It therefore translates to the fact that PW1 was roughly aged 15 years old.

24. 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.

25. 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 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..."

26. In this case, PW5 who examined PW1 found that the hymen was freshly broken although the same showed signs of healing; pregnancy test was negative and on high vaginal swabs, there was presence of epithelial cells. It was his finding that indeed PW1 was defiled. Given the evidence of pw1 and the medical evidence adduced thereof, I have no doubt the complainant was penetrated on hence an act of defilement.

27. On identification, PW1 testified that the appellant took her to his house where he defiled her. She stated that she stayed in the said house till 17.10.2019 with the appellant herein. It therefore follows that the number of days and the time PW1 spent with the appellant herein were adequate for her to positively identify her aggressor who in this case is the appellant. In the case of *Kariuki Njiru & 7 others v Republic*, Criminal Appeal No. 6 of 2001 (Unreported) the court held as follows:

> "Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and

acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

28. In any event, the complainant was found in the appellant's house within Garissa far away from western Kenya the home of the complainant. What were they doing in the same house for all those days. PW3 confirmed that on 11th October 2019, he found the appellant in his house in company of PW1. When he enquired who PW1 was, the appellant dismissed him thereby answering that he was to answer that question later.

29. That later, PW1 told him that the appellant had promised to get her a well-paying job. That the two left his house and only came to see them after the appellant was arrested. PW4 wife to PW3 corroborated the testimony of PW3. From this set of evidence, the appellant cannot be heard to say that he had no idea of the fate that befell PW1. He is the one who picked the innocent girl from her home in western Kenya after promising to find her a good job. Essentially, he had an ill motive. The evidence is well corroborated hence I have no doubt the perpetrator of the offence herein was the appellant herein.

30. In the foregoing therefore, I find that the prosecution proved its case beyond any reasonable doubt and as a consequence, grounds 2, 3,4,6 and 7 are thus unfounded.

31. On the ground that his defence and mitigation was not considered, the lower court record shows that the trial magistrate in his judgment weighed in the evidence of the appellant and reached a determination that he passed out as a dishonest person. Further, the appellant was offered an opportunity to mitigate and in doing so, the appellant informed the court inter alia that he was the only boy in his family and that he is charged with the responsibility of fending for his parents. That ground is therefore not tenable.

32. On the question regarding the sentence meted out, it is outright that the trial court in sentencing referred to the provision of section 8(3) which pronounces the sentence of the said offence and in his discretion proceeded to sentence the appellant as per the law. In the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the Court of Appeal stated thus;

> " 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."

33. In the instant case, the trial court also noted that in as much as the appellant herein was guilty, the punishment stipulated in such a case was punitive.

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

35. In the same spirit and considering the mitigation on record, I hereby confirm conviction but set aside the twenty-year imprisonment and substitute the same with 7 years imprisonment to run from the time the trial court imposed its sentence.

ROA 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER 2023.

J. N. ONYIEGO

JUDGE