Chepkwony v Republic (Criminal Appeal E015 of 2021)
[2022] KEHC 12448 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E015 OF 2021

RL KORIR, J

JULY 26, 2022

BETWEEN

GILBERT KIPKOECH CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case S.O. Number. 60 of 2020 by Hon. P.J. Aduke at the Resident Magistrate's Court at Bomet on 23rd April 2021)

JUDGMENT

1. The appelant, Gilbert Kipkoech Chepkwony was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on the 26th day of August, 2020 at around 1600hrs, in [particulars withheld] village within Bomet county, intentionally caused his penis to penetrate the vagina of MC a child aged 14 years old.

2. The appelant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars were that on the 26th day of August, 2020 at around 1600hrs in [particulars withheld] village within Bomet county, intentionally touched the vagina of MC, a child aged 14 years old with his penis.

3. The appelant pleaded not guilty to the main charge and the alternative charge before the trial court. A full hearing was conducted. The prosecution called four witnesses. At the close of the prosecution's case, the appelant was found to have a case to answer and was called to make his defence under section 211 of the *Criminal Procedure Code*. He opted to give sworn evidence and called one witness whom he eventually withdrew. By judgment delivered on April 7, 2021, the appelant was acquitted of the main charge of defilement and convicted of the offence of commiting an indecent act with a child. On April 23, 2021, he was sentenced to serve fourteen (14) years imprisonment.

4. Being dissatisfied with the decision of the trial court, the appelant filed the present appeal against the conviction and sentence. In his homemade petition of appeal dated and filed on May 7, 2021, the appelant raised the following five (5) grounds:

    a) That he pleaded not guilty during the entire trial.

    b) That the learned trial magistrate erred in both law and fact by sentencing him to serve 14 years imprisonment for the offence of commiting an indecent act with a child without making a finding that he was initially charged with defilement.

    c) That the learned trial magistrate misdirected herself both in law and fact by sentencing him while basing her conviction on PW1, PW2 & PW3 who were incredible witnesses. (sic)

    d) That the learned trial magistrate misled herself both in law and fact while basing her conviction on uncorroborated contradictory and tainted evidence.

    e) That the learned trial magistrate erred in law by rejecting his concrete defence.

5. It was the appelant's prayer that the period he had spent in custody would be considered should the conviction be upheld.

6. This court on November 25, 2021 directed that the parties canvass the appeal by way of written submissions.

The Appelant's Submissions:

7. The appelant filed his submissions dated 15th May 2021 on 17th May 2022. He submitted that the trial magistrate relied on circumstantial evidence to convict him and that the evidence presented by the prosecution (respondent) was not cogent and did not meet the legal threshold. He also submitted that PW1, PW2 and PW4 were members of the same family who gave doubtful evidence that ought to have created a suspicion in the mind of the court since they were were not straightforward persons. That, their evidence ought to have been dismissed as false information. He further submitted that the clinical officer never pointed to him as the one who defiled the child. Lastly, he submitted that his constitutional rights, particularly articles 48, 50 (2) (p) and 25 of the *Constitution* were violated.

The Respondent's Submissions

8. The respondent submitted that the key evidence in sexual offence cases stems from the testimony of the victim which is usually corroborated by the medical report. That it was the evidence of PW3 the clinical officer that the child was sexually assaulted. Secondly, that having conducted a *voire dire* and having satisfied itself of the credibility of the minor's evidence, it was clear that the appelant undressed the minor behind her house and committed the indecent act on her. That the evidence of the prosecution witnesses remained uncontroverted. Lastly, that the appelant's defence was hopelessly contradictory and woefully unreliable as his only witness failed to appear.

Issues For Determination

9. I have reviewed the trial record, the grounds of appeal and the parties' respective submissions and the main issue for determination is whether the offence of committing an indecent act with a child was proven to the required threshold.

Whether the offence of committing an indecent act with a child was proven to the required standard.

10. The duty of a first appellate court was clearly enunciated in the case of *Kiilu & Another vs Republic* [2005] 1 KLR, 174]. It requires that the evidence from a lower court must be subjected to a fresh analysis and carefully examined in order for the court to draw its own conclusion. (See also *Pandya vs Republic* [1957] EA 336).

11. The appelant was first charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* of 2006. It provides as follows: -

> " 8. (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.....

12. In the case of *George Opondo Olunga vs Republic* [2016] eKLR, the court outlined the ingredients of the offence of defilement as: identification or recognition of the offender, penetration and the age of the victim. These three ingredients must each be proven beyond reasonable doubt.

13. The importance of proving age in a defilement case cannot be gainsaid. It can be proven in a number of ways as stated in the Court of Appeal case of *Kaingu Elias Kasomo vs R* Malindi Criminal Appeal No 504 of 2010 (UR). It stated thus: -

> " The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard..."
>
> (See also *Hadson Ali Mwachongo vs. Republic* [2016] eKLR and *Eliud Waweru Wambui vs Republic* [2019] eKLR.)

14. From the record, PW4, JC who was the victim's mother produced PEX-4 which was the victim's birth certificate number (particulars witheld) indicating that she was born on February 20, 2006. Thus, at the time of commission of the offence, the victim was 14 years, 6 months and 6 days old, a minor in law. This ingredient is adequately proven.

15. The second ingredient is identification. *Collins Dictionary* defines identification as the association or linking of one thing with another. In a criminal trial, identification is what links an accused person to a criminal act. In the present case, PW1 testified that she knew the appelant as he normally came to her grandmother's home. That on the material day, she was at home at 4.00 pm and requested the appelant to assist her to fetch some water since her mother was away at work. She further stated that the appelant was well-known to her and that she would be able to recognize him anytime.

16. Evidence of identification based on the prior knowlegde of a witness (recognition) is normally considered more credible even though it may not be free from error. The court must carefully examine the same and determine that it is free from error. (see *R vs Turnbull & Others* [1976] 3 ALL ER 549).

17. In the Court of Appeal case of *Peter Okee Omukaga & Another vs Republic*, Criminal Appeal No 274 and 275 of 2009 at Eldoret (unreported) it was held thus: -

> " We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appelants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of appeal....."

18. From my analysis of the evidence of PW1, she was able to easily identify the appelant since she had even requested him for help to fetch water. I am not in doubt that the evidence of identification was cogent and the appelant's mere denial was not sufficient to water it down.

19. The third ingredient is penetration. It is defined under section 2 of the act as follows: -

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

20. It was the testimony of PW1 that the appelant took her behind her house, removed her clothes (panty and biker) and inserted his penis. She specifically stated as follows:

> " ....Alitoa kitu yake ya kukojolea akaingiza pahali pa kupupu yangu. Nikamchapa kwa sababu nilikua nimekasirika..." (He removed his penis and inserted it in my anus. I hit him because I was angry...)

21. It is evident therefore that the victim's testimony was that the appelant inserted his penis into her anus. Section 2 of the Sexual Offence Act defines "genital organs" to include the whole or part of male or female genital organs and for purpses of this act include the anus."

22. The victim was examined by PW3 Dr Nixon Mutai who also produced the P3 form (Exhibit 3) and PRC form (Exhibit 2). He found the victim's vagina was normal with no bruises, that the pregnancy test was negative and that there was no spermatozoa. In addition, he testified that the hymen was broken but the breakage was old. Upon cross-examination, he stated that the genitals of the minor were firm. Despite these findings PW3,arrived at the conclusion that PW1 was sexually assaulted.

23. From the evidence of PW3 above, It is clear to me that the act of anal penetration was not proved. PW3 upon examining the victim found no evidence of recent penetration but observed that the hymen had been broken earlier implying that PW1 had sexual intercourse before. There was no evidence of anal penetration either. It is my conclusion therefore that the trial court was right in dismissing the main charge of defilement. The 3rd ingredient was not proved to the required legal standard.

24. I shall now consider the alternative charge of committing an indecent act with a child. This offence is provided under section 11 of the *Sexual Offences Act* as follows:

> " 11. (1) Any person who commits an indecent act with a child is guilty of an offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".

The act further defines an indecent act under section 2(1) as follows: -

> " indecent act" means an unlawful intentional act which causes -
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

25. In *Paul Otieno Okello vs Republic* Migori HC Criminal Appeal No 3 of 2019 [2019] eKLR Mrima J held as follows:

> " .....A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt."

26. In the present case, only the minor's evidence links the appelant to the offence. It is pertinent to determine whether reliance can be placed solely of PW1's testimony.

27. Section 124 of the *Evidence Act* provides that in sexual offence cases, a person can be convicted on the sole evidence of the child and therefore dispenses with the aspect of corroboration, provided that the court is satisfied that the minor is telling the truth and records its reasons for believing so. The said section provides as follows:-

> " 124. 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."

28. This court finds guidance from the Court of Appeal in the case of *JWA vs Republic* (2014) eKLR where it observed thus: -

> " We note that the appelant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

29. The trial record indicates that the trial magistrate was satisfied that the minor understood the importance of telling the truth in her testimony as she was a child of 14 years with sufficient understanding.

30. During cross examination, the victim's testimony remained consistent and the appelant failed to controvert her evidence. In addition, the victim described vividly what transpired before, during and after the incident. There is no doubt in my mind that her testimony was truthful and that the appelant committed the indecent act on her.

31. The legal threshold for a criminal conviction is well settled in law. It is proof beyond reasonable doubt. This burden of proof falls on the prosecution. (See Lord Denning's decision in the case of *Miller vs Minister of Pensions* 1942 AC).

32. The evidence adduced in respect of penetration is consistent with the offence of indecent act. PW1 described clearly what the appelant did to her behind the house and it is clear that there was contact between the appelant's genitals and the victim's buttocks. It is my finding that though these facts do not prove the offence of defilement to the required standard, they adequately prove the alternative offence of committing an indecent act with a child beyond reasonable doubt.

33. In the petition of appeal, the appelant prayed that the court considers the time he had spent in remand should it uphold the conviction. I am guided to approach sentence on appeal with caution. In *Ahmad Abolfathi Mohammed & Another vs. Republic* (2018) eKLR, the Court of Appeal laid the principles thus: -

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In *Bernard Kimani Gacheru v. Republic*, Cr App No 188 of 2000 this court stated thus:
>
> It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

(See also *Wanjema v Republic [1971] EA 493*).

34. I have perused the sentencing hearing in the trial record. The trial magistrate clearly stated that she put into consideration the pre-sentencing report, the accused's mitigation and the period he had spent in remand. It was on this premise that she sentenced the appelant to serve 14 years imprisonment.

35. The minimum sentence stipulated by the law is 10 years imprisonment. I have perused the undated probation officer's report in the trial file and noted that the victim in this case had disability, that she had had several cases of epilepsy when growing up and though she had received treatment, the same impeded her mental development and speech. Her mother (PW4) testified that her daughter may not have screamt as she had challenges in speech. From this evidence, it is clear that the victim was a vulnerable person, not just in age but in terms of her physical and mental status. These to me amount to aggravating factors.

36. I am satisfied that the trial magistrate properly considered all these factors and rightfully arrived at the sentence of 14 years imprisonment. I shall however reduce from this sentence the period that the appelant spent in pre-trial custody. Further, I consider that the appelant has had time to reflect on his henious act.

37. In the end, I affirm the conviction. The appelant shall serve 12 years' imprisonment from the date of arrest being August 23, 2020. The appelant has a right of appeal, to the court of appeal against both conviction and sentence.

Orders accordingly.

Judgement delivered, dated and signed at Bomet this 26th day of July, 2022

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr.Muriithi for the State, Appellant present in person and Kiprotich(Court Assistant).