JT v Republic (Criminal Appeal E047 of 2022)
[2023] KEHC 27166 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E047 OF 2022

PJO OTIENO, J

NOVEMBER 29, 2023

BETWEEN

JT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. C.N. Njalale (SRM) in Butali SPMC SO Case No. 8 of 2019)

JUDGMENT

1. The appellant was arraigned before the Senior Resident Magistrate at Butali in Sexual Offences Case No 8 of 2019 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 offence are that on the 4th day of April, 2019 in Kakamega North Sub County within Kakamega County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of FB a child aged 14 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on the 4th day of April, 2019 at [Particulars Withheld] in Kakamega North Sub County within Kakamega County, the intentionally touched the vagina of FB a child aged 14 years with his penis.

3. The appellant pleaded not guilty to the charges and the case proceeded to full trial with the prosecution calling a total of seven (7) witnesses whose evidence can be summarized as below;

4. Voire dire examination was conducted on PW1 and upon the court being satisfied on her ability to tell the truth she testified that she was a class seven student at [Particulars Withheld] School and that on 4/4/2019 she had gone to fetch firewood near a river with her niece when the appellant appeared all over a sudden, held her hand and pulled her. She resisted but he knocked her and she fell to the ground

then he removed her inner pants and laid on top of her. The appellant then unzipped, removed his penis and defiled her. She started shouting and her niece left crying and met with her brother who came and pulled the appellant off her. The appellant wanted to fight her brother thus causing the attention of other people who came to the scene. She further stated that the appellant was her neighbor and a distant relative.

5. On cross examination she stated that she had known the appellant for a month.

6. PW2 testified that she was 6 years of age and a class four student. She stated that the victim was her aunt and that on 4/4/2019 at about 2pm she had accompanied the complainant to collect firewood when the appellant pulled PW1 to the bush and started to strangle her. She started to scream and went to call her father who she met by the roadside and together they went to the scene.

7. PW3, brother to the complainant testified that he was a form 2 student at [Particulars Withheld] and that on 4/4/2019 at about 2pm he was heading to swim when he met with PW2, his niece, who was screaming and she informed him that there was a person strangling the victim. He followed a path as directed by PW2 to the scene where he found the appellant on top of the victim. The appellant had worn a black trouser which was pulled to his knees and had a yellow t-shirt which, for the complainant her skirt had been pushed up and her pants had been removed. He then asked PW2 to call his father since the appellant wanted to fight him. He further stated that the appellant was a distant relative and that he had known him for less than a year.

8. PW4, a clinical officer at Malava County Hospital testified that the victim was examined at the hospital on 4/4/2019 at 4pm following allegations that she had been defiled the same day. She stated that she had no physical injuries and that externally her genital was normal though she had discharge around her vagina. There were no levies and her hymen was absent though it was not freshly broken. All tests done on her returned negative. On examination of her clothing, her skirt had traces of seminal fluid and the pant also had traces.

9. PW4, mother to the victim gave evidence that on 4/4/2019 she received a call from his son asking her to go to the scene where she found the appellant who only had pants and her daughter, the victim, who did not have her pants. They called the village elder and the appellant admitted to having defiled her daughter. She stated that her daughter was 14 years old and produced a birth certificate to that effect.

10. On cross examination she stated that she was not present when the incident happened and only found the appellant and her daughter sat on the ground where the incident occurred.

11. PW6, testified that she was the investigating officer and that on 4/4/2019 the appellant and the victim were taken to the station by the Assistant Chief, [Particulars Withheld] Location. The victim informed her that she had gone to fetch firewood accompanied by her sister when she met with the appellant who took her to the nearest bush and defiled her. The young girl who she was with rushed and called her brother who rescued her. They issued the victim with a P3 form and after filling it she charged the appellant. She stated that when she went to the scene she did not find anything unique since it had rained.

12. On cross examination she stated that the victim had admitted to having sexual encounter with different people before the incident and that she neither had discharge nor spermatozoa. She further stated that there were women at the scene though they refused to record statements. Upon reexamination she stated that the other witnesses did not record statements as they were relatives of the suspect.

13. PW7 testified that he was a village elder in[Particulars Withheld] Location and that on 4/4/19 he received a call from the complainant's father informing him that a mistake had been done in his village. He headed to the scene and found the appellant having been sat down on allegations that he raped

PW1. He called the assistant chief who interrogated the appellant and the victim and later took the accused to the police station. He further stated that when he went to the scene both of the victim's and appellant's clothing were dirty and also claimed that they were both his relative.

14. On cross examination he stated that the complainant's father was his cousin and that at the scene he found three women whom he asked to inquire from the complainant if she had been defiled a fact which they confirmed.

15. The evidence of PW7 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.

16. At the defence hearing, the appellant gave a sworn testimony, denied the charges and stated that on 4/4/2019 he went to help his uncle ES harvest sugarcane at about 7AM. He worked until 2pm and then went to shower at the river where he met up with Tom, brother to the victim. Tom asked him to accompany him to see one CW which he agreed to do so. As they passed by the bush, a lady appeared and Tom started screaming, people gathered and they accused him of the raping the girl who was by herself. He claims that he was framed by Tom who also had his money taken away from him.

17. In a judgment of the trial court, the appellant was convicted of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 and sentenced to ten (10) years imprisonment.

18. Aggrieved with the judgment and sentence of the trial court, the appellant has lodged this appeal premised on the grounds that he pleaded guilty, the sentence was harsh, he is a first offender, he is the family bread winner and is in bad health.

19. The appeal was directed to be canvassed by way of written submissions but only the respondent's submissions are on the record. That notwithstanding, the court hasn't executed its mandate on first appeal and shall decide the matter based on the full appraisal of the entire record.

Respondent's Submissions

20. It is their submission the respondent contends that the prosecution proved the offence of defilement against the appellant to the legal standards in that the age of the victim was proved through the production of a birth certificate which showed that the victim was born on 1/1/2006 which fact was corroborated by the clinical officer who conducted an age assessment on the victim.

21. On the element of penetration, they argue that in sexual offences the crucial evidence is that of the victim and cite the case of *DS v Republic* (2022) eKLR in that regard. They argue that though it was the clinical officer's evidence that no injuries were observed, no spermatozoa were seen and that the victim had had previous sexual encounters, the evidence of the victim was clear and consistent that she had been defiled by the appellant and SB confirmed that he found the appellant on top of the victim. They contend that if the complainant appeared to have said the truth about her age, hence the rest of her evidence cannot be considered untrue. In that regard they cite the case of *Williamson Karimi Njogu v Republic* (2016) eKLR where the court held as follows;

> " The trial court in his judgment observed that the minor appeared truthful and found her credible. This observation in my view was key in light of the provisions of Section 124 of the *Evidence Act* that provides that, a court can find a conviction based on evidence of the complainant only if that is the only evidence available and if the victim is found to be truthful based on reasons to be recorded. The learned trial magistrate in this case found the minor truthful because he found her credible consistent and not "shaken at all" on

cross-examination. On the basis of this, and the fact that the doctor's inconclusiveness was in conflict with the other cited evidence tendered before the trial court, the learned trial magistrate ought to have discounted the doctor's evidence and conclude that penetration had been proved beyond reasonable doubt notwithstanding the inconclusive opinion of the said doctor.(emphasis added)

22. On the element of proper identification of the perpetrator, it is submitted that the same is not in contention.

23. On the sentence it is submitted that a sentence of 15years would be appropriate and place reliance on the case of *Williamson Karimi* (*supra*) where the court held;

> " The trial court ought to have properly directed itself on the evidence tendered and had it done so, it could have found the Appellant guilty of the main charge of defilement contrary to Section 8 (1) (4) of the *Sexual Offences Act* No 3 of 2006. In that regard there would have been no need or legal basis to make a finding on the alternative charge. Consequently, I hereby quash the conviction of the Appellant and the sentence meted out on the alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The sentence of 10 years imprisonment is set aside. I hereby invoke my powers under Section 354 (3) (ii) of the *Criminal Procedure Code* and convict him under Section 8(1) (4) of the *Sexual Offences Act* No 3 of 2006 and sentence him to serve 15 years imprisonment as provided by law. It is so ordered."

Issues, Analysis and Determination

24. Looking at the grounds of appeal and the submissions by the respondent, this court discerns the issues for determination to be;

    a) Whether the prosecution proved beyond reasonable doubt the offence of defilement against the appellant; and

    b) Whether the sentence meted on the appellant was harsh and excessive

Did the prosecution proved beyond reasonable doubt the offence of defilement against the appellant?

25. The appellant was convicted of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No3 of 2006 and sentenced to 10 years' imprisonment. The prosecution however argues that they proved the offence of defilement against the appellant and he therefore ought to have been convicted of the main charge of defilement.

26. Section 8(1) of the *Sexual Offences Act* defines the offence of defilement as a person committing an act which causes penetration with a child. To establish the offence of defilement, certain known ingredients and/or elements must be proved. Elements include the age of the victim, the act of penetration and proper identification of the perpetrator.

27. The age of the victim appears not to be in contention because PW4, mother to the victim, produced the victim's birth certificate which confirmed that the victim was 14 years of age at the time of the incident. That element was sufficiently proved.

28. On the element of penetration, defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person, the victim testified how she was accosted by the appellant on her way to fetch firewood and that he knocked her down, removed her inner pants and laid on top of her. The appellant then removed his penis and defiled

her. It is trite law that the evidence of a sexual offence victim, where especially they give sworn testimony as was in this case, is sufficient by itself and needs no corroboration. This position is reiterated by the court in the case of *Morris Murimi v Republic* [2021] eKLR where it was held as follows;

> "In this case, the evidence of the defilement or sexual assault can only be given by the victim. The other witnesses only testify as to the circumstances surrounding the relationship between the appellant and the complainant PW1 and the aftermath. I find the provisions of section 124 of the *Evidence Act* to specifically apply to the case before the court. So that, even if the complainant had given evidence unsworn, the court would still be entitled to convict on her evidence uncorroborated, if the court considered, for recorded reasons, that she was telling the truth. The 16-year old complainant gave sworn evidence and her evidence technically did not require corroboration."

29. In this matter however, the element of penetration was corroborated by PW4, the clinical officer who examined the victim on the day of the incident and found the victim's skirt to have traces of seminal fluid.

30. On the element of positive identification of the perpetrator, it is evident that the appellant was a person well known to the victim as a neighbor and a distant cousin.

31. It is thus the finding of this court upon full reappraisal of the accused that the trial court was in error when it absolved the appellant of the main count of defilement yet the prosecution had adduced sufficient evidence to prove the offence of defilement against the appellant. That finding deserved interference and is thus set aside. In place of committing an indecent act with a minor, appellant is convicted of the offence of defilement.

Whether the sentence meted on the appellant was harsh and excessive

32. When an appellate court may interfere with a sentence remains settled since *Wanjema v Republic* Criminal Appeal No 204 of 1970 (1971) EA 493, 494 where it was held as follows: -

> "An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

33. Having found the appellant guilty of the offence of defilement, the court must interrogate the facts and circumstances of the case and determine if the same warrants this court to interfere with the sentence meted.

34. The complainant was 14 years of age at the time of the incident and the sentence prescribed under Section 8(3) of the *Sexual Offences Act* No 3 of 2006 fordefilement of a child between the age of twelve and fifteen years is imprisonment for a term of not less than twenty years.

35. This minimum sentence however does not hamstring the court in its discretion. Being a first appellate court proceeding by way of retrial, and having appreciated that the appellant has been in custody since conviction, the court declines to interfere with the sentence.

36. The appeal is adjudged to be bereft of any merit and is dismissed in its entirety.

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

PATRICK J O OTIENO

JUDGE