RN v Republic (Criminal Appeal 45 of 2019)
[2022] KEHC 11267 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 45 OF 2019

F GIKONYO, J

MAY 31, 2022

BETWEEN

RN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((From the conviction and sentence of Hon. A. N. Sisenda (R.M) in Narok SOA No. 104 of 2018 on 3rd December 2019))

JUDGMENT

1. The conviction of the appellant on December 3, 2019, for defilement contrary to section 11(1) of the *Sexual Offences Act* (count I), and assault contrary to section 251 of the *Penal Code* (count II), and sentence to 20 years' imprisonment and one year's imprisonment, respectively, aggrieved the appellant.

2. He filed undated memorandum of appeal on December 16, 2019. But, in his written submissions he filed 5 amended grounds of appeal as follows;

    i. That the learned trial magistrate erred in law and fact in failing to find that the age of the complainant was not conclusively proved.

    ii. That the learned magistrate erred in law and facts in failing to find that penetration as a crucial ingredient of the offence of defilement was not proved beyond reasonable doubt.

    iii. That the learned magistrate erred in dismissing the appellant's defence which was strong and unchallenged.

    iv. That the learned trial magistrate erred in awarding harsh and excessive sentence.

3. The matter was canvassed by way of written submissions.

Appellant's Submissions

4. In his submissions which have been analyzed below, the appellant relied on the following authorities;

   i. *John Otieno Obwar v Republic* High Court Criminal Appeal No 34 'B' of 2010.

   ii. *Abduba Gatana Wako v Republic* [2013] eKLR.

   iii. *Kaingu Elias Kasomo v Republic*, Malindi Criminal Appeal No 504 of 2010.

   iv. *Alfayo Gombe Okello v Republic* [2010] eKLR.

   v. *Folkes v Chadd* (1782) 3 Doug KB 157.

   vi. *R v Turner* [1975] All ER 70.

   vii. Article 29 (a) and 50(4) of the *Constitution*.

   viii. Section 77 of the *Evidence Act*.

   ix. *Elijah Njihia Wakianda v Republic* [2016] eKLR.

   x. Machakos Criminal Appeal No 60 of 2014- *Julius Kioko Kivuva v Republic*.

   xi. *Elias Kiamati Njeru v Director of Public Prosecution* [2015] eKLR.

   xii. *Ann Ekimat v Republic* [2014] eKLR.

   xiii. *Joseph Ndungu Kimanyi v Republic* [1979] eKLR.

   xiv. *PKW v Republic* [2012] eKLR.

   xv. *Wilson Kipchirchir Koskei v Republic* [2019] eKLR.

   xvi. *Philemon Koech v Republic* [2021] eKLR.

The Respondent's Submissions

5. The respondent supported its submissions which are analyzed below with the following authorities;

   i. *Ngao v Republic* (Criminal Appeal 5 of 2020) [2021] KECA 154 (KLR).

   ii. *Francis Korioko Muruatetu & another v Republic* Petition No 15 of 2015.

   iii. *Benard Kiptoo v Republic* [2021] eKLR

Analysis And Determination

Court's Duty

6. As a first appellate court, I will re-evaluate the evidence and make own conclusions, except, bearing in mind that I neither saw nor heard witnesses, thus, matters of demeanour are best observed by the trial court. See *Okeno v Republic* [1972] EA 32.

7. I have considered the grounds of appeal, evidence adduced in the lower court and the rival submissions of parties. I find the main issues for determination to be;

   i. Whether the prosecution proved its case beyond reasonable doubt.

   ii. Whether there was a grudge.

iii. Whether the sentence was manifestly harsh and excessive

Elements Of Offence Of Defilement

8. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* which provides:

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

9. The specific elements of the offence defilement arising from section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

1) Age of the complainant;

2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

3) The appellant caused penetration; positive identification of the assailant.

10. See the case of *CWK v Republic*, Criminal Appeal No 72 of 2013.

11. What does the evidence portend?

Age of the complainant

12. Defilement is a sexual offence against a child; so age of the victim is essential element. I should also state that, age of the child (victim) has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

13. A child is defined as a person under the age of eighteen years. was the victim herein a child?

14. The appellant submitted that the maker of the age assessment report ought to have been summoned to give facts upon which he based his opinion for the court to make a considerable opinion. PW6 -SGT Jackline Kemunto was not the maker or a medical practitioner.

15. The respondent submitted that the prosecution proved the age of the complainant beyond reasonable doubt. Complainant told court she was aged 12 years. Age assessment (P Exh 1) and P3 form indicated she was 12 years.

16. PW1 testified that she was aged 12 years and in class 4 at [particulars withheld] Primary School. PW6 an investigating officer stated that, upon age assessment, it was found that PW1 was 12 years old at the time. PW6 produced the age assessment report as P Exh 1.

17. Even if the age assessment report was not there, the evidence of the child and other witnesses proved that the vitim was a child aged 12 years. See the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR where it was held:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

18. It bears repeating that, the evidence adduced show, and I find the victim was 12 years old.

Penetration

19. The appellant submitted that the fact of penetration was not proved beyond reasonable doubt. That it was alleged that the appellant eloped with the complainant for 1 year but no complaint or report was made to the police. Lab tests for PW1was positive for HIV and negative for syphilis and other tests while that for the appellant was positive for syphilis but negative for other tests.

20. The respondent submitted that the prosecution proved penetration through *viva voce* evidence and medical evidence produced in court.

21. PW1 testified that in September 2016 the appellant; who at the time was a friend to her mother threatened both of them that he would cut them up and put them in a sack. At the time they were living at Olodroto. After threatening her he did 'tabia mbaya' after he had removed her biker and he proceeded to defile her in a forest near their home.

22. After a while he took her to [particulars withheld] where he stayed with PW1 for a period of one year. He forbade her from leaving the house and defiled her several times during that period. Her mother took her in 2018 after sending the appellant money. The appellant then beat up her mother and told her PW1 was her woman.

23. She further stated that on December 25, 2018 the appellant beat her mother, then took PW1 to a bushy place where he defiled her. After he had defiled her, he threatened to kill her if she revealed the same to anyone. He then locked her inside his house. When she was able to escape, she ran to PW2 and they notified the village elder leading to arrest of the appellant.

24. PW1'S testimony was corroborated by PW2 who confirmed that in 2016 the appellant had taken PW1 to Eor Ekule where he had turned her into his wife on December 24, 2018 at around 11 p.m. the appellant beat her and PW1. She was able to escape. She went and reported the incident at the village elder. She then sought treatment at the hospital.

25. PW2 testified that it was not the first time the appellant had defiled the girl. She stated that she had not reported to anyone as he used to threaten to kill her and PW1 if they even disclosed to anyone.

26. PW5-jacob Leshan, a clinical officer testified that he received PW1 on December 26, 2018. PW1 was wearing a green underwear that was stained with a discharge. On examining the genital, he noted that she had a bruise on one side of the vagina wall; it was swollen. The hymen was broken and long standing. There was whitish discharge. The lab tests confirmed that she was HIV positive and other tests were negative.

27. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

28. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

> " 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." (Emphasis added).

29. In light thereof, it is totally indefensible the argument by the appellant that the trial court misconstrued the evidence of PW5, Clinical Officer Jacob Leshan on penetration.

30. PW5 was very clear that penetration did occur. Notably the incident was reported late. However, this does not rule out penetration. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that since PW1 did not test positive for syphilis there is not a proof of penetration.

31. I find that the medical evidence supports there was penetration of the child. But by whom?

Was The Appellant The Perpetrator?

32. The respondent submitted that the appellant was someone well known to the victim having co habited with her aunt (PW2) who had custody of her after her mother passed away. Therefore, there was no case of mistaken identity.PW3 and PW4 who knew the appellant and PW2 as husband and wife.

33. The appellant in his defence denied living with the minor but confirmed that he had lived with PW2. He stated that on December 25, 2018 he differed with PW2 and PW2 left.

34. PW1 testified that the appellant was a friend to her mother (aunt). The appellant had defiled her on several occasions from September 2016 up to December 24, 2018 even claimed the appellant claimed PW1 was his woman. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

35. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

36. In the upshot, I find that the appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

Of Causing Actual Bodily Harm

37. According to section 251 of the *Penal Code*: -

> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

38. The essential elements of the offence of assault causing actual bodily harm are;

    i. Assaulting the complainant or victim,

    ii. Occasioning actual bodily harm.

39. See the case of *Ndaa v Republic* [1984] KLR

40. I have carefully evaluated the evidence adduced by the prosecution witnesses. The appellant was known to the complainant; his identification was by recognition

41. Of actual bodily hurt or injury, in *Rex v Donovan* [1934] 2 KB 498, Swift, J stated: -

> " For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

42. See also *R v Chan-Fook* [1994] 2 ALL ER 557, paragraph D Lord Hobhouse, LJ said: -

> " We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."

43. Also relevant is a passage in *Archbold's Criminal Pleading, Evidence and Practice*, 32nd edition, page 959 where it is stated as follows: -

> " Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor" (ie, complainant)

44. The prosecution must, therefore, show that the assault has resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus reus*)

45. The respondent submitted that the charge of assault was proved against the appellant beyond reasonable doubt.

46. PW1 and PW2 narrated the events of December 24, 2018 when the appellant assaulted PW2 causing her to flee and seek assistance from PW4 who noted that she had injuries on her body.

47. PW5 stated that he received PW2 on December 26, 2018 who was complaining of having been assaulted. He noted she had injuries on her left ear and she had been cut. Her clothes had blood stains. She had a tender left thumb. He produced p3 form and treatment notes as P Exh 3 (a) and 4 respectively.

48. The defence offered by the appellant is a mere denial and a make-up story that he that these cases were fabricated due to the fact that he had differed with PW2.

49. The evidence tendered by the prosecution that the appellant assaulted and caused actual bodily harm or injury to the complainant has not been controverted in any way. I find that the evidence tendered by the prosecution proved beyond reasonable doubt that the appellant is guilty of the offence of assault causing actual bodily injury. Accordingly, the conviction was well founded on evidence and I find no reason to fault the findings of the learned magistrate.

50. The upshot is that I find no merits in the grounds of appeal advanced by the appellant. I dismiss the appeal on conviction.

Whether There Existed A Grudge

51. The appellant submitted that there was a sour relationship between Alice and the appellant. The child was only used to fix the appellant.

52. The appellant simply testified that he had differed with PW2 which explains why they brought up the charges. I do not find anything which show that there was a grudge between the PW2 and the appellant. The defence is mere afterthought. I dismiss this ground of appeal.

On Sentence

53. The respondent submitted that the sentence passed by the trial court was just and fair considering the circumstances of the case. That considering all the aggravating factors in this case, the sentence passed upon the appellant was quite lenient and urged this court to affirm the sentence passed by the lower court.

54. The trial court applied section 8 (3) of the *Sexual Offences Act* to convict. The section provides:

> " 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."

55. The offence is serious. I take into account that the accused is first offender. I also take into account that he showed remorse at the trial as was observed by the trial court. In the circumstances, 20 years' imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

56. In the upshot, the appeal herein is dismissed.

Section 333(2) CPC

57. The appellant submitted that the trial magistrate did not exercise discretion given mandatory nature of the sentence of the offences under section 8(1) (3) of *SOA* and did not take into account time spent in custody.

58. I have perused the trial court record and found that the appellant was first arraigned in court on December 28, 2018. The sentence will run from the date he was first arraigned in court; December 28, 2018. It is so ordered

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF MAY 2022.

F GIKONYO M

JUDGE

In the Presence of:

1. The appellant.

2. Ms Torosi for respondent.

3. Mr Kasaso - CA.