Kamai v Republic (Criminal Appeal 13 of 2020)
[2022] KEHC 16977 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 13 OF 2020

GWN MACHARIA, J

DECEMBER 20, 2022

BETWEEN

DAVID CHEGE KAMAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Engineer in Sexual Offence Case No. 13 of 2019 delivered by Hon. R. L. Musiega (RM) on 17th July, 2020)

JUDGMENT

1. The appellant, David Chege Kamai, was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 18th day of August 2018 at [Particulars Withheld] area in Kipipiri Sub County within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of MWN, a child aged 17 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars thereof were that on the 18th day of August 2018 at [Particulars Withheld] area in Kipipiri Sub County within Nyandarua County intentionally touched the vagina of MWN a child aged 17 years.

2. The appellant pleaded not guilty to both charges. Upon trial, he was convicted of the offence of defilement and sentenced to serve fifteen years imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

3. The appeal is based on the fifteen grounds contained in the appellant's amended grounds of appeal filed alongside his written submissions. These are:

1. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant based on evidence that was highly contradictory.

2. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant based in a defective charge sheet.

3. The learned trial magistrate erred in law and fact in disregarding the doctor's opinion as to when the incident may have occurred.

4. The learned trial magistrate erred in law and fact in disregarding the DNA evidence without acquitting the appellant.

5. The learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt when she disregarded the DNA evidence.

6. The learned trial magistrate erred in law and fact in failing to find that the date of incident was not proved beyond reasonable doubt.

7. The learned trial magistrate erred in law and fact in failing to find that the evidence relied on by the prosecution failed to form the requisite "links of a chain" sufficient prove beyond reasonable doubt that the appellant committed the offence.

8. The learned trial magistrate erred in law and fact in failing to uphold the appellant's defense of alibi even when the prosecution had failed to dislodge it.

9. That the learned trial magistrate erred in law and in fact in leaving the burden of objecting to the framing of the charges against the appellant to the appellant.

10. That the learned trial magistrate erred in law and in fact in finding that the do opinion on the conception date was a mere estimation.

11. That the learned trial magistrate erred in law and in fact in making an erroneous finding on the appellant's defence of alibi.

12. That the learned trial magistrate erred in law and in fact in failing to find in find in favour of the appellant's written submissions and authorities relied on.

13. That the learned trial magistrate erred in law and in fact in failing to find that the prosecution did not prove its case beyond reasonable doubt.

14. The conviction is dangerous and against the weight of the evidence.

15. The sentence is excessive and illegal in the circumstances.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See *Okeno v Republic* (1972) EA 32).

5. The prosecution's case can be summarized as follows: On August 18, 2018 at about 2.00pm, sixteen year old PW1, MWN was at home alone when the appellant who was her former teacher in primary school visited their home. The appellant had been to PW1's home several times in the past to see her parents as they were known to each other. On this day however, he entered the house and told PW1

that he wanted to have sex with her. PW1 refused but the appellant threw her on the sofa seat, removed her panty, pulled up her skirt and touched her breasts. He then sept on top of her with his clothes on and opened his trouser zip, removed his penis, inserted it into her vagina and had sex with her for close to 10 minutes. PW1 felt pain but did not scream because she feared the appellant. When the appellant finished, he rose up, closed his zip, gave PW1 Kshs 50/= then left without saying a word. PW1 went to take shower immediately. She did not tell her parents about the incident when they got back home. That was the second time they had sex. The first time was in June of the same year when PW1's parents were away.

6. In January 2019, some lady by the name CN told PW1's mother PW2, AWN that people were suspecting PW1 to be pregnant. PW2 asked PW1 but she denied. In February, PW1 developed a throat problem. PW2 took her to a doctor in [Particulars Withheld] market and requested the doctor to test if PW1 was pregnant. The doctor did and confirmed that PW1 was indeed pregnant. PW2 asked PW1 who was responsible for the pregnancy but she refused to disclose. At night, she followed PW1 to her bedroom, gave her a pen and paper and told her to write down the name. PW2 later found some paper on which PW1 had written the name "Mwalimu Mr Kamai". PW2 was shocked because the said Mr Kanai who is the appellant herein was known to them and was their neighbor. PW2 told her husband and they went to the sub chief to report. The sub-chief went to talk to the appellant then late came and told PW1's parents that the appellant had offered them Kshs 200,000/=. A week later, PW2 went and reported the incident to the principal of the school where PW1 was schooling. The principal went to Miharati to report to TSC. The matter was also reported to the chief who called PW2 and her husband and advised them to make a report at Miharati Police Station.

7. On February 28, 2019 at around 1400 hours, PW1 went with PW2 to the station to Kipipiri Police Station and reported the incident. The investigating officer, PW3, PC Violet Atieno recorded their statements. PW3 then took PW1 to Manunga Health Center where she was tested again and found to be pregnant. PW3 then sent her colleagues to arrest the appellant at Turasha.

8. On March 1, 2019, PW3 took PW1 to Engineer District Hospital for examination and filling of the P3 Form. At the medical facility, PW4, dr Jackline Rotich examined PW2 and found that she had a broken hymen and vaginal wall laceration at 6 o'clock. A high vaginal swab revealed the presence of pus cells which was a sign of a urinary tract infection. PW4 filled, signed and stamped the P3 and PRC forms respectively which she produced in evidence.

9. PW1 gave birth to a baby boy named SNW on Wednesday May 1, 2019 as evidenced by a birth notification serial number 01409XX produced in evidence by PW1.

10. On June 19, 2019, PW5, Pamela Okello, an analyst from the government chemist, obtained buccal swab samples from David Kimai the appellant herein, PW1 and the PW1's newborn baby SNW. The exhibited memo form was submitted by PC Caleb Omosa and the request was to examine the exhibits and determine paternity. PW5 subjected the samples to DNA analysis. Upon examining the DNA profiles generated, the child was found to have inherited half DNA from PW1 and half from the appellant herein meaning he belonged to both of them. PW5 opined that the DNA results were 99.99% correct hence very accurate. PW5 produced the exhibit memo and the DNA report in evidence.

11. During trial, PW5 confirmed in cross examination by the appellant that the exhibit memo form indicates that the items received at the chemist were blood samples instead of buccal swabs. PW5 explained that the reference to blood samples was purely an unintended typographical human error occasioned by the person who wrote the report while she was on leave although the actual analysis was done using the items received. PW5 further stated that they were not trained to extract blood samples from clients.

12. The investigating officer PW3 also produced a Birth Certificate showing PW1 was born on November 8, 2002, during trial.

13. Upon being placed on his defence, the appellant elected to give an unsworn testimony. He testified that on August 18, 2018, he attended a family gathering at Mahianyu village in Laikipia County where his parents reside. On January 14, 2019, his wife was at home when a lady passed by and told her that PW2 had told her PW1 was pregnant. The lady also told his wife that PW2 told her that if Mwangi was the one responsible for the pregnancy, she would not accept because he takes tobacco and if it was Kimani who hails from a poor family, her daughter could not get married there. On January 31, 2019, he was approached by the area assistant chief one Shadrack Waweru Kariuki who told him that he had information for him from PW1's father SN. It was alleged that he had impregnated PW1. He was surprised to hear that and so he asked to know how it came about. The assistant chief told him that the girl was pressured and she mentioned his name. He told the assistant chief that he could not discuss that issue there.

14. He told the chief that he wanted the issue to be discussed openly in a meeting at his home in the presence of the parents of PW1, his wife and the chief because he was innocent. The chief started intimidating him on how serious the offence was and how he could lose his job. The chief also told him that that they had discussed and the best thing the appellant could do was to look for Kshs 300,000/= to make the family leave the area until the baby was born. He told the chief that money could not be a problem but questioned what he was paying for since he had not done anything wrong. The chief told him to go and talk to PW1 and her parents.

15. On February 2, 2019, there was a village meeting where that issue of PW1's pregnancy was discussed and her father was given a chance to talk. He told the whole village that the appellant raped PW1 at night as he was transporting her from Murungaru and that PW1 had shown PW2 where the incident took place. Thereafter, the issue died down until March 6, 2019 when three gentlemen appeared at the office of the head teacher in the school where he was teaching and requested to see him. He was called and they identified themselves as the area chief, Mr Mburu, Caleb Omosa a police officer and the other did not introduce himself. Mr Mburu said they had come to arrest him. Mr Omosa informed him that he was under arrest for impregnating a girl from [Particulars Withheld] Secondary School. The appellant requested not to be handcuffed at the school premises. He was taken to Kipipiri Police Station where he was placed in custody till 6.00 pm. when the OCS called him for questioning. On March 7, 2019, he was taken to court but was not charged until March 8, 2019.

Analysis and Determination

16. Upon carefully re-evaluating the evidence on record and considering the parties' respective written submissions, I find that the following are the issues for determination:

    a. Whether the charge sheet was incurably defective;

    b. Whether the prosecution proved its case beyond a reasonable doubt; and

    c. Whether the sentence was excessive and illegal?

Whether the charge sheet was incurably defective

17. The appellant contended that the charges were wrongly framed because there was a disparity between the age of PW1 as indicated thereon and her actual age which was sixteen years. He faulted the trial magistrate for failing to take that disparity into account during sentencing. On the other hand, the respondent submitted that the discrepancy on the charge sheet regarding PW1's age does not go to the

root of the conviction and is curable under section 382 of the *Criminal Procedure Code*. Further, it was submitted that it does not take away the fact that the defilement took place and, in any event, it makes no difference in terms of sentencing since under section 8(1) and (4) of the *Sexual Offences Act*, a 16 and 17 years old victim fall into the same sentencing category of 15 years imprisonment, which is what was meted to the appellant.

18. The charge sheet indicates that the appellant was charged in count 1 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* for allegedly defiling a child aged seventeen (17) years. From the evidence on record, it is obvious that PW1 did not fall within the age bracket specified in section 8(2) of the Act which prescribes the punishment for persons convicted of defiling children aged eleven years or less. PW1 fell within the age bracket specified under section 8(4) of the *Act* due to her age and the learned magistrate took due note of this in his judgment.

19. The only question that the court has to concern itself with in the circumstances is whether the appellant was prejudiced in any way with the obvious defects in the charge sheet. I have looked at the trial court's record. It is apparent that the appellant was not embarrassed or prejudiced during cross examination or in his defence by the defect, as he understood clearly what he was alleged to have done. In the circumstances, the defect was not fatal as it did not occasion any miscarriage of justice. It is a defect that is curable under section 382 of the *Criminal Procedure Code*.

Whether the prosecution proved its case beyond reasonable doubt.

20. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:

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

21. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard: proof of penetration, age of the victim and the positive identification of the appellant as the perpetrator of the offence.

22. As regards the age of the victim, the evidence of PW1 and PW2 that PW1 was born on November 8, 2002 was supported by a Birth Certificate serial number xxxx produced in evidence as exhibit 1 by PW3. I therefore find that the prosecution sufficiently proved PW1's age.

23. As regards penetration, the P3 and PRC forms produced by PW4 confirmed that PW1 had a broken hymen and vaginal wall laceration at 6 o'clock. It is my considered view that the broken hymen and the fact that PW1 conceived and eventually gave birth was conclusive evidence that her genitalia was penetrated.

24. The next question therefore is whether the prosecution proved beyond reasonable doubt that the appellant is the one who penetrated PW1's genitalia. To begin with, the appellant submitted that identification was not proved since the only evidence that connected him to the offence was DNA test results which the trial magistrate found to be faulty and shaky.

25. On the other hand, the respondent submitted that the trial court did not place any reliance on the DNA report. It was also argued that DNA evidence is not necessary in proving defilement.

26. From the impugned judgment, it is evident that the trial magistrate did not place any reliance on the DNA report that was tendered in evidence due to the mistake regarding the actual samples that were taken for analysis and the ones indicated on the DNA report tendered in evidence. In rejecting the DNA results, the learned magistrate placed results on the case of *Michael Akhonya v Republic* [2019] eKLR and *John Ngui v Republic* [2015] eKLR where it was held that where the chain of custody of

crucial evidence is either non-existent, broken or unknown, the court cannot make a finding of guilt based on such evidence. I am in agreement with the reasoning adopted by the trial magistrate on the DNA results tendered in court. I see no reason to disturb that finding particularly in view of the fact that DNA results are not mandatory in proving sexual offences such as defilement or rape. See *TMK v Republic* [2018] eKLR where the court held that:

> " But a defilement charge shall not be proved by the evidence of DNA link between an accused and the child of the complainant he is alleged to have defiled. There may be other evidence pointing to the involvement of the accused upon which the court must convict, if by that evidence the accused's guilt is proved to the required standard of beyond reasonable doubt."

27. The involvement of the appellant in the defilement of PW1 was established by virtue of section 124 of the *Evidence Act* which empowers a trial court in a sexual offence case to convict an accused person on the sole evidence of the victim if the court is satisfied that the victim is telling the truth. Indeed, it is the trial magistrate who had the benefit of observing PW1's demeanour when recording her evidence. The trial court noted that during hearing, PW1gave a step by step narration of the events and remained firm and consistent even during cross examination. For that reason, the court was satisfied that PW1's testimony was believable and consistent.

28. In any event, it is common sense that sexual offences are generally committed in secrecy hence there would hardly ever be any eye witness save for the victim of the offence. In this case, the appellant was well known to PW1 and her family as confirmed by PW2 and the appellant himself in his defence. He was their neighbour and has taught PW1 in primary school. He would occasionally visit their home to see her parents. Additionally, the incident is alleged to have taken place during daytime at around 2.00 pm and according to PW1, it happened for close to ten minutes. This means that the circumstances prevailing at the time were favourable for positive identification.

29. Further, the appellant contended that there were contradictions as to the exact date that the incidents occurred. He took issue with the fact that the trial magistrate regarded these contradictions as minor when to him they were very fundamental. Additionally, the appellant submitted that if PW4's evidence that the PW1 was about 32 weeks pregnant as at March 1, 2019, it means that the approximate conception date was July 1, 2018 yet the charge sheet speaks of August 18, 2018 as the date of the alleged incident. He faulted the trial court for dismissing the doctor's expert opinion as a mere estimation since in his view, this would have assisted the court in finding that the case had not been proved to the required standard.

30. Like the learned magistrate, I have no doubt that it was possible that PW1 had lost track of the exact date that the incidents occurred due to the passage of time. Indeed, were it not for the pregnancy, the offence may have never been discovered as PW1 stated that she did not disclose it to anyone because she feared the appellant. The contradictions were therefore minor and did not go to the root of the matter.

31. Further, I note that the appellant faulted the trial magistrate for shifting the burden of proving his alibi defence to him instead of requiring the prosecution to apply to court to obtain evidence for purposes of rebutting the same. In his view therefore, his defence of alibi was not appropriately considered. According to the respondent however, it was submitted that the appellant's defence of alleged alibi of set up by PW1 was raised at the last stage and was an afterthought hence it was rightfully rejected by the trial court.

32. It is trite law that when an accused person raises an alibi defence, the burden of proof rests on the prosecution to disprove it and prove its case beyond reasonable doubt. See *SSentale v Uganda* (1968) EA 36. The appellant alleged that the second time he is alleged to have committed the offence that

resulted in the conception of a baby by PW1, he was attending a family function in Laikipia. While this alibi clearly came up as an afterthought during his defence, it was not up to the appellant to avail a witness to corroborate or verify it as alluded to by the trial magistrate in his judgment. Be that as it may, it is my considered view that the appellant's alibi is not believable and did not dislodge the watertight evidence by the prosecution.

33. The upshot is that I am satisfied that the prosecution proved beyond any reasonable doubt that the appellant was the perpetrator of the offence.

Whether the sentence was excessive and illegal

1. The appellant did not tender any submissions in support of this ground. As for the respondent, it was submitted that the sentence should not be disturbed as it was lawful under the *Sexual Offences Act*. Before imposing the sentence, the learned magistrate gave the appellant an opportunity to tender mitigation properly considered the mitigation availed. While appreciating the decision of Odunga, J (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), that courts are at liberty to impose sentences prescribed under the *Sexual Offences Act* provided they are not deemed to be the mandatory minimum sentences, the learned trial magistrate adequately explained why he imposed the sentence prescribed under section 8(4) of the *Sexual Offences Act* on the appellant. I agree with his reasoning and affirm the sentence as meted since it is legal.

Conclusion

34. Consequently, the appellant's appeal lacks merit and is hereby dismissed in entirety. It is so ordered.

DATED AT NAIVASHA THIS 20TH DAY OF DECEMBER, 2022.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Mr. Michuki for the Respondent.