Magawi v Republic (Criminal Appeal E071 of 2022)
[2023] KEHC 27017 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E071 OF 2022

RPV WENDOH, J

DECEMBER 20, 2023

BETWEEN

JOSEPH OGOLLA MAGAWI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. H. C. Maritim – Resident Magistrate in Senior Principal Magistrate's Court S.O. NO. E 049 OF 2021 delivered on 27/4/2022))

JUDGMENT

1. Joseph Ogolla Magawi, the appellant was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* by the Senior Resident Magistrate Migori Court on 27th April, 2022.

2. The allegation against the appellant was that on diverse dates between 1/4/2020 and 24th March 2021 at [particulars withheld] Nyatike Sub County intentionally caused his penis to penetrate the vagina of J. A. O a child aged 14 years.

3. Upon conviction, he was sentenced to serve twenty years imprisonment. He is aggrieved by both the conviction and sentence meted on him by the trial court. He preferred this appeal based on the following grounds:-

    1. That the trial court erred by not complying with Articles 50 (2)(g) and (h) of the *Constitution*;

    2. That the offence of defilement was not proved to the required standard;

    3. That the trial court shifted the burden of proof onto the appellant.

4. The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.

5. The appellant filed submission in support of the appeal and the same was opposed by the prosecution counsel who filed submissions in support thereof.

6. This being a first appeal, this court is required to re-examine afresh all the evidence tendered before the trial court, analyse and evaluate it and arrive at its own conclusion. However, this court has to bear in mind that it neither saw nor heard the witnesses testify. This court is guided by the decision in *Okeno vs. Republic* (1972) EA 32.

7. The complainant J. A. of [particulars withheld] recalled that the appellant told him that he is called Jababa and asked her to pass by his home to take money she recalled going to his home and she went there several times as he had asked her to be his friend and have each other . PW1 agreed to be his lover and that she had engaged sex with him; that she used to pass by his home while going to school or that they could have sex in the bush behind his home, that he would take his private part and put in her and that it happened several times; that the appellant used to give her 50/= or 100/= or 150/=; that the Chief called her and asked if Jababa was her friend and she agreed; that the lady Chief told her not to go back to the appellants house or tell anybody; PW1 weas asked about the same issue before elders and her parents; that after that they went to the children's office then Nyatike Police Station, reported after which she taken to hospital at Macalder where she was treated. She later recorded her statement. PW1 knew that the appellant was married and with married children and school going children.

8. PW2 E.A, PW1's mother recalled 21/3/2021 when the Chief went to her house and informed her that she wanted to tell her something but she had to investigate first, the Chief called her after a week and informed her that her daughter had been with O.J, PW2 knows the appellant as her neighbour. Joseph Ogolla Jababu; after she was informed she took PW1 to hospital then reported tom the police station. She told the court that PW1 is 14 years.

9. PW3 Seth Midira Obura, a clinical officer at Nyatike Sub County produced the complainant's treatment notes; on examination, her hymen was broken and not freshly broken. He produced the P3 form on behalf of Marren Marabe who had proceeded for further studies.

10. PW4 CPL Josphat Kiplangat Mundwa of Nyatike Police Station recalled 8/5/2021, he was allocated a case to investigate. He recoded statement of PW1 who complained of having been defiled from 1/4/2020 to 27/3/2021; that the complainant identified the appellant and he started to look for him till he was found on 10/6/2021 when he was arrested and charged for his offence.

11. When called upon to defend himself, the appellant gave sworn testifying denying the offence. He admitted to knowing PW1 and PW2 but stated that which PW1 told the court was untrue. He denied giving her money or that she visited his home because he has or wife and children. He claimed to have been arrested on 30/5/2021 while asleep at his home. He was taken to police station but did not see the complainant, but the Chief Mary Kirum was there. He said that she had differences with Mary Kirum, the Chief; that the Chief went to ask for alcohol but he did have money and he does not drink alcohol. He further stated that the girl used to go to the Chief's house and he had no idea why the Chief used the girl. He denied that he had any differences with the complainant's mother.

12. In his submissions, the appellant argued that the court relied on the untenable evidence of the complainant. He relied on the case of *Kaluza vs. Brauer* (1926) AD 243 page 266267 where and South African Court cautioned courts against relying on evidence of children; that the testimony of PW3 the clinical officer did not corroborate the complainant's evidence on penetration; that the court was not called to tell the court what the source of her information was. He also submitted that the complainant did not undergo voire dire examination to ascertain whether she knew what it is to tell the truth. The appellant relied on the decisions of *Kiarie vs. Republic* (1984) KLR 739 and *Karanja vs. Republic*

(1983) KLR 501 in considering that the burden of proof was shifted on him which was contrary to the law.

13. On sentence, the appellant argued that the mandatory nature of the sentence under Section 8 (1) and 8(3) of the *Sexual Offences Act* is unconstitutional and this court should reduce the sentence based on the circumstances of this case.

14. Mr. Kaino, the prosecution counsel filed submissions opposing the appeal. He urged that the three ingredients that comprise the offence of defilement were proved of the complainants vivid account of the incidents that they engaged in sexual intercourse and the trial court was of the law that she was a truthful witness; that the complainant's evidence was corroborated by PW3's testimony on his findings upon examining the complainant; that the appellant was well known to the complainant as a neighbour and the issue of identification did not arise. He urged court to dismiss the appeal.

15. To prove a charge of defilement under Section 8 (1) o f the *Sexual Offences Act*, the prosecution has to establish that the following ingredients exist.

    1. The complainant is a minor;
    2. Proof of penetration;
    3. Proof of identity of the perpetrator.

Age:

16. In the case of *Mwalango Chichoro Mwajembe vs. Republic* Criminal Appeal No. 24 of 2015; the Court said:-

> " 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 documentary 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."

17. In *Francis Omuroni vs. Uganda* (2000) UG 2, the Court of Appeal of Uganda the court said:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

18. In the instant case, PW2, complainant's mother told the court that she was 14 years. PW4 produced the complainant's birth certificate (PEXNO. 6)which indicates that she was born on 20/4/2007 which means that as of April, 2020, she was about 13 years old. She was therefore a minor.

Penetration:

19. The complainant vividly recalled what had transpired between her and the appellant. It did not happen once but severally between April 2020 to March 2021 when the secret between the two was unearthed. She stated that they would meet behind the appellant's house or in the bush and the appellant would insert his genital organ in her genitalia. No injuries or bruises were found because it had been going on for long. She had a missing hymen. Unfortunately, the whistle blower was not called as a witness. The Chief did not testify for some reasons. However, the trial court which observed the complainant testify considered found her demenour to be convincing and believed her and invoked Section 124 of

the *Evidence Act* to find that he believed the complainant's testimony. Based on that finding this court cannot find otherwise. Penetration was proved based on PW1's testimony.

Identity of the perpetrator:

20. The Complainant was well known to the appellant. The appellant admitted that fact. He denied that he had any dispute with the complainant or her mother. It is only in his defence that he claimed to have had issues with the Chief who was to be called as a witness but was not called. During the cross examination of the prosecution witness by the appellant's counsel, no such allegation was ever made. The trial court believed PW1's testimony and I have no doubt that the appellant was properly identified as the perpetrator. I must add that failure to call the Chief as a witness was not fatal to the case because she would merely come to tell court what she was told about what was going on between the appellant and PW1 but not what she witnessed.

21. The appellant alleged that his rights vide Article 50 (2)(g) and (h) of the *Constitution* were violated. He did not file any submissions in support of the said allegations to demonstrate how his rights were violated. The one who alleges violation of Constitution rights must demonstrate how they were breached. I have looked at the court record and note that on 2/8/2021 when the appellant appeared before the magistrate for plea, the court explained to him his rights under Article 50 (2) (g) of the *Constitution* being the right to engage counsel of his own choice.

22. Besides the Appellant thereafter hired Mr. Odingo Advocate to represent him and was present all through the trial. The appellant's rights were have not been violated in any way.

23. On sentence, the appellant was sentenced to serve the minimum sentence under Section 8 (3) of the *Sexual Offences Act* as provided under the said section; whereas the mandatory minimum sentences tend to take away the court's discretion in sentencing, the same is not unconstitutional. The court exercised its discretion under the said section. The appellant had totally taken advantage of this minor and abused her for nearly two years. It is immaterial that she consented to his actions and never reported to anybody. The appellant knew that she is a minor and the court should not have mercy on such person, who prey on young children, stealing their innocence. The appellant is said to be a very mature man with married children and others in school yet he did not care about this child. He did not allow her to grow like his children did. He deserves a deterrent sentence. In the exercise of this court's discretion, and considering all factors, I set aside the sentence of twenty (20) years and I substitute it with 15 years imprisonment. The sentence to commence on 2/8/2021 the date that he took plea. The appeal succeeds to that extend.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF DECEMBER, 2023.

R. WENDOH

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR