Ogechi v Republic (Criminal Appeal E001 of 2022)
[2023] KEHC 24673 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E001 OF 2022

WA OKWANY, J

OCTOBER 31, 2023

BETWEEN

JOSEPH MORURI OGECHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Conviction and Sentence of Hon. M. C. Nyigei (PM) Nyamira dated and delivered on the 16th day of December 2021 in the original Nyamira CMC Sexual Offence Case No. 75 of 2020)

JUDGMENT

1. The appellant herein, Joseph Moruri Ogechi, was charged with the offence of defilement contrary to Section 8 (1) of the *Sexual Offences Act* as read with Section 8 (2) of the same Act. The particulars of the charge were that on 24th September 2020 in Nyamira South Sub-County within Nyamira, intentionally and unlawfully caused his genital organ penis to penetrate the genital organ vagina of RNM (particulars withheld) a child aged 12 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the charge were that on 24th September 2020 in Nyamira South Sub-County within Nyamira, intentionally and unlawfully touched the genital organ vagina of RNM (particulars withheld) a child aged 12 years with his genital organ penis.

3. The Appellant pleaded not guilty to both the main charges and the alternative charge after which the trial court conducted a hearing in which the prosecution presented the evidence of 5 witnesses. At the close of the trial, the said court found the Appellant guilty on the main charge of defilement and sentenced him to serve 20 years imprisonment.

4. Dissatisfied with the decision of the lower court, the Appellant filed this appeal. He listed the following grounds of appeal in his Petition of Appeal: -

    a. That the learned trial magistrate erred in law and in fact in convicting the Appellant of the offence of defilement notwithstanding the fact that the evidence before the trial court, when properly analysed and evaluated, did not support the conviction.

    b. That the trial magistrate erred in law and in fact by failing to afford the Appellant a fair trial.

    c. That the trial magistrate erred in law and fact by failing in convicting the Appellant without considering his mental status.

    d. That the trial magistrate erred in law and fact by not finding that the prosecution had proved its case beyond reasonable doubt.

    e. That the trial magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient evidence.

    f. That the learned trial magistrate erred in law and fact in putting the Appellant on his defence without the evidence from the arresting or investigating officer.

    g. That the learned trial magistrate erred in law and fact by giving a sentence which was harsh, excessive and hard in law given that he never committed the alleged offence.

    h. That the trial magistrate erred in law and fact by failing to evaluate, analyse and appreciate that the medical evidence was not enough to sustain a conviction.

    i. That the learned trial magistrate erred in law and fact by failing to record and ascertain the language that the Appellant understood properly.

5. A summary of the prosecution's case was that on 24th September 2020, PW2, the victim's mother RBM (particulars withheld), sent her to the Appellant's shop to buy some wheat flour. It was alleged that no sooner had the victim, RNM (particulars withheld), arrived at the shop than the Appellant grabbed her, pulled her into a room at the back of the shop, undressed and defiled her before he was interrupted by another customer who had also gone to purchase goods from the same shop. The victim was able to dress up after which the Appellant gave her the flour that she had gone to buy. While on her way home, the victim met her mother (PW2) who was already worried about her whereabouts and was looking for her. PW1 informed her mother about her ordeal at the Appellant's shop. PW2, in turn, informed the victim's father about the incident.

6. PW3, Paul Mayaka Obure, the Clinical Officer, produced the victim's treatment notes which revealed that she had sustained bruises on the labia minora, a broken hymen and had a whitish discharge. The notes also indicated that the victim had epithelial cells. PW3 concluded that there was penetration of the victim's vagina. He produced the treatment notes as P. Exh 1. On cross examination, he stated that hymen had an old tear which was an indication that she may have been defiled prior to the incident in question. He explained that epithelial cells are shed from the linings of the vagina during sexual intercourse or friction during penetration.

7. PW4, Sgt. Jeridah Nyatichi, an investigating officer attached to Nyamira Police Station, received the defilement report, recorded the witness statements and issued the complainant with the P3 form. She

also visited the scene of the assault and noted that the shop was partitioned to provide for a sleeping area where the complainant alleged that she was defiled.

8. When placed on his defence, the appellant gave a sworn statement wherein he confirmed that he sold flour to the complainant on the material day. He also conceded that there is a room behind his shop but stated that the room was not a sleeping area. He vehemently denied the allegation that he defiled the complainant or that he was interrupted by another customer. He added that a group of boda boda riders arrested him and took him to the police station.

9. At the end of the case, the trial court found the Appellant guilty on the main charge of defilement and sentenced him to serve 20 years imprisonment.

10. The appeal was canvassed by way of written submissions which I have considered.

Analysis and Determination

11. The duty of the first appellate court is to re-analyze, and re-consider the evidence tendered before the trial court afresh in order to arrive at an independent decision without losing sight of the fact that, unlike the trial court, it did not have the advantage of seeing or hearing the witnesses testify. (See Okeno vs Republic [1972] E.A.32).

12. After considering the Record of Appeal and the parties' respective submissions, I find that the main issue for determination is whether the prosecution proved its case against the Appellant to the required standards.

13. It is trite that the standard of proof in a criminal trial is beyond reasonable doubt. Lord Denning explained this standard in the case of Miller v Minister of Pensions [1942] A.C. thus: -

> "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

14. Section 8 (1) of the *Sexual Offences Act* provides as follows: -

> 8. Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> 4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon

conviction to imprisonment for a term of not less than fifteen years.

5. It is a defence to a charge under this section if-

a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. the accused reasonably believed that the child was over the age of eighteen years.

15. In order to secure a conviction on the charge of defilement, the Prosecution must establish the following ingredients: -

i. Age of the victim

ii. Identification of the perpetrator

iii. Proof of Penetration

(See George Opondo Olunga v Republic [2016] eKLR.)

i. Age of the Victim

16. It is important to prove the age of a victim in a defilement case because age determines the type of punishment to be meted on a convicted person. In Edwin Nyambogo Onsongo v Republic [2016] eKLR the Court of Appeal explained the manner in which the age of a victim can be proved as follows: -

> " ... 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 or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

17. In the present case, PW2, the victim's mother, and PW4 Sgt. Nyatichi produced the victim's birth certificate which indicated that she was born on 2nd February 2008. The victim was therefore 12 years 7 months old as at the time of the incident in question. I therefore find that the ingredient of the age of the complainant was proved to the required standard.

ii. Penetration

18. Section 2 of the *Sexual Offences Act* defines penetration as follows: -

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

19. Penetration is established through the evidence of the victim that is corroborated by medical evidence. This means that the testimony of the victim and the medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court is required to weigh, with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration. In other words, an accused person

may be convicted on the sole evidence of the victim in sexual offences. This principle is premised on the provisions of Section 124 of the *Evidence Act*, Cap 80 which provides as follows: -

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (emphasis added)

20. A perusal of the record shows that the trial court conducted a voire dire before taking the evidence of the victim. The victim testified as follows: -

> " ...On 24th September 2020, I was in our hotel at Kesiero...My mother sent me to buy wheat flour from the shop of Moruri. His shop is about 250 meters from our hotel. I found Moruri sitting outside his shop. Mum had given me Kshs. 1,000/=. When I arrived, I sat outside on a bench. While he was seated on a plastic chair. I told him I wanted unga and he went into the shop. He came out shortly and pulled me into the shop. I tried to scream but he covered my mouth.... He pulled me to the bedroom. He undressed me while holding my hand. He removed my pant. He pulled my dress up. He threatened to kill me if I refused to cooperate. He then removed his trouser and underwear. He did bad things to me to my (points) vagina. He inserted his penis into my vagina. He heard a customer knocking so he wore his clothes and went to serve his customer. I also wore my clothes...."

21. Besides the victim's testimony, the medical evidence produced by PW3 the Clinical Officer showed that the victim's external genitalia was normal but had bruises on the labia minora. He also found a whitish vaginal discharge and a broken hymen. On cross-examination, the Clinical Officer stated that the hymen was an old torn hymen which indicated that there was a possibility that this was not the first time the minor was being defiled. On re-examination, he stated that he concluded that the victim had penetrative sexual intercourse because of the presence of bruises and epithelia cells which were indicative of sexual penetration or inflammatory process resulting from friction or penetration. The Clinical Officer testified as follows:

> " Epithelial cells are shed from the linings of the vagina. If someone has sexual intercourse, then the cells are shed in large quantities and are found in urine & HVS. The presence of numerous epithelial cells could indicate sexual penetration or inflammatory process from the sexual penetration or friction. Epithelial cells are shed and found in urine or during a HVS. In this case, both methods were used".

22. The Appellant argued that since the victim did not testify that a condom was used, the lack of spermatozoa upon examination implied that she was not defiled. Courts have however held that the mere absence of spermatozoa does not connote that a victim was not defiled. This is the position that was adopted in the case of Mark Olruvi Mose v R [2013] eKLR where the Court of Appeal held thus: -

> " 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 if 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."

23. Going by the definition of penetration as stated under Section 2 of the *Sexual Offences Act* and the above case law, I find that it is possible that the Appellant was not able to complete the act of defilement because he was interrupted by the customer who knocked at the shop when he was in the act of defiling the minor. In any event, Section 2 of the Act provides that the slightest form of penetration will constitute the offence of defilement. I have considered the victim's testimony and found it to be consistent and credible. I therefore find that penetration was proved to the required standards through the victim's evidence that was corroborated by the medical evidence.

iii. Identification

24. On identification of the Appellant as the perpetrator of the offence, PW 1 stated that she knew the Appellant prior to the incident as she used to buy goods from his shop. She also testified that the Appellant had on several occasions attempted to touch her breasts. In his testimony, the Appellant conceded that he knew the victim. I note that the incident took place during the day and therefore the issue of mistaken identity does not arise. I am satisfied that the Appellant, who was well-known to the victim, was positively identified.

25. In sum, I find that the offence of defilement was proved to the required legal standards and I therefore uphold the conviction by the trial court.

ii Whether the sentence imposed was appropriate

26. The *Sexual Offences Act* provides for a minimum mandatory sentence of 20 years imprisonment. Section 8 of the said provides as follows:

> 8. Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

27. It is a well- established principle that sentencing is a matter of discretion to be exercised by the trial court. (See the Court of Appeal decision in Bernard Kimani Gacheru v Republic [2002] eKLR). Sentences must however reflect the seriousness of the offence and must be founded on set legal principles. In R v Scott [2005] NSWCCA 152, Howie J Grove and Barr JJ stated: -

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..."

28. It is also trite that an appellate court will not readily interfere with the sentence imposed by a trial court merely because it would have imposed a different sentence. The appellate court must establish that the sentence is illegal or manifestly harsh before it can alter it. In R vs. Mohamedali Jamal (1948) 15 E A C A 126, the Court of Appeal for Eastern Africa stated:-

> "It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

29. The question for my determination here is whether the sentence passed by the trial court was appropriate in the circumstances. The issue of minimum mandatory sentences has been the subject of several court decisions. The punishment stipulated under Section 8 of the Act are couched in mandatory terms thus signaling the seriousness of that the lawmakers attributed to sexual offences. Some recent court decisions have however tended to suggest that courts are free to depart from the prescribed sentences. The *Sexual Offences Act* has however not been amended to give the courts a free hand, so to speak, in meting out sentences that are lower than the mandatory minimum sentences provided for in the Act. In S vs. Malgas 2001 (2) SA 1222 SCA 1235 para 25 it was held thus: -

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

30. The Judiciary Sentencing Policy Guidelines, 2016 at paragraph 23.8 provide for considerations that the courts take when sentencing including the mitigating factors.

31. I have considered the Appellant's mitigation where he stated that he was remorseful for the act and that he has elderly parents who depended on him. I have also considered the circumstances of the victim/ minor and the gravity of the offence. It is my view that this case does not present circumstances that would have warranted the trial court to depart from the minimum mandatory sentence. I find that the sentence imposed was appropriate and legal.

32. The only considerations I make are in line with Section 333 (2) of the Criminal Procedure Code (CPC) which requires the court to consider the period, if any, that the Appellant spent by the Accused in custody while awaiting his trial. (See Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR). I note that the Appellant was out on bail during the trial and was only held in custody upon conviction. I therefore find that the provisions of Section 333(2) of the CPC are not applicable in this case. I find that the sentence passed by the trial court was legal and I find no reason to interfere with it.

33. In conclusion, I find that the instant appeal is not merited and I therefore dismiss it.

34. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2023.

W. A. OKWANY

JUDGE