**Ireri v Republic (Criminal Appeal E023 of 2021)**
**[2022] KEHC 3149 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3149 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CRIMINAL APPEAL E023 OF 2021**

**LM NJUGUNA, J**

**APRIL 28, 2022**

**BETWEEN**

**THOMAS KINYUA IRERI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The appeal herein was instituted vide a Petition of Appeal dated 12th March, 2021 challenging the conviction and sentence in SPM's Court at Siakago MSC.O No. 3 of 2017 where the appellant was convicted with the offence of defilement contrary to section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* and sentenced to serve 30 (Thirty) years imprisonment.

2. The appellant raised Eight (8) grounds of appeal but which grounds in my view can be summarized into one ground and the same being that the prosecution failed to discharge the burden of proof to the required standards.

3. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.

4. The appellant submitted inter alia that the trial court failed to uphold his rights during the trial process and as such, his conviction and consequent sentence should be quashed and set aside. The appellant submitted that the trial magistrate relied on a defective charge sheet and given that the same was never amended, his conviction should then be quashed. It was also submitted that there was no proper identification since he was never subjected to a medical examination to determine whether he was the person responsible for the commission of the alleged offence. The appellant also submitted that the burden of proof was shifted to him as the learned magistrate stated that he did not offer an explanation on how the minor could have sustained injuries on the genital organs. He thus prayed that this court quashes his conviction and thereafter set aside the sentence.

5. The Respondent on their part submitted that the grounds of appeal raised by the appellant are not merited in as far as they seek to contest the decision by the trial court to convict and sentence him. As such, the appeal is frivolous, baseless and the same should be dismissed.

6. The duty of this court while exercising its appellate jurisdiction (1st appellate court) was set out by the Court of Appeal in *Okeno v. Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 and is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles [See *Gunga Baya & another v Republic* [2015] eKLR].

7. I have considered the grounds of appeal and the submissions by both the appellant and the prosecution and in my view, the issue which this court ought to determine is;-

    i. Whether the prosecution tendered sufficient evidence to prove its case to the required standards (beyond reasonable doubts).

8. The prosecution under Section 107(1) of the *Evidence Act* bears the burden of proof on every element in a criminal charge beyond reasonable doubt. [See *Woolmington v DPP* 1935 AC 462 and *Miller v. Minister of Pensions* 2 ALL 372-273].

9. The Appellant was charged with the offence of defilement contrary to section 8(1) as read together with Section 8(2) and an alternative charge of indecent act with a child contrary to section 11(1) of the Act. The victim was said to be a child of Eight (8) years of age at the time of the commission of the alleged offence. 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 it 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."

10. The question which needs to be answered is whether the above elements were proved to the required standards.

11. As for the age of the victim, the Malindi Court of Appeal in Criminal Appeal No. 504 of 2010 - *Kaingu Elias Kasomo v Republic* held that

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

12. The birth certificate produced in court as PExbt 1 indicated that the complainant was eight years at the time of examination whereas the alleged offence happened on the night of 21st and 22nd of December, 2016.In the same breadth, PW2, the complainant's mother testified that the complainant was eight years old at the time the alleged offence was committed. The document and the oral testimonies were never controverted or challenged by the defense. It is my view that the prosecution was able to prove that the victim was a child. Section 2(1) of the *Sexual Offences Act* adopts the definition of a child as used in *Children Act* which defines a child as a person under the age of 18 years. The complainant was therefore a child at the time of the commission of the alleged offence.

13. As to penetration, section 2(1) defines "penetration" to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. Section 124 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that evidence of a minor needs no corroboration in sexual offences. I have considered the evidence adduced by PW1, PW2 and PW3 which pointed to the fact that the complainant was defiled. The complainant testified as she was sleeping, the accused Kinyua went to the house she was sleeping. He used his male organ to urinate into her genital organ and she screamed for help and PW3 went to help her. PW5 corroborated the issue on penetration in that he testified that on examination, the vaginal region had a tear on the lower side laterally and the hymen was torn. He proceeded to state that the complainant had a yellowish discharge and further, she was diagnosed to be suffering from severe UTI post sexual assault. The P3 form indicates that the hymen was broken and not freshly broken. PW2's evidence was consistent with that of PW3 to the effect that as he was sleeping in the boy's house, he heard the complainant screaming and when he went to the house, he found the appellant herein lying on the sister defiling her. In my view, it is quite evident that the complainant was defiled by the appellant whom she said was known to her which evidence was corroborated by that of PW2 who found the appellant lying on top of the complainant defiling her. It was the evidence of PW2 that he told the appellant to go away or else, he would shoot him with an arrow but the appellant pleaded with PW2 not to shoot him but he escaped leaving his pair of sandals under the bed.

14. The appellant has contested his conviction and sentence on the basis that he was charged using a defective charge sheet. He submitted that the date the alleged offence took place is noted as the night of 21st and 22nd December, 2016 while the appellant was apprehended on 13.01.2016. Further that, the date indicated at the top of the charge sheet is inconsistent with the date indicated in the section of particulars of the offence. The respondent in response to this submission stated that section 382 of the Criminal Procedure Code focuses not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. Reliance was made on the case of *http://kenyalaw.org/caselaw/cases/view/101881/ Samuel Kilonzo Musau v Republic http://kenyalaw.org/caselaw/cases/view/101881/* Criminal Appeal No. 153 of 2013. In that regard, I find that the appellant's concern is baseless since the alleged date at the corner that he is referring to, denotes the date he was taken to court while the date in particulars of offence denotes the date the alleged offence took place. Nonetheless, it has been held that Section 382 of the Criminal Procedure Code insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. [See *George Njuguna Wamae v Republic,* CR. APP. No. 417 of 2009). In *Samuel Kilonzo Musau v Republic,* Cr App. No. 153 of 2013, the Court of Appeal declined to interfere with a conviction where the appellant was charged with "defilement contrary to section 8(1) (2) of the *Sexual Offences Act*" instead of "defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*", after finding that he had suffered no prejudice. In light of the above, the appellant herein has failed to show how he was prejudiced.

15. On ground two, the appellant submitted that PW2, KN was never subjected to voire dire since he was a child at the time of testifying. Reliance was made *inter alia* on the case of *Patrick Kathurima v Republi*c (2015) eKLR. The appellant submitted that the competency of the witness ought to have been tested first before being allowed to testify. In the case of *Patrick Kathurima* (*supra*), the Court of Appeal after reviewing case law on the subject observed thus:-

> " It is best though not mandatory in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in *Regina v Compell* (Times) December 20, 1982 and *Republic v Lalkhan*

[1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

16. On account of the above observations, the court in the *Kathurima case* arrived at the conclusion that the minor's evidence in that appeal had wrongly been received and therefore vitiated the prosecution's case which stood or faltered on the said minor's evidence. Further that, the minors evidence which had formed the back bone of the prosecution case was riddled with contradictions and on that account allowed the appellant's appeal in its entirety.

17. However, it is of importance to note that, there is no hard rule laid down in the *Kathurima case* (supra) that in all cases where voir dire procedure has not been properly administered before reception of a minor's evidence, the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

> " It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded..."

18. In this case, PW2, KN, gave sworn evidence and the record shows that the appellant was given an opportunity to cross examine the witness but he had no questions for the witness. The court record further notes that the appellant made an application to have PW1 recalled which request the court granted. It is clear that the appellant was given a chance to cross examine the witness in question but he replied that he had no questions for him. Further, at the time when the trial court went on transfer and a new trial magistrate took over, the court explained to the appellant the provision of Section 200 and he opted to have the case proceed from where it had reached. In that regard, the appellant cannot be heard to say that he was never given an opportunity to recall the said witness.

19. The appellant further submits that it would have been worthwhile if medical examination was done to link him with the PW1 on the alleged offence. Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of the Court of Appeal abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved. In *George Kioji v Republic,* Cr. App. No. 270 of 2012 (Nyeri), the Court of Appeal expressed itself thus, on proof of commission of a sexual offence:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."
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> [See also *Kassim Ali v Republic*, Cr. App. No. 84 of 2005 and *Jacob Odhiambo Omumbo v Republic,* Cr. App. No. 80 of 2008 (Kisumu].

20. It is important to note that even the complainant's evidence is enough to return a conviction as long as the trial court finds the witness truthful.[ See *Sahali Omar v Republic* [2017] eKLR].

21. Further, the appellant submitted that his defence and mitigation were never considered and in the end, this court should review the trial court's decision and quash the conviction and sentence meted out on him. The trial magistrate in his judgment recognized the fact that he carefully reviewed the evidence on record in it's totality and in the end, he was satisfied that the prosecution proved its case beyond any reasonable doubt. In the same breadth, the court record notes that the appellant herein was given a chance to mitigate and during which, he stated that he had a child living with a disability and that he is the one who takes care of the child. The court noted that the appellant's mitigation was considered and as such, a judgement was pronounced based on all the facts and evidence presented before the trial court. As such, the appellant cannot be heard to say that his mitigation and/ or defence were never considered. Further, the prosecution witnesses gave sufficient evidence against the appellant herein.

22. Although not challenged directly that the sentence meted out by the trial court was harsh, the appellant did submit that the sentence should be quashed and set aside. Section 8 (2) of *Sexual Offences Act* stipulates that 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.

23. The complainant herein was aged eight years at the time the offence was committed. The trial court sentenced the appellant to serve 30 years imprisonment. It is thus clear that the court exercised its discretion in sentencing and in doing so meted out the appropriate sentence and which is lawful. As such, it is my view that in the circumstances of the case, the sentence cannot be said to be excessive and/ or harsh. The appellant did not satisfy and/or prove as to any of the grounds as were pronounced in *Bernard Kimani Gacheru v Republic* [2002] eKLR.

24. It is my view, therefore, that the prosecution proved the elements of the offence of defilement and the trial court was right in convicting the appellant of the same. I hereby dismiss the appeal and uphold both the conviction and the sentence.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF APRIL, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent