Ali v Republic (Criminal Appeal E294 of 2023)
[2025] KEHC 2805 (KLR) (Crim) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E294 OF 2023

AB MWAMUYE, J

MARCH 6, 2025

BETWEEN

ABDULLAHI YUSUF ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. M. Kivuti (SRM) delivered on 18th August,2023 in S.O Case No. 288 of 2021)

JUDGMENT

1. The Appellant, Abdullahi Yusuf Ali, 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 as stated on the Charge Sheet were that on diverse dates between the 22nd day of October 2021 and 31st October, 2021 in Kamkunji sub county within Nairobi County the appellant caused his penis to penetrate the vagina of F.I.H, a girl aged 14 years. The appellant was also 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 alternative count are that on the diverse dates between the 22nd day of October 2021 and 31st October, 2021 in Kamkunji sub county within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with F.I.H a girl aged 14 years by touching her breasts, buttocks and vagina.

2. The Appellant pleaded not guilty. The prosecution called 4 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 10 years imprisonment for the offence of defilement.

3. This is the first appellate court and the duty of first appellate court was set out in the case Okeno Vs. Republic [1972] E.A 32 as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] 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. Rulwala Vs. Republic [1957] E.A. 570). It is not the function 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."

4. While reanalyzing evidence adduced before the trial court, I am minded of the fact that unlike the trial court, I did not get the benefit of taking evidence from the witnesses first hand and observe their demeanor and for that reason I will give due allowance. In view of the above, I have perused and considered record of appeal together with submissions filed by parties herein and find that following as issues for consideration:-

   i. Whether ingredients for offence of defilement were proved beyond reasonable doubt.

   ii. Whether sentence imposed was harsh and excessive.

Whether the prosecution proved its case to the desired threshold

5. 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* which provides:

   8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement

   8(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."

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

   1) Age of the complainant;

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

   3) Positive identification of the assailant.

7. In the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013, it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

i. Age of the Complainant

8. On the element of age, it is vital for two purposes; Firstly, to prove that the victim was minor; that is below 18 years. And secondly, for purposes of sentencing under section 8 (2), 8 (3) and 8 (4) of the *Sexual Offences Act*. [See Moses Nato Rapahel V. Republic (2015)eKLR].

9. In the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR the Court of Appeal had this to say regarding the proof of age:-

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

10. In this regard, the prosecution produced the complainant's birth notification which showed her date of birth was 22.07. 2008. Which is conclusive proof that the claimant was 14 years old at the time the offence was committed. There is therefore no doubt that age was proved beyond reasonable doubt.

ii. Penetration

11. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

12. In the case of Mark Oiruri Mose V. R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

13. Further, The Supreme Court of Uganda in the case of Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995 with regard to proof of penetration stated thus: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

14. In the instant case, PW1 testified that the appellant forcefully removed her clothes while he was naked, forcefully placed her on his bed and inserted his penis into her vagina. That the appellant was holding a knife and he was threatening to cut her private parts. The appellant locked her in his house for days and repeatedly defiled her

15. Further the medical reports corroborated this. PW4, Doris Kerubo, a clinical officer at MSF produced the p3 form and PRC form which showed that on genital examination, the minor's vagina was pink, moist and no injuries but had a whitish non-smelly discharge. The hymen had old tears at 3, 6 and 9 o'clock positions. She stated during cross examination that any tear beyond 12 hours is considered old. Based on her testimony and the expert opinion, the tears in her genitalia could only have been sustained as a result of penetration.

16. Consequently, it is my finding that the second element of penetration was proved beyond reasonable doubt.

iii. Identification of the perpetrator

17. The Court of Appeal in Michael Nganga Kinyanjui Vs. Republic [2014] eKLR quoted from Cleopas Otieno Wamunga V. R. Criminal Appeal No. 20 of 1982 (UR) that:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well known case of Republic V. Turnbull [1970] 3 ALL E.R. 549....."
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> "...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way..? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?"

18. In the present case, the complainant testified that the appellant locked her in his house for days and repeatedly defiled her. PW2 also testified that she found the minor at the appellant's house and that the appellant attempted to escape when she arrived with the police. There is therefore no doubt that the minor had spent several days with the appellant in his house and she was frequently seeing him. I am thus persuaded that under the circumstances, the complainant was well able to identify him. The Appellant was therefore properly identified as the perpetrator of the offence of defilement.

19. All the elements of the offence of defilement were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence was harsh and excessive under the circumstances

20. The appellant contended that the sentence was excessive given the circumstances of the case herein. Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

> " 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.

21. It is trite law that superior courts will not interfere with sentence unless it can be shown that the sentence was excessively harsh or excessive or that the court overlooked some material factors or took into account some wrong material or acted on the wrong principle of law. This was laid down in the Court of Appeal decision of Ogolla s/o Owuor Vs. Republic, [1954] EACA 270, as cited in Republic V. Stephen Mweizela Mutuku & 2 others [2020] eKLR.

22. Furthermore, the Court of Appeal in Benard Kimani Gacheru vs Republic [2002] eKLR stated that:

> " 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, the 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, any one of the matters already stated is shown to exist.

23. I am satisfied that the sentencing of the Appellant to 10 years imprisonment was not harsh or excessive and I find no reason to interfere with the same.

24. From the foregoing analysis, I am satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal on both conviction and sentence. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE