Okumu v Republic (Criminal Appeal E028 of 2021)
[2022] KEHC 10829 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E028 OF 2021

RE ABURILI, J

MAY 31, 2022

BETWEEN

BENJAMIN ANGANGA OKUMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence delivered by the Hon. S. Mathenge on the 30.11.2021 in the Principal Magistrate's Court in Bondo Sexual Offence Case No. 70 of 2020)

JUDGMENT

Introduction

1. The appellant herein Benjamin Anganga Okumu was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the charge are that on diverse dates between May 1, 2019 and August 29, 2020 at around night hours at [Particulars Withheld] village in Ramba sub-county within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of SA a child aged 15 years. 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* No 3 of 2006.The appellant denied committing the offence.

3. The trial magistrate after considering the evidence presented by the five prosecution witnesses called as well as the defence given by the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict the appellant and subsequently sentenced him to 20 years' imprisonment.

4. Aggrieved by the trial court's conviction and sentence imposed, the appellant filed his petition of appeal on the December 7, 2021 setting out the following grounds:

    1. That I pleaded not guilty to charges.

2. That the prosecution did not prove its case beyond reasonable doubt.

3. That the trial magistrate ignored the testimony of medical officer during trial.

4. That I confirmed to the court that I was just fixed by my mother –in- law due to grievances we had over dowry.

5. That PW1 who is fifteen years at age did not clearly say when and where her case of abortion was conducted.

6. That the medical officer did not confirm whether there was penetration.

7. That the trial court did not consider the chronology of events that took place before the allegation of defilement came up.

8. That the trial court relied on the evidence of PW1 only.

9. That I wish to adduce more grounds after getting proceedings from the trial court.

5. The parties canvassed the appeal through written submissions.

The Appellant's Submissions

6. The appellant submitted that it was the prosecution's burden to prove that the complainant procured an abortion whilst in the company of the appellant and that failure to do so should have been decided in favour of the appellant. The appellant further submitted that there was no evidence of penetration as the medical evidence adduced did not show that the complainant was penetrated.

7. The appellant further submitted that the charge sheet against him was defective in form and nature as the particulars of the charge failed to disclose that the act was unlawful and as such the appellant's right to a fair trial were violated as he was not able to prepare for his defence.

8. It was submitted that the meting out of his sentence was due to the fact that the trial magistrate's hands were tied by the mandatory minimum provided in law which prevented the trial magistrate from considering the circumstances surrounding the case before her given that the appellant's conviction was on the basis of a single identifying witness without corroboration.

9. The appellant submitted that his defence was not considered or the fact that the appellant was a first offender, a father of seven kids whose future would be ruined by long incarceration.

The Respondent's Submissions

10. It was submitted that the age of the complainant was proved through the provision of baptismal card and birth certificate produced as exhibits 1 and 5 respectively that showed that the complainant was born on November 8, 2004. Reliance was placed on the case *Francis Omuroni v Uganda* where the Ugandan Court of Appeal stated interalia that in absence of medical evidence of age, the same may be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

11. On penetration, it was submitted that the same was proved as PW1 gave graphic details on how she was defiled and even impregnated at one time before procuring an abortion and that her evidence was corroborated by PW2 and further that PW5 observed that the hymen was broken.

12. On identification of the perpetrator, the respondent submitted that the appellant was the complainant's father and therefore the issue of mistaken identity did not arise.

13. Accordingly, the respondent submitted that it proved its case beyond reasonable doubt, proving all ingredients of the offence of defilement. It was further submitted that the evidence of the medical officer was clearly analyzed and further that the delay in reporting the case was sufficiently explained.

14. The respondent further submitted that the complainant could not be faulted for being unable to remember where she was taken to procure an abortion.

Analysis

15. This being a first appeal, this court must reassess and reanalyze the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that it did not have the opportunity to hear and see the witnesses as they testified hence give an allowance for that. This principle was espoused in the case of *Okeno V Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [1957] EA 570). It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* 1978) EA 424."

16. The evidence presented before the trial court was as follows: The complainant, SA testified as PW1. She was taken through a voire dire examination and found understanding of the nature of an oath and was thus sworn. It was her testimony that she was 15 years old as she was born on November 8, 2004 and was in class 8. PW1 testified that she knew the appellant who was her father. She further testified that in May 2019 at about 5pm whilst she was watching TV in the sitting room, her father returned from Ndori and sat next to her and started caressing her, touching her breasts and vagina while telling her not to tell anybody after which he left the house and returned after a few days.

17. She further testified that her father found her watching TV, whilst she was dressed in her school short, touched her hand and took her to the bedroom, undressed her, told her to keep quiet, then slept with her taking off her clothes and putting his penis into her vagina. She stated that it was about 6pm and there was nobody else in the house.

18. PW1 further testified that after two weeks she went to school where she developed headaches and stomach pains and the head teacher then sent her home to seek treatment. She stated that when her mother, MA got home, she informed her so together with her father they took her to hospital. She stated that her mother took her to a hall in Akala where people procured abortions and the doctor there inserted a metallic item into her vagina and pressed it then blood started oozing out.

19. The complainant testified that the doctor removed a lot of blood but did not show her after which he spoke to her mother. She further testified that on their way she had stomach pains and bled and when they reached home her mother told her father what had happened and from that day she was not in good terms with her father.

20. PW1 testified that on August 29, 2020, at about 6pm, she was cleaning dishes, when her father called her to his bedroom, slapped her then undressed her, took his penis and inserted it into her vagina, took a black cloth and covered her face. She stated that her father finished and left her on the bed then she went and took a shower where she saw white discharge from her vagina.

21. It was her testimony that on the September 4, 2020 she had gone to plant vegetables with her father when two people who she learnt were police officers from Ndori Police Station came and took her father with them then they returned and took her and interrogated her and she revealed that her father had defiled her. She stated that she was taken to Kisumu Jaramogi Oginga Odinga Teaching & Referral Hospital where she was examined and a P3 form filled.

22. In cross-examination, PW1 denied that her grandmother wanted to keep her away from the appellant. She stated that she was afraid of telling people because of the threats that the appellant had made to her though she was not aware that he had been arrested for defiling her. She stated that MA was the one who had reported the defilement. She also stated that they were both not taken to hospital at the same time.

23. PW1 denied that she had a boyfriend or that the teacher had summoned the appellant to school about it. She stated that her abortion took place in a house next to the road and not in a hospital.

24. PW2 MA, a minor aged 14 years old was taken through a voire dire and found understanding of the nature of an oath and thus competent to give a sworn statement. She testified on oath that the appellant was her father and that on August 30, 2020 at 1430hrs she was at Kitambo School where visitors had gone to teach them about protecting themselves from bad people and she was found crying and on interrogation, she revealed to them that her father had been defiling her.

25. She testified that she was taken to a girls' help centre in Kisumu, COFAS, where she told them about the defilement and when they asked her about her sister MA, she informed them that her mother had informed her that their father had impregnated her said sister. She testified that on the 2nd she had gone to water vegetables with her younger brother TB Blair who told her that he had once found her father and sister MA naked and her father told him not to tell anyone what he had seen.

26. PW2 testified that the following day, she was taken to Ndori police post where she recorded her statement after which she was taken to Russia Hospital in Kisumu. PW2 testified that she had one sister MA who had since changed her name to SA

27. In cross-examination, PW2 testified that nobody took her form home to hide her in Homabay. She stated that she had visited Agape twice and that the first time she did not remember where she had come from. She testified that other than what her mother told her she did not know anything about the complainant. She further stated that her mother left when she was 2 months old and that nobody told her the appellant had refused to bury her mother.

28. PW3 Martin Oloo, a programmes director at KOFAS and organization involved in the rescue of abused girls testified that on September 2, 2020 at about 1200hrs, 2 officers from impact programme went to their offices with a girl called M whom he interrogated. He testified that the girl alleged that her father had defiled her severally and that he was also defiling her older sister, S.

29. He further testified that he took her to Jootrhgender-based-violence recovery centre where they were given a vehicle to go to Ndori Patrol base where she was interrogated, her P3 and PRC forms filled. It was his testimony that at the police station where M was interviewed, they went to her home and returned with S and that they also had the children's father, the appellant herein arrested. He testified that they took the 2 girls to Kisumu and S toJootrh where she was examined and treated.

30. In cross-examination, PW3 stated that S did not go to report to them. He stated that M had run away from home severally due to the trauma of the appellant defiling them. He stated that M had registered in a programme Mwendo where she had informed one of her facilitators that her father normally defiled her and that she feared her father would kill her for revealing this.

31. PW3 further stated that he was not aware that M. had been taken to stay in another house. He stated that it was not important if she slept with other men but that she reported that the appellant had been defiling them. She further stated that she was not aware if S.had returned home as she was taken by Agape to her grandmother in Sondu. He stated that the doctor confirmed that she was defiled and further that the girl categorically stated that the appellant defiled her.

32. PW4 No 1xxxx2 PC Patrick Musyoka of Ndori Patrol Base, the investigating officer testified that on September 5, 2020 at 1pm, a case of defilement was reported by S a child aged 15 years claiming that she had been defiled by her father. He testified that the complainant stated that she was first defiled on the May 1, 2019 and again on the August 29, 2020 and further that on May 1, 2019 she conceived after defilement and her father instructed the girl's stepmother to help her procure an abortion. He testified that the complainant further reported that on the August 29, 2020 her father took her into the house and defiled her after covering the mouth.

33. PW4 testified that he issued the complainant with a P3 form that was filled at Jootrhafter which he recorded witness statements. He stated that he recovered a birth certificate and baptismal card which he produced as exhibits PEX 5 and 1 respectively. It was his testimony that the appellant had another similar matter and that so he arrested the appellant in court on the September 10, 2020. PW4 further testified that the complainant identified the appellant, her father, as the person who had defiled her.

34. PW4 testified that he investigated the abortion issue but the complainant was unable to identify the place and person who did the abortion but only remembered that it was at Akala market and that she was taken there by her step-mother.

35. In cross-examination, PW4 stated that he arrested the appellant in court where he had another defilement case relating to his daughter. He further stated that for the 1st arrest, they found the appellant in the farm with the complainant. He stated that PEX1 and 5 helped them establish the age of the complainant and that PW2 was the complainant in the other file and she was the one who reported that the appellant had defiled her and her sister. PW4 further stated that he did not take the appellant to hospital as no law required him to do so and further that the complainant was able to identify the appellant as the person who defiled her.

36. PW5 Dr Lucy Ombok testified that she filled the complainant' s P3 form, a 15 year old girl who reported that her father forced her into his bedroom and defiled her while he blind folded her. She testified that the complainant said that it happened severally.

37. PW5 testified that on examination, the complainant was fine and calm and that on examination of her genitalia she noted that she had normal external genitalia with a broken hymen. She testified that there was no discharge or blood present and that there was probable sexual penetration. She stated that she signed the P3 form on September 8, 2020 and produced it as PEX2, PRC form as PEX3 and the attendance card as PEX4.

38. In cross-examination, PW5 stated that at the time she examined the complainant, the complainant was not expectant. She further stated that she was not able to establish if the complainant had committed an abortion or not but that she found evidence that she had been defiled though she could not determine when exactly she was defiled.

39. Placed on his defense, the appellant testified on oath and stated that on the August 4, 2020 he was in the farm planting tomatoes and kales when two police officers from Ndori Police Station went and informed him that he had been summoned to the chief's office. It was his testimony that in the police car was M his daughter.

40. The appellant testified that the police also asked to leave with his other daughter who was with him in the farm and that the police asked her if she had been defiled or if she was pregnant but the girl answered in the negative. He stated that the children's mother abandoned them and that the case was being pushed by the Children's office. The appellant denied knowing anything about the charges brought against him and stated that his mother-in-law warned him that he would never get the children.

Determination

41. I have considered the evidence adduced before the trial court, the grounds of appeal and the rival submissions for and against this appeal. In my view, the main issues for determination re whether the prosecution proved its case against the appellant beyond reasonable doubt; whether the charge sheet brought against the appellant was defective and whether the appellant's sentence was justified.

42. This being a case for defilement what was to be proved are the ingredients of the offence of defilement. In the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

43. The issue of identification of the perpetrator is not in doubt and neither has it been subject of challenge in this appeal. The appellant was the complainant's father and the complainant was firm in her testimony that it was the appellant who defiled her.

44. Therefore, the two other essential elements that must be proved beyond reasonable doubt to sustain a conviction for the offence of defilement under these provisions of section 8(1) and (3) of the *Sexual Offences Act* are the act of penetration and the age of the victim.

45. Regarding the age of the complainant herein, the prosecution produced the birth certificate issued on January 9, 2020 indicating that the victim was born on November 8, 2004.This was produced in court as PEX 5. In addition, a baptismal card showing the same date of birth was produced as PEX1. It follows that the complainant at the time of alleged violation by her father the appellant herein was aged 15 years old. Iam therefore satisfied that the prosecution proved the age of the complainant herein beyond reasonable doubt, to be a minor aged 15 years hence falling within section 8(1) of the *Sexual Offences Act*.

46. The next element to be proved beyond reasonable doubt is that of penetration. "Penetration" is a term of art and is defined under Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

47. The key evidence relied by the prosecution in rape and defilement cases in order to prove penetration Is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer.

48. The complainant herein though a minor was very clear and detailed that it was the appellant who defiled her. She recalled to court the intricate events of the offence perpetrated by the appellant and was firm in cross examination. She stated how at first upon being defiled by her father, she went to school and felt sick and that she was led by her step mother to a hall in Akala where an object was inserted

into her vagina and a lot of blood came out of her and she learnt that she had become pregnant and an abortion had been procured.

49. The law still requires corroboration of evidence by minors as is clear from section 124 of the *Evidence Act*. However, a proviso to that section is that there need not be corroboration if the trial court believed that the minor told the truth and recorded its reasons. The trial magistrate relied on that proviso to hold that there was no need for corroboration in this case. The section provides:

> " 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 proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence 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 offence, 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."

50. In this case since the complainant was a minor, the evidence of the Doctor is key so as to corroborate such testimonies. I have critically analyzed the evidence of PW5 the doctor who testified that on examination of the complainant's genitalia, she noted that the minor had normal external genitalia with a broken hymen. She testified that there was no discharge or blood present and that there was probable sexual penetration.

51. More corroboration on the complainant's testimony was offered by PW2, her sister who testified that she learnt that the appellant had similarly been defiling the complainant herein just as he had been defiling PW2.

52. Compared against the evidence of PW1, PW2 and PW5 was the appellant's testimony in which he denied the occurrence of the offence and stated that the complainant's grandmother wanted to take away the children from him. I have considered that defence as against the evidence of the prosecution witnesses and I am unable to find any truth in the appellant's denial. I further do not find any reason why the children of the appellant herein, PW1 and PW2 who were aged 15 and 14 years respectively could have framed him with such a heinous offence. The allegation that their grandmother wanted to have the children or that the case was being pushed by the Children's Office is neither here nor there as the mandate of the Children's Officers and of any and every citizen is to protect the interests and welfare of children s the latter are vulnerable beings.

53. In this case, I find that even if the appellant had not offered any defence, the evidence adduced by the prosecution witnesses was more than sufficient to sustain the conviction of the appellant with the offence charged.

54. The complainant's testimony was corroborated by that of PW2 who had also been defiled by the appellant and further, the P3 form produced as PEX2 as well as the PRC form produced a PEX3 all provided that an examination of the complainant's vagina revealed penetration and since the offence had taken place on several occasions, at that time of discovery, the external genitalia appeared normal but with a broken hymen. It is my finding therefore that this element of the offence which is penetration was proved beyond reasonable doubt.

55. Although the appellant claims that his defence was not considered, the trial magistrate at paragraphs 18 and 19 of her judgement adequately considered the appellant's defense and found it to be an

afterthought that was devoid of merit and a denial. I agree with the trial magistrate as the appellant's defence was a mere denial in my view, does not create any alibi or offer up any alternate explanation in light of the evidence presented by the prosecution.

56. Accordingly, it is clear from the analysis above that the prosecution proved its case against the appellant for the charges brought against him of defilement beyond reasonable doubt.

57. The appellant submitted that the charge sheet against him was defective as the particulars of the charge therein failed to disclose that the act was unlawful and that this affected his ability to prepare his defence.

58. The offence of defilement is provided for under section 8 of the *Sexual Offences Act* in the following terms, limiting myself to section 8(1)(3):

> " 8. Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ...
>
> (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 ..."

59. The Charge Sheet against the appellant was drafted as follows;

Charge: Defilement Contrary to Section8 (1) as read with Section8 (3) of the*Sexual Offences Act* No 3 of 2006.

> Particulars: Benjamin Anganga Okumu: On the diverse date between May 1, 2019 and August 29, 2020 at around night hours at [Particulars Withheld] village in Ramba sub-county within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of SA a child aged 15 years.

60. According to section 8, where the victim of the offence is aged fifteen years, the applicable subsection would be (3), and the charge that the appellant faced was said to be brought under section 8(1), which defines the offence, as read with section 8(3), which prescribes the penalty.

61. The particulars are also clear, that on a particular date and at a particular place, the appellant intentionally caused his penis to penetrate the vagina of PW1, who was aged fifteen years at the time. It is not alleged that the act was unlawful, but the omission of the word "unlawful" is not fatal as the act of penetrating a minor is unlawful ipso facto. The courts have held as much, and the effect is that it need not be pleaded in the charge, that the penetration was unlawful. There is, therefore, no foundation to the allegation that the charge that the appellant faced at the trial court, was defective.

62. Finally, the appellant submitted that the meting out of his sentence was due to the fact that the trial magistrate's hands were tied by the mandatory minimum provided in law which prevented the trial magistrate from considering the circumstances surrounding the case before her given that the appellant's conviction was on the basis of a single identifying witness without corroboration.

63. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term of not less than twenty years. It is thus clear that at the time of passing the

sentence, upon the appellant herein, the Learned Trial magistrate had her hands bound by the strict sentences provided under the *Sexual Offences Act*.

64. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.

65. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis.

66. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence fails to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the *Constitution*. See the decisions in *Christopher Ochieng v Republic* KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No 93 of 2014 [2019] eKLR

67. However, the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR clarified the position and stated interalia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*.

68. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful unless otherwise changed and therefore any sentence to the contrary is illegal. In addition, the recent decision by Odunga J in Machakos High Court is persuasive and not binding on this court.

69. Further, the circumstances of this case are so grave that they warrant a harsh punishment considering the appellant who was the biological father of the complainant and was in a position of authority to the complainant, as her father, abused the said authority and caused untold harm and trauma on the complainant who had to be rescued from further harm.

70. The appellant was also adamant according to the presentence report claiming that he did not commit the offence and alleging that he had been fixed because he had not paid dowry. He was therefore not remorseful at all. He was reported to be a threat to the life of the minor who lived in fear and that even his own mother threatened the minor and her caregiver.

71. The upshot of the above is that I find and hold that the instant appeal lacks merit. I dismiss it and uphold the conviction and sentence imposed on the appellant by the trial court. I however order that the sentence imposed on the appellant shall be calculated from the date of his arrest on September 4, 2020 as per the charge sheet.

72. I so order. File closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 31ST DAY OF MAY, 2022 (VIRTUALLY-APPELLANT PRESENT AT KISUMU MAXIMUM PRISON)

R.E ABURILI

JUDGE