Ali v Republic (Criminal Appeal E018 of 2022)
[2023] KEHC 27420 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27420 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E018 OF 2022

JN ONYIEGO, J

DECEMBER 29, 2023

BETWEEN

ABDIFATAH MOHAMMED ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Kimani R.M. delivered on 25.03.2022 in Sexual Offences Case No. E026 of 2021 SPM's Court at Mandera)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 17.07.2021 at around 1400hrs at Mandera East Sub – County within Mandera County, unlawfully and intentionally caused his penis to penetrate the vagina of SMO, a girl aged 5 years.

2. He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 17.07.2021 at around 1400hrs at Mandera East Sub – County within Mandera County, unlawfully and intentionally touched the vagina of SMO, a girl aged 5 years old with his penis.

3. The trial court upon considering the law and facts in the case, reached a determination that the appellant was guilty of the said offence and therefore imprisoned him to serve life imprisonment. The appellant having been aggrieved by the conviction and the sentence of the court, filed a petition of appeal dated 08.04.2022 on grounds cited hereunder:

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

ii. That the trial magistrate erred in law and fact by considering extraneous matters in reaching its determination.

iii. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence in the circumstances herein.

4. At the hearing of the appeal, the parties filed written submissions to canvass the appeal herein.

5. The appellant submitted that the prosecution did not prove its case to the required standards. That it is critical that in defilement cases, the prosecution ought to lead evidence to show that the key ingredients of the offence are established. In regards to age, the appellant submitted that the complainant's age was not established. That a birth certificate or evidence from the complainant's mother would have been the best in the scenario herein.

6. On penetration, it was argued that the same was not established. That the prosecution witnesses gave conflicting testimonies hence raising doubts whether the complainant was indeed penetrated by the appellant herein. Reliance was placed on the case of *John Mutua Munyoki v Republic* [2017] eKLR where the court of appeal stated that:

> " ...it is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant"

7. On identification, the appellant urged that the appellant was framed to have committed the offence herein as the prosecution witnesses gave conflicting evidence as to the identity of the perpetrator.

8. The appellant argued that there were inherent contradictions and inconsistencies that bloated the prosecution's case. That the evidence by the complainant was not corroborated with that of PW5 and that of the doctor. It was urged that the same were material and therefore, bloated the prosecution's case.

9. Additionally, it was urged that the prosecution did not avail all the necessary witnesses to prove its case. That PC Namu who previously had accompanied the investigating officer to the scene ought to have been availed as a witness. Reliance to support the same was placed on the case of *Juma Godia v Republic* [1982 – 88] KAR 454 where the Court of Appeal was of the view that: the prosecution has in general, discretion whether to call or not call someone as a witness. If he does not call a vital witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced have been unfavourable to the prosecution.

10. He faulted the trial court for failing to fully comprehend the matter before it thus reaching a wrong determination. He therefore urged this court to allow the appeal herein.

11. Mr. Kihara for the respondent while relying on his submissions dated 24.04.2023 stated that to prove the offence herein, it was required of the respondent to establish the age of the victim, penetration and identity of the perpetrator. On age, it was submitted that the age of the victim was a crucial element that determines the sentence of a perpetrator of a sexual offence. The respondent relied *interalia* on the case of *Hudson Ali Mwachongo v Republic* [2016] eKLR where it was held that the age of the victim of defilement cannot be gainsaid and that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation or common sense.

12. On penetration, it was submitted that the same meant the partial or complete insertion of the genital organ of a person into the genital organ of another person. With regard to identification, it was submitted that the appellant was identified by the complainant at the scene as she referred to him as

toto aka Abdifatah. Further, PW2 testified that she found the appellant in the act and once he saw her, he ran away.

13. On sentence, the respondent contended that the trial court properly exercised its discretion and sentenced the appellant to life imprisonment having considered the circumstances of the case. This court was therefore urged to dismiss the appeal in its entirety and uphold the sentence by the trial court.

14. This being a first appeal, I am mandated to analyse 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].

15. PW1, SMO testified through her mother thus stating that the incident herein happened at home as the appellant approached her and thereafter directed her to remove her clothes. That the person was known as toto aka Abdifatah. It was her statement that the appellant inserted his penis into her vagina and when she started crying, he gave her a biscuit and a sweet. She testified that her cries led to her mother coming to the scene and that upon the appellant seeing her, he ran away.

16. PW2, Farhia Omar Mohamed testified that while in the house with Abdia, they heard a child crying. That the cries were coming from behind the house and it was about 2.30 p.m. She further stated that she saw the appellant pull up his trousers and then hurriedly ran away. That the complainant was crying while holding a biscuit and soda and so they inspected the girl and found that she was oozing blood from her private parts. She stated that she raised alarm and further rung the chief. On cross examination, she stated that at the time of the incident, she was with her in-law inside the house.

17. PW3, Omar Mohamed,a senior chief – Barwako Village testified that on 17.07.2021 at 3.00 p.m., while at the mosque in Bulla Mpya, he received a call from Abdia Mohammed. That she informed her that something had happened as a girl had been raped. He stated that the incident occurred at 2.00 p.m on the same day and that the appellant herein had been implicated for being responsible. He stated that with the help of the suspect's parents the appellant was arrested. That they took her to Mandera Referral Hospital where the girl was examined and thereafter treated. It was his evidence that with the help of the KPR officers, they later arrested the appellant.

18. PW4, Mutalid Sheikh testified that he examined the complainant's genitalia and the same revealed that there were lacerations and the hymen was not intact. That there were no injuries on the labia minora and majora. He conceded that based on the lacerations and the hymen not being intact, there was partial penetration. He signed the P3 Form and thereafter produced it as Pex 1.

19. The prosecution closed its case and the trial court put the appellant on his defence upon finding that a prima facie case had been established against the appellant.

20. DW1, Abdifatah Mohamed Ali in his sworn testimony stated that the complainant was his niece and that on 17.07.2021, he was sleeping at home. That the chief together with KPR officers went to his home and ordered him to accompany them to the police station. He stated that on the next day, he was arraigned in court as the charges herein were read to him. It was his evidence that he did not commit the offence and as a result urged the court to acquit him. On cross examination, he stated that he was framed of these charges as there existed a grudge between him and the chief.

21. Having read and understood the case herein, I find that 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; identification of the perpetrator and whether the sentence meted out was excessive.

22. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (2) 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."

23. 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."

24. 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.....

25. In the instant case, the appellant argued that the age of the complainant was not proved as there was no documentary evidence produced before the court to support the same. That in the alternative, the complainant's mother ought to have testified on the same.

26. The Court of Appeal in case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR emphasized 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.

27. In the instant case, the court has since perused the record and finds that indeed, there was no birth certificate presented before the court. The P3 Form showed that the complainant was 5 years of age and in the same breadth, PW4 who examined the complainant also indicated that minor was aged 5 years. It is not lost to this court that the trial magistrate who saw the complainant was satisfied that she was aged 5 years. In the given circumstances, I am in agreement with the trial court's finding that the complainant was a minor aged 5 years.

28. 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.

29. In the case of *Alex Chemwotei Sakong v Republic* [2018] 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 v 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..."

30. From the medical evidence adduced, there was evidence that the victim sustained vaginal lacerations and her hymen was not intact. The complainant testified that the appellant penetrated her vagina and when she cried, the appellant gave her a biscuit and a sweet. That upon her mother going over to the scene, the appellant ran away. It is my finding therefore that indeed, the complainant was penetrated.

31. On identification, the complainant described in detail all that happened. She stated that an incident happened inside the lot behind the house. That it was during the day when the appellant approached her and thereafter instructed her to remove her panty. It was her evidence that the appellant then put his male organ in her vagina and when she started crying, the appellant gave her a biscuit and sweet. The complainant referred to the appellant as toto aka Abdifatah.

32. The appellant in his defence stated that he resided at Bulla Mpya and the complainant was his niece. It therefore follows that identification was by way of recognition as the appellant was a person who was well known to the complainant. In the case of *Anjononi & Others v Republic* [1989] KLR the court held as follows;

> 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.

33. In my humble view therefore, the appellant was positively identified. And it is my finding that the prosecution proved its case to the required standard and therefore, conviction by the trial court was safe.

34. On sentencing, the same was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* [1954] 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a

somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R*., [1950] 18 EACA 147:

> " It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, [1912] CCA 28 TLR 364."

35. The appellant contended that the sentence was excessive given the circumstances of the case herein.

36. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal N0. 12 of 2021, the court was of the view that:

> We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*.
>
> This fact notwithstanding, 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 equality before the law under Article 27 of the *Constitution*.
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> 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.

37. In the above case, the appellant who 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, 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. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction"

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

39. In the instant case, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment. However, guided by the recent court of appeal decision in the case of *Evans Nyamari Ayako v Republic criminal Appeal* No.22 of 2022 Kisumu court of appeal where life imprisonment was construed to mean a maximum of 30 years imprisonment, and considering the appellant is a youth aged 29 years old, he needs a chance to reform and be rehabilitated.

40. In the given circumstances therefore, I hereby set aside the life imprisonment term and substitute the same with 20 years imprisonment to run from the time the trial court imposed its sentence.

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

ROA 14 days.

J.N.ONYIEGO

JUDGE