PNN v Republic (Criminal Appeal 40 of 2022) [2022] KEHC 16000 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16000 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL 40 OF 2022

LM NJUGUNA, J

NOVEMBER 30, 2022

BETWEEN

PNN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

((Being an appeal against the conviction and sentence of Hon Ouko S. (R.M.) and delivered on 10.11.2021))

JUDGMENT

1. This appeal arises from the judgment of the learned trial magistrate aforementioned. The appeal filed by the appellant on 31.10.2022 seeks to nullify the said determination on the grounds as set out on the face of his petition of appeal.
2. The case against the appellant was one of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006. The particulars of the main charge being that the appellant on 16.06.2020 at about 1600hrs in Kiaragana sub location within Embu County, intentionally caused his penis to penetrate the vagina of G.W., a child aged 7 years.
3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, 2006 whose particulars were that on 16.06.2020 at about 1600hrs in Kiaragana sub location within Embu County, intentionally touched the vagina of GW, a child aged 7 years with his penis.
4. At the conclusion of the trial, the trial magistrate convicted the appellant in the main charge of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*, 2006 and sentenced him to life imprisonment, as provided under the Act.
5. It is the said conviction and sentence that forms the basis of the instant appeal.

6. The court directed that the appeal be canvassed by way of written submissions which directions the parties complied with.

7. The appellant submitted that the case was not proved beyond any reasonable doubt by the prosecution and further that, the first eye witness by the name of Immaculate was never brought as a witness by the prosecution. That the evidence by prosecution that the appellant was lying on the complainant could not be imputed to mean that he indeed had sex with the complainant. Further, he submitted that since DNA was not conducted, it could not be conclusively deduced that he was responsible for the alleged defilement. In the end, the appellant urged this court to quash the conviction and set aside the sentence as meted out by the trial court.

8. The respondent submitted that upon evaluation of the six witnesses, the trial court convicted the appellant herein of the main charge of defilement and sentenced him to serve life imprisonment, a determination it fully supported. That the appeal herein is devoid of any merit. It was submitted that the evidence of PW5, who examined the complainant, P3 Form which was produced as an exhibit confirmed that the complainant had been defiled. Further that, the evidence of PW1, PW3, PW5 and medical documents also confirmed penetrative sexual intercourse. On whether the complainant's age was established, the respondent relied on the case of *Faustine Mchanga v Republic* [2012] eKLR in that PW2 indicated in her evidence that she was born on 25.08.2012; further, a birth certificate was also produced as an exhibit which confirmed that the complainant was indeed 7 years old. On identification, the respondent submitted that PW3's testimony denoted that the appellant herein was a person well known to her, to be precise, her uncle and as such, identification was by recognition. While on sentence, it was its case that the same is provided for by the law as the minimum and mandatory sentence. As such, the court was urged to find that the grounds raised are not merited in as far as the contest of the decision of the trial magistrate to convict and thereafter sentence the appellant to life imprisonment is concerned.

9. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

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

    i. Age of the complainant;

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

    iii. Positive identification of the assailant.

11. On these elements; "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." (Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013).

12. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 which defines a "Child" as "........any human being under the age of eighteen years."

13. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court stated that:-

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See *Alfayo Gombe Okello -vs- Republic* Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated:-
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as 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)....."

14. PW2 in her testimony stated that the complainant was 7 years and further produced her birth certificate. Having perused the said birth certificate, I note that the complainant was born on 25.08.2012 and the offence herein was allegedly perpetrated on 16.06.2020. As such, the same shows that the complainant was aged 7 years at the time when she was defiled. I am therefore convinced that the age of the complainant was proved appropriately.

15. On penetration, the *Sexual Offences Act* defines "penetration" as

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

16. The Court of Appeal, in the case of *Sahali Omar v Republic* [2017] eKLR, noted that:

> " .....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*."

17. In the case herein, PW1 testified that on the material day, he was working at his home when Immaculate informed him that the appellant was having sex with the complainant in the coffee bushes. That he rushed to the spot where he found the appellant lying on top of the complainant having sex with her. PW3 in the same breadth testified that the appellant herein who happens to be her uncle undressed her and thereafter 'put his thing for urinating on where she urinates'. PW5 also testified that upon examining the complainant, he found no physical injuries except on the genitalia which was reddish with tenderness. That at 09.00 O'clock, there were lacerations and the urethral orifice was reddish with a blood clot at 5.00 O'clock and markably tender on palpation with bruises. Further, there was reddish discharge and that the injuries were 20 hours old. From the evidence on record, I am satisfied that G.W. was defiled and that there was improper, intentional and unlawful penetration of her vagina.

18. On identification, PW3 stated that the appellant herein was her uncle and therefore a person known to her. I am guided by the decision herein on the way to approach the evidence of visual identification

as was succinctly stated by Lord Widgery, CJ in the well known case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552 where he said:-

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

19. It is my finding that the appellant in the instant case was properly and positively identified by recognition based on the testimony of the prosecution witness including G.W. in that he is an uncle to the complainant. The appellant was someone well known to G.W. in any case, the incident happened around 4-5 p.m. as stated by PW1.

20. Further, the evidence of PW1 corroborates that of the complainant on identification. PW1 testified that he was working at home when his sister one Immaculate went and told him that the appellant was having sex with the complainant and he proceeded there and found the appellant and the complainant naked in the coffee bushes. The appellant was lying on top of the complainant having sex with her and he hit the appellant with a stick who got up and tried to beat him. He called Immaculate for help and she left her dressing the complainant and went back home. He saw the complainant's father and told him what had happened and the appellant was arrested and taken to the police station. The accused was his neighbour for many years and therefore a person well known to him. It was his further evidence that the appellant and himself had no bad blood. Further that, the incident happened between 4 – 5 pm which was during the day. I am of the considered view that the appellant was properly identified.

21. On the ground that the trial magistrate did not appreciate the appellant's defence, the trial magistrate in her judgement noted that the prosecution's evidence proved all the ingredients of the offence and further that, the defence did not raise or cast doubt on the prosecution evidence and as such, the ground is hereby rejected.

22. On whether the sentence imposed was harsh in the circumstances, I note that, faced with the evidence, the magistrate found that the offence that was proven by the prosecution was that of defilement contrary to Section 8 (1) as read with 8(2) of the SOA and sentenced him to serve life imprisonment.

23. I also note that the appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006 but was convicted for the offence of defilement contrary to Section 8 (1) as read with 8(2) of the SOA. Such conviction in sexual offences is, however, allowed under Section 186 of the *CPC Code*, which provides as follows;

> 186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.

24. Thus the trial court had powers to convict even if the offence was not a lesser offence. In the circumstances of the case, I also see no prejudice occasioned to the appellant as the trial magistrate convicted him on sound evidence.

25. Section 8 (2) of the *Sexual Offences Act* (*supra*) provides that upon conviction the offender shall be sentenced to life imprisonment. Sentencing is exercise of discretion by the trial court which should not be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See *Shadrack Kipkoech Kogo v R*., and *Wilson Waitegei v Republic* [2021] eKLR].

26. I therefore find no merit in the appeal both on conviction and sentence. The same is hereby dismissed.

27. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2022.

L. NJUGUNA

JUDGE

....for the Appellant

....for the Respondent