Wafula v Republic (Criminal Appeal 45 of 2019)
[2022] KEHC 12614 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 45 OF 2019

CM KARIUKI, J

JULY 28, 2022

BETWEEN

KELVIN MULONGO WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from a judgment dated 25th day of November 2019 by Hon SN Mwangi SRM in criminal case No. 144 of 2018 at Nyahururu Chief Magistrate)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with section (4) of the *Sexual Offences Act* No. 3 of 2006 particulars being that on the 22nd day of October 2018 at [Particulars Withheld] Village, Mawingu Location within Nyandarua County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of SWN, a girl aged 16 years.

2. In the alternative count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 22nd day of October 2018 at [Particulars Withheld] Village, Mawingu Location within Nyandarua County, the Appellant intentionally and unlawfully touched the vagina of SWN, a girl aged 16 years.

3. The Appellant was found guilty of the principal count of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 15 years imprisonment.

4. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal based on 10 grounds of appeal, summarized as follows:-

5. That the trial magistrate erred in both law and fact by failing to find that the prosecution evidence did not prove that the Appellant caused his penis to enter the Complainant's genital organ.

6. That the trial magistrate erred in law and fact by failing to find that the prosecution did not medically connect the Appellant to the offence since the medical report indicated that the hymen was missing and old and there was no connection of the injuries to the offence.

7. That the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence adding that he did order for birth certificate of the Complainant to ascertain her age.

8. That there were glaring inconsistencies and material contradictions that could not sustain the charge facing the Appellant.

9. That the sentence meted was harsh under the circumstances.

10. The prosecution called a total of six witnesses in support of their case.

11. PW1 No. 2xxxxxxxx PC Antony Njane attached to Mawingu Police Post testified that he was at work on October 24, 2018 when he got information from the Chief, Kirima that a man had defiled child. He went to Kirima and found that the Chief had arrested the Accused (the Appellant herein) and rearrested him then proceeded to the Complainant's home and took her to Kanyariri Police Station.

12. PW2 No. 1xxxxx PC Joy Chebet attached to Olkalou Police Station performing investigation duties testified that she was assigned to investigate this case on October 25, 2018. That the Complainant said that she went to fetch water when she met the Accused who asked her about their love affair. That the Complainant was in the company of her 6 year old cousin. The Accused lured her into his house and when they got there, she was defiled by the Accused in another room while her cousin was left in the sitting room.

13. PW2 asserted that the Complainant said that she slept with him and that she was forced into that room. That the Accused removed her clothes and penetrated her private parts using his penis. After he finished, the Complainant was taken to the kitchen and she prepared supper. That the Accused told his friend to escort the Complainant's cousin home and he did so.

14. That at around 9pm, the Complainant's guardian Naomi Wanjiku accompanied by relatives and other villagers looked for the Complainant and found her cooking at the Accused's kitchen where he was employed. That she was taken to Dundori Health Center. The Accused was taken to Olkalou Police Station.

15. PW3, the Complainant testified that the Accused was her lover. That on October 22, 2018, her mother sent her to the river and that is when she met the Accused with another man herding goats. That they talked and then went to his house with her small cousin. That when it became late and dark she told the Accused that she wanted to go home but he refused and said that she had to sleep with him.

16. She testified that the Accused took the child to the sitting room then they had sex. That he removed her clothes and took his thing that is 'muti' and put it in her vagina. That it was not the first time. The Complainant asserted that it was not the first time she was having sex with him and that it was the second time.

17. The Complainant narrated that the Accused told her not to go home but looked for someone to take her cousin home. That as the Accused's friend was taking her cousin home, they met with the Complainant's aunt and he told her that the Complainant's was at the Accused's employer. That the aunt and others came for her and called the Chief and told him that she was raped.

18. The Complainant stated that she was taken to hospital the next day and that the Accused was arrested and they were taken to Kanyariri Police Post. That she recorded her statement by force and she did

not want to do so. She stated that she signed the statement by putting her thumbprint and was not forced to do so.

19. On cross examination, the Complainant stated that John was the one who defiled her and not the Accused and that she told the chief. On re-examination, she reiterated that the Accused did not force her and that she had agreed with the Accused.

20. PW4 NW, the Complainant's aunt testified that she sent the Complainant together with MN to fetch water. That when she did not come home, she went to the road to look for them and that is when she met with M and she told her that she had left the Complainant at the Accused's house. She called some neighbours and went to the house and found the Complainant in the sitting room.

21. She stated that she took the Complainant to Dundori Dispensary and that she also found out that a neighbour had reported the Accused to the Chief. She was then called to Olkalou Police Station to record her statement.

22. PW5 Dr. Alex Mwaura based at JM Memorial Hospital produced the P3 and PRC form. He stated that on examination the Complainant had no visible injuries on her body. She came to hospital 3 days after the incident. That no weapons were used and she had received treatment from a peripheral facility where she was given antibiotics, painkillers, emergency contraceptives pills and PEP administration.

23. He indicated that the Complainant had no injuries on her vaginal area and she had an old broken hymen. She had no children or use of contraceptives. She had changed her clothes and had not handed them to the police. She had gone for a long and short call and had taken bath. She had two tests done at Dundori Health Centre. The pregnancy test was negative and urinalysis showed no abnormalities detected. HIV test was negative.

24. PW6 Peter Muigai Wainaina testified on how the Accused was arrested and afterwards handed over to the police after receiving a report from the Assistant Chief that a girl had been defiled who was informed by one of the villagers.

25. During defence hearing, the Appellant gave unsworn evidence and did not call any witnesses. In his defence, he testified that on October 24, 2018 while at work his employer told him that the area chief wanted to talk to him. He went to where he was then they proceeded to a hotel. At the hotel the chief asked for his names and where he was from then PC Njane and another inspector handcuffed him and took him to Kanyariri Police Station and then he was transferred to Olkalou Police Station.

Respondent's Submissions

26. The respondent submitted that the Complainant was 16 years old at the time of the offence as evidenced by the PRC form. They relied on Rule 4 of the *Sexual Offences Act* (Rules of Court) 2014.

27. On proof of penetration, the prosecution asserted that the Complainant gave evidence that the Appellant used his penis to penetrate her vagina and did not use a condom during the act. That the evidence was corroborated by that of the doctor PW5 who produced the P3 form and the PRC form which indicated that the Complainant has an old broken hymen and that indicated penetration of her genitalia, vagina.

28. The prosecution stated that the Appellant was clearly identified by the Complainant and was well known to her prior to the offence.

29. In conclusion, the respondent reiterated that the prosecution evidence was free from error and that the Appellant's defence was full of mere denials. They asserted that all the ingredients of defilement were proved and urged the court to dismiss this appeal in its entirety because it lacks merit.

Analysis and Determination

30. Having considered the grounds of appeal herein against the record of appeal and submissions by both parties, the issue that falls for determination is as follows: Whether the prosecution proved the ingredients of the offence of defilement beyond reasonable doubt?

31. 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) 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)."

33. 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*.

> 8.Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. 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.
>
> 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.
>
> 4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

34. The key ingredients of the offence of defilement are proof of the age of the Complainant, proof of penetration and proof that the Accused person before court was the perpetrator of the offence. (See *George Opondo Olunga v Republic* [2016] eKLR.)

Age of the Complainant

35. The age of the Complainant is a question of fact to be proved by available evidence. In *Francis Omuroni v Uganda*, CRA 2/2000 it was held:

> " 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 a birth certificate, the victim's parents or guardian and by observation and common sense. ...."

37. The Appellant argued that the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence adding that he did not order for the birth certificate of the Complainant to ascertain her age.

38. PW4 stated that she was not the Complainant's biological mother but her aunt and that her parents had died. She indicated that the Complainant was left with her grandmother but when she fell ill, she took her in and that she did not have her birth certificate and didn't know when she was born. PW2 stated that the Complainant said she was born in 2002 but she said she had no proof of card.

39. PW5 the author of the P3 form and PRC form indicated in the forms that the Complainant was 16 years old. Under general appearance and behavior in the PRC form, he indicated that the Complainant appears younger than the stated age. In court he testified that it was the Complainant who had personally told her that she was 16 years old and he did not have any documents to prove her exact age and so he cannot say with certainty that she was 16 years old.

40. Notably, proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. The onus lied with the prosecution to prove the Complainant's age. (See *Eliud Waweru Wambui v Republic* [2019] eKLR)

41. In *Alfayo Gombe Okello v Republic* [2010] eKLR the court stated that: -

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on October 16, 2007 that... "This child in court is mine aged 14 years born in 1992...The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the Appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the Appellant. We so find."

42. Except for the Complainant stating that she was 16 years, her guardian i.e. her aunt did not offer any useful information but the evidence contained in the PRC form indicated her age to be 16 years when she was examined. PW5 went on to indicate that she appeared younger than that upon examination. It appears that PW5 assessed albeit not scientifically her apparent age to be 16 years old.

43. The Court of Appeal in *Evans Wamalwa Simiyu v R* [2016] eKLR held as follows in a similar case:

> " As to whether the Appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the Complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the Complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the Complainant was 12 years. We have anxiously considered the purport

of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the Complainant from his observation was 12 years. Thus, although the actual age of the minor Complainant was not established, the apparent age was established as 12 years."

44. In *Edward Mwikamba Gitonga v Republic* [2020] eKLR the court held that:-

> The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See Aroni, J in Kevin Kiprotich Amos alias Rotich vs. Republic - Criminal Appeal No. 89 of 2016.

45. Moreover, in *PMG v Republic* [2022] eKLR the court held that:-

> Therefore, although production of a birth certificate is important to help the court determine the correct sentence to impose, failure to produce one is not an automatic ground to acquit an Accused person if age is established through other means including parents giving the age of their child. Where in doubt, a court can order for medical examination in the course of the hearing to avoid a possible dilemma when sentencing in case of a conviction.

46. Similarly, in the case of *PMM v Republic* [2018] eKLR the court had this to say when a birth certificate is not produced in court;

> "What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the Complainant's age together with the combination of all other evidence available can be relied on to determine the age of the Complainant."

47. From the foregoing, I find that the trial court correctly analyzed the evidence and came to the conclusion that the Complainant 16 years of age. I also rely on the apparent age indicated in the PRC form i.e. 16 years old. Further, it is my finding that the trial magistrate's application of the proviso in Section 124 of the *Evidence Act* was appropriate in the circumstances. I must however highlight that in circumstance such as these it is always prudent and good practice for the trial court to order for a medical age assessment in order to clear any doubts as to the age of the parties.

48. The Court of Appeal, in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR regarding reliance on Section 124 of the *Evidence Act* to convict stated that:-

> As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an Accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

1. "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."

Penetration

49. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> " 'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

50. The act of sexual intercourse or penetration has therefore to be proved to sustain a charge of defilement. In order to prove that the act of penetration occurred the court relies in the Complainant's own testimony which is usually corroborated by the medical report presented by the medical officer as key evidence. In *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No. 35 of 1995, the court stated that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

51. In the case of *EE v Republic* [2015] eKLR the court expressed itself on the question of penetration as follows;

> The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the Complainant own testimony which is usually corroborated by the medical report presented by the medical officer.

52. Revisiting the evidence adduced in the lower court, the Complainant testified that she was sent to the river and that is when she met the Accused with another man herding goats. That they talked and then went to his house with her small cousin and when it became late and dark she told the Accused that she wanted to go home but he refused and said that she had to sleep with him.

53. She testified that the Accused took the child to the sitting room then they had sex. That he removed her clothes and took his thing that is 'muti' and put it in her vagina. That it was not the first time. The Complainant asserted that it was not the first time she was having sex with him and that it was the second time.

54. PW5 stated that upon examination, the Complainant had no visible injuries on her body. She came to hospital 3 days after the incident. That the Complainant had no injuries on her vaginal area and she had an old broken hymen. She had no children or use of contraceptives. She had changed her clothes and had not handed them to the police. She had gone for a long and short call and had taken bath. She had two tests done at Dundori Health Centre. The pregnancy test was negative and urinalysis showed no abnormalities detected. HIV test was negative. He also testified that there was presence of old broken hymen and concluded that there coercion or consent due to the lack of injuries indicating no violence was used.

55. The Appellant contended that the trial magistrate erred in law and fact by failing to find that the prosecution did not medically connect the Appellant to the offence since the medical report indicated

that the hymen was missing and old and there was no connection of the injuries to the offence. However, it is my opinion that the fact that the hymen was missing and old as the Appellant puts it does not discredit the fact that penetration occurred. In any case, the Complainant testified that she had had sexual intercourse with the Accused before and that it was not the first time therefore the presence of the old broken hymen was to be expected. Indeed, PW4 stated that the old broken hymen means that she could have engaged in sexual intercourse earlier or daily activities which impacts on the hymen to break. He went on to state that according to him, she has engaged in sexual intercourse before.

56. The trial court in this case convicted the Accused based on the evidence of the Complainant. Section 124 of the *Evidence Act* provides that:

> " 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.
>
> a. 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."

57. The court of appeal in the case of *AML v Republic* [2012] eKLR where the court stated that:-

    a. "The fact of rape or defilement is not proved by DNA test but by way of evidence"

58. Further the court of appeal in the case of *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 [2006] eKLR, it was stated that:-

    a. "The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence".

59. In the case of *Stephen Nguli Mulili v Republic (supra)* where the court held;

    a. "With regard to the issues of corroboration and the Appellant being proved as the one who defiled the Complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

60. In this case penetration was proved by the testimony of the Complainant and though the charge could be proved by way of evidence, the prosecution tendered evidence which corroborated the testimony of the Complainant. I find that the trial court properly found that penetration was proved under Section 124 of the *Evidence Act*.

Identity of the perpetrator

61. With regard to the identity of the defiler, the Appellant was a person who was well known to the Complainant. She stated that they were or had been lovers. Moreover, PW4, the Complainant's aunt found the Complainant at the Appellant's house. It is my finding that the Appellant was well known to the Complainant was not in doubt.

62. Accordingly, I am therefore satisfied that the prosecution proved its case beyond reasonable doubt against the Appellant on the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

63. The Appellant submitted that the mandatory sentence was too harsh. I take judicial notice of the pronouncements of the other courts with regard to imposition of mandatory minimum sentences in the *Sexual Offences Act*. (See *Jared Koita Injiri v Republic* [2018] eKLR, *DWM v Republic* [2016] eKLR & Petition No. 17 of 2021 *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & the Attorney General* where it was held that: -

    a. "To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

64. Although the trial court indicated that it had considered the Appellant's mitigation, it seemed the court was constrained by the mandatory minimum sentence provided in Section 8 (4) of the *Sexual Offences Act*. I have weighed the circumstances of this case against the fact that the Appellant was a first offender and it is my opinion that the sentence meted out by the trial court was indeed excessive and harsh. (See *Eliud Waweru Wambui v Republic* [2019] eKLR). Taking all these into account, the fact that appellant and the lady complainant are lovers, there was no violence used, he was a young man at the time of the act and is a first offender I set aside the sentence of 15 years and substitute thereof with a sentence of years' served imprisonment, i.e. which will take into account the period already served by the Appellant. And thus order that;

    i. The appellant has served enough thus conviction upheld but sentence reduced to period served so that he will be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.

CHARLES KARIUKI

JUDGE