Mutai v Republic (Criminal Appeal 155 of 2019)
[2022] KEHC 11582 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL 155 OF 2019

EKO OGOLA, J

MAY 25, 2022

BETWEEN

ISAAC KIPKURGAT MUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Principle Magistrate Criminal Case No 5045/2018 delivered on October 3, 2019 by Hon P W Wasike R M)

JUDGMENT

1. 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*. The particulars of the charge are that on May 2, 2018, at Kibwareng location, within Nandi County unlawfully did cause his penis to penetrate the vagina of RJ, a child aged 14 years.

2. He was charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the charge are that on May 2, 2018, at Kibwareng location, within Nandi County unlawfully did cause his penis to penetrate the vagina of RJ, a child aged 14 years.

3. The trial court found the appellant guilty of the first charge and sentenced him to 20 years' imprisonment. Being dissatisfied with the decision of the court the appellant filed the present appeal vide a petition of appeal filed on October 11, 2019 on the grounds that;

    a. The appellant pleaded not guilty at the trial.

    b. The trial magistrate erred in both law and fact by convicting him on prosecution witnesses that were inconsistent.

c. The trial magistrate erred both in law and in fact in failing to observe and consider the provisions of the *constitution* and even his fundamental rights were violated under article 50 (g) (i) (k) (j).

d. He was not given adequate time to defend himself

4. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down 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) E A 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] E A. 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) E A. 424."

5. PW1 was put through a voire dire examination and the court established that she understood the nature of an oath. She testified that on May 2, 2018, between 4pm to 5pm she was at home preparing vegetables in the kitchen. A person she knew entered the house. She pointed to the accused and identified him as the person who entered the house. He entered the kitchen and had an axe in his hand. He asked her her age and she did not answer. He then threw her to the ground and removed her inner clothes. He pulled his pants down to his legs and pulled her dress up and did 'tabia mbaya' to her. She felt pain in her stomach and described his private parts, stating that he put his private parts into hers and she felt pain in her stomach and the place she used for urinating (her private parts). She screamed and her brother, Matthew Kipleting went into the kitchen. The accused then ran out of the kitchen and her brother followed him.

6. PW1 was later taken to hospital where she filled a P3 form. The outpatient record and the P3 form were produced as PMFI-1 and PMFI-2 respectively.

7. PW2, Matthew Kipleting, testified that he was at home on May 2, 2018 studying with his smaller brother. His sister, the complainant, was in the kitchen preparing vegetables. His younger brother Obadiah went out and came back into the house saying he heard someone screaming in the kitchen. They both went to the kitchen and found the accused sleeping on top of the complainant. They were having sex and he had inserted her penis in her vagina. He took an axe that he saw in the kitchen and asked the accused to stop. The accused snatched the axe and escaped with PW2 in pursuit. When their mother came home, they reported the incident and the complainant was taken to the hospital the next day.

8. PW3, Leah Cheptoo, testified that on March 2, 2018 she had gone to the poshomill at 4pm and when she returned home, her son Matthew told her that a boy came and held her daughter, the complainant. He said it was Isaac, who she knew as a neighbour. She reported the same to the assistant chief and they went to the hospital the next day. The doctor said the complainant had been raped. The incident was reported to Kobujoi police station.

9. PW4, Joan Chelagat, was a clinical officer based at Kaptumo hospital at the time of the offence. She produced treatment notes for PW1 and testified that the complainant was a minor aged 13 years. Upon

vaginal examination he saw that her hymen was broken, she had pain in her vaginal walls and a brownish discharge which was secondary to penetration. He filled her P3 form and the same was produced as P-Exh 2.

10. PW5, John Kiketer Rotich, the assistant chief from Mogiywo sub location testified that at 8.30pm on May 2, 2018, PW3 reported to him that her daughter had been defiled by the accused. On the next day he went and arrested the accused and handed him to the police at Kobujoi police station. The accused was known to him, and was a neighbour to the complainant.

11. PW6, Corporal Lillian Ochieng, the investigating officer in the case testified that on May 3, 2018, the accused was brought to the station by the assistant chief on the allegation that he had defiled the complainant. In her testimony she laid out the events as narrated by PW1 and stated that from the age assessment report the complainant was 14 years old. The age assessment report she referred to was P-Exh 3.

12. Upon the close of the prosecution case, the accused was put on his defence and he called two witnesses.

13. DW1, the accused, gave unsworn evidence to the effect that he did not defile the complainant. He testified that on the material date he was working at a neighbours' place splitting firewood. They worked until 5pm and even took tea. They then went to Peters' shop where they stayed until 7.30pm and he went home. The next morning the assistant chief went and took him to the police station and he was later brought to court.

14. DW2, Peter Kiplagat Sugut, testified that he was with the accused on the morning of March 2, 2018. They sold trees and split them after which they drank busaa until 4pm. He went home and left the accused. When he returned he found the accused with Cosmas. He then went back home and the accused returned later with Cosmas. They slept on the sofa until 6.30pm and then left for home.

15. On cross examination PW2 testified that they finished splitting firewood by 1pm. He went to take lunch at his place alone and returned at 5pm. Further, that he was not with the accused between 4pm and 5pm.

16. DW3, Cosmas Kemboi testified that he was with the accused on March 2, 2018 and they finished work at 2pm. They drank busaa as payment for the work done until 5pm. They then went to look for a phone at Peter's house and stayed there because of the rain. They slept on the sofa set and left at 7pm.

17. On cross examination PW3 testified they drank busaa and not tea as the accused had stated. He said he could not know everything that happened and he confirmed that he was drunk and did not wake up in the evening when they slept at Peters' house until it was time to leave.

18. The defence closed its case and the trial court being satisfied that the prosecution had proved its case beyond reasonable doubt found the accused guilty of the offence of defilement and sentenced him to 20 years imprisonment.

19. Being dissatisfied with the conviction and sentence, the appellant instituted the present appeal vide a petition filed on October 11, 2019.

Appellant's case

20. The appellant filed submissions on March 29, 2021.

21. It was the appellant's case that he was not given witness statements and this violated his right to a fair trial. Further, that the charge sheet was defective as the charge and the information on the particulars were not in agreement. The appellant submitted that the plea entered was invalid in nature as it was in

respect of the same charge. He submitted that it was wrong for the trial court to administer the trial process before advising the prosecutor to present the charge sheet correctly as this was a violation of section 214(1) of the *CPC*. In support of this submission, he cited the case *Suleiman Juma Alias Tom vs Rep* App 181(2002) CA where the court held;

> In charging a person the prosecution must be careful as the consequences of a conviction are serious care must be taken when dealing with draft of charges as it is the life of an individual at stake.

22. The appellant submitted that the evidence adduced was circumstantial in nature; that the magistrate and the prosecution thought brownish vaginal discharge meant penetration in the doctor's view. He questioned why a crucial witness such as Obadiah was not called to testify and cited the case of *Peter Gitau Munene v Rep* 364 (2006) HC Nairobi where the court held;

> ''In the present case with the evidence on record, I find and make that adverse inference that of the witnesses who were mentioned by the complainant as having responded to the screams were called to testify, their testimony would have been adverse to the case. Therefore, the conviction of the appellant cannot be safely sustained.''

23. The appellant submitted that there was no evidence that the sexual act occurred, and cited section 73 of the *Evidence Act* in support of his submission.

24. It was his case that PW4 had noted the last menstrual cycle of the complainant was in March 2018 and therefore the next cycle was on the day of the alleged incident. Further, he cited section 109 of the *Evidence Act* and the case of *John Wagner and Others v Rep*, Nairobi HCCR App No 406 (2006) where the court held;

> '' if a material element in evidence and one which must have been within the knowledge of the person giving evidence is demonstrably untrue, the value of the evidence as a whole is destroyed and cannot be relied upon.''

25. The appellant submitted that using the finger to prove penetration showed that the investigation methods used were inconclusive and unreliable. That PW5 did not demonstrate her qualifications as required by sections 43 and 49 of the *Criminal Procedure Code* and section 69 of the *Medical Practitioners' Act*.

26. On circumstantial evidence he cited the case of *R v Taylor Weaver & Donovan* (1928) 21 CR App R20 where the principles of circumstantial evidence were enunciated as follows;

> ''Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination is capable of providing a proposition with the accuracy if mathematics, it is no derogation of evidence to say that it is circumstantial.

27. He also cited the case of *Dhalay v Rep* (1995-1998) 1 EA 29 where the court held that;

> ''It must be such evidence which irresistibly points to the person accused as the exclusive perpetrator of the crime alleged and none other co-existing circumstantial evidence which would weaken the conclusion.''

28. It was the appellant's submission that there was no conclusive evidence that he defiled the complainant. The investigating officer failed to bring the complainant's clothes as evidence and did not visit the

scene. The prosecution evidence was full of hearsay, contradictions and inconsistencies. He prayed the appeal be allowed.

Respondent's Case

29. Ms Emma Okok, learned counsel for the State opposed the appeal and filed written submissions on November 2, 2021. She submitted that the appellant took plea on May 4, 2018 and was supplied with witness statements in court, and that the same is on record. On the alleged defective charge sheet, learned counsel submitted that the particulars in the charge revealed an offence known in law. The charge sheet was not defective.

30. On corroboration of evidence, learned counsel submitted that PW1 testified as to the events of the material date including the defilement. She described the sexual organs in her testimony. PW2 corroborated PW1's evidence and was categorical that he found the appellant having sex with PW1. PW4's evidence further corroborated PW1s evidence. After examining the victim, she concluded that there was evidence of penetration.

31. On the age of the complainant, learned counsel submitted that the age of PW1 was estimated by PW4 to be 13 years and her age assessment report produced by PW6, the investigating officer, showed her to be 14 years old. The respondent cited section 77 of the *Evidence Act* in response to the appellant's submission that he did not cross examine the medical officer who prepared the age assessment report. She stated that it was not mandatory for a medical practitioner to produce a report in person. The same can be produced by an investigating officer or another medical officer.

32. Counsel submitted that both PW1 and PW2 placed the appellant at the scene of the crime. The complainant identified the appellant in court as the man who defiled her and PW2 identified him by name as someone who he knew prior to the incident. He was also identified by PW3 and PW5. It was submitted that the appellant's defence was full of contradictions and was inconsistent as to where the appellant was between 4pm and 5pm. The inconsistency lends credence to the assertion by PW1 and PW2 that the incident occurred between 4pm and 5pm.

33. On the sentencing of the appellant, Ms Okok submitted that section 8(3) of the *Sexual Offences Act* gives the court discretion while sentencing the person. Looking at the circumstances of the case the 20 years' imprisonment imposed by the trial court was sufficient. Counsel urged the court to dismiss the appeal.

Determination

34. Upon reading the submissions and the petition of appeal, I have identified the following issues for determination;Whether the appellant was accorded a fair trialWhether the charge sheet was defectiveWhether the offence of defilement was provenWhether the sentence was excessive

Whether the appellant was accorded a fair trial

35. The appellant's bone of contention with regard to a fair trial is that he was denied access to witness statements. Upon perusal of the proceedings, I find no instance where the appellant raised the issue of witness statements. This is therefore a mere allegation with no proof.

Whether the charge sheet is defective

36. The Court of Appeal in *Yongo v Republic* [1983] KLR, 319 held as follows;

> " In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:
>
> (a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> (b) it does not, for such reasons, accord with the evidence given at the trial; or
>
> (c) it gives a misdescription of the alleged offence in its particulars."

37. In this case the charge sheet clearly states the offence and the particulars. The charge sheet corresponded with the evidence that was given during the trial. The appellant did not satisfy the threshold for a charge sheet to be found defective.

Whether the offence of defilement was proven

38. The appellant had raised a defence that he was at work on the material date. His two witnesses, DW2 and DW3, gave testimony that was contradictory and full of inconsistencies. DW2 admitted in cross examination that he was not with the accused from 4pm to 5 p.m. The appellant had stated that they drank tea whereas his witnesses were categorical that they drunk busaa. The inconsistency in their testimony coupled with the fact that they were drunk on the material date discredited the value of their evidence and hence this defence.

39. 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.

40. The appellant did not dispute the issue of identification. The age of the victim was proven to be 14 years vide an age assessment report which was not challenged by the appellant at the trial court. The appellant disputed the production of the age assessment report. However, I find that it was produced in line with section 77 of the *Evidence Act* and the court was satisfied with its authenticity. Section 77 of the *Evidence Act* provides;

> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

41. PW1's evidence with regard to the act of penetration was corroborated by PW2 who witnessed the defilement and PW 4, the clinical officer who examined her. I find that the trial court was correct in finding that penetration was proven.

Whether the sentence was excessive

42. Section 8 (3) of the *Sexual Offences Act* provides;

> (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.

43. The court has the discretion of sentencing the accused. The accused was given the statutory minimum sentence. While it is my view that minimum sentences in the penal statutes are unconstitutional, I am nevertheless satisfied that in the present case, I jail term of 20 years was reasonable, and this court will not interfere with the sentence.

44. The upshot is that, the appeal fails in its entirety and is herewith dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH OF MAY 2022

E K OGOLLA

JUDGE