Kirieri v Republic (Criminal Appeal E063 of 2022)
[2024] KEHC 77 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 77 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E063 OF 2022

AC MRIMA, J

JANUARY 17, 2024

BETWEEN

JAMES KAMAU KIRIERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.I.G. Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 274 of 2019 delivered on 31st August, 2022)

JUDGMENT

Introduction:

1. The Appellant herein, James Kamau Kirieri, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 11th day of November 2019 at [particulars withheld] within Trans Nzoia County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of TC, a child aged 11 years old.

2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully caused the contact between his genital organ namely penis and the genital organ namely vagina of TC, a child aged 11 years old.

3. When the Appellant was arraigned before Court, he pleaded not guilty to the offences. He was tried and subsequently convicted on the main charge of defilement.

4. He was sentenced to serve 20 years imprisonment. Unlike in the appeal, the Appellant was not represented at the trial.

The Appeal:

5. The Appellant was utterly aggrieved by the conviction and sentence. He subsequently lodged an appeal against both.

6. In his Petition of Appeal dated 26th September, 2022 drawn by Messrs. Khisa, Bisonga & Company Advocates, the Appellant challenged the convictions and sentences mainly on 7 grounds. He mainly contended that the offence was not proved in that there was no medical evidence of penetration, that the evidence was doubtful and contradictory, that he had a solid defence and that the sentence was unproportional.

7. In the premises, the Appellant prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.

8. At the hearing of the appeal, Learned Counsel relied on his written submissions dated 15th June, 2023 wherein he extensively submitted that the offence was not proved. Counsel also referred to several decisions.

9. The Respondent opposed the appeal. It relied on its written submissions dated 28th March, 2023. The Respondent argued that the charge was rightly proved in law and that the sentence was lawful.

10. The State prayed for the dismissal of the appeal.

Analysis:

11. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.

12. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

13. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

14. Before dealing with the said aspects of the offence, this Court acknowledges the comprehensive manner in which the trial Court captured the evidence in the impugned judgment. As such, this Court hereby adopts that evidence as part of this judgment; by way of reference.

15. As a brief recap, a total of 4 witnesses testified. PW2 was TC, the complainant. PW1 was LS, the mother to the complainant. PW3 was Dr. Cynthia Shivachi based at the Endebes Sub-County Hospital who produced the complainants' P3 Form and treatment notes as exhibits. The Investigating Officer, No. 8xxxx1 PC WT, attached at Endebes Police Station testified as PW4.

16. When the Appellant was put on his defence, he gave a sworn testimony and called a witness, one Peter Wangila Eteka, who testified as DW2.

17. It was the cumulative evidence of the above witnesses that led to the conviction and sentence under review in this appeal.

18. The Court will now look at the elements of the offences of defilement in this case.

Age of the complainant:

19. The age of the complainant was not contested. It was proved by way of an Acknowledgment of Birth Notification Serial No. B1 AB 3017358. It confirmed that the complainant was born on 28th May, 2007. Therefore, on 11th day of November 2019 when the offences were allegedly committed, the complainant was around 12 years old.

20. Accordingly, the complainant was a child within the meaning ascribed to the term under Section 2 of the Children's Act.

Penetration:

21. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The provision also defines 'genital organ' to include the whole or part of male or female genital organs and for purposes of the *Sexual Offences Act* it also includes the anus.

22. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

> .... 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.... (emphasis added).

23. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v Republic* (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

24. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.

25. In this case, it was argued that there was no medical evidence to confirm penetration. The evidence on penetration was given by the complainant, PW1 and PW3 who was the examining and treating the Doctor.

26. The trial Court analyzed the evidence of all the witnesses and found that the prosecution witnesses were truthful. The Court believed the complainant and even went ahead to caution itself on relying on her sole testimony.

27. The complainant was quite candid in the manner she narrated the events as they occurred. She used euphemism in describing how a male genital organ (penis) found its way into her female genital organ

namely vagina. She complained that the entry was painful, but could not raise alarm as the assailant threatened her.

28. PW1 corroborated the evidence on penetration. She confirmed in cross-examination that she examined the complainant's private parts and that she had injuries.

29. PW3 produced the P3 Form and the treatment notes for the complainant and narrated how she had physically examined the complainant within 24 hours of the incident. On examination, PW3 found that the hymen was broken and there were bruises on the labia minora and the vagina. They were also hyperemic. There was also a discharge from the vagina, but was not foul-smelling. A laboratory high vaginal swab did not reveal the presence of any spermatozoa. According to PW3, there was ample evidence of penetration.

30. Again, the P3 Form and the treatment notes were produced as exhibits. This Court has perused them and is also satisfied that they are of sound probative values. The broken hymen and the hyperemic and bruised labia minora and vagina all pointed to force having been applied into the complainant's vagina.

31. This Court, thus, finds no difficulty in affirming the position that penetration into the complainant's vagina was proved to the required standard.

Identity of the perpetrator:

32. The prosecution had to lastly positively identify the perpetrator of the offence. The prosecution relied on the complainant's sole testimony in establishing the fact.

33. The complainant narrated her encounter with the Appellant who her step-father and they lived together. She explained that PW1 sent her to collect milk from a shop leaving behind the Appellant and her mother at home. It was a round 6pm. That, she collected the milk and, on her way back, she met the Appellant walking from their home. The Appellant asked her to accompany him and collect more milk. He used an alternative route that passed through a bushy area. Midway, the Appellant told the complainant to follow him into the bush and she obliged only to be undressed and sexually ventured into.

34. On return home, the complainant was crying and PW1 enquired what had happened. She narrated what the Appellant had done to her. She was rushed to Anderson Hospital where she was treated and matter was reported to the police. The complainant was escorted to the Endebes Hospital the following morning where she was examined and treated by PW3.

35. Being a sexual offence matter, a Court can rely and find a conviction on uncorroborated evidence of the victim. That is courtesy of Section 124 of the *Evidence Act*. In doing so, the Court must, however, be satisfied that the complainant was truthful.

36. The complainant testified before the trial Court which observed her demeanor. The Court did not make any adverse finding on her demeanor or character. The Court was satisfied that the complainant was truthful and not mistaken on the person who sexually engaged her.

37. The Appellant vehemently impugned the finding of the trial Court on this aspect. He pitted out that the trial Court ought to have relied on his defence which fully exonerated him.

38. The trial Court considered and analyzed the defence and found it to be unsustainable. This Court has equally reconsidered the defence. It is the finding of this Court that the trial Court, correctly so, analyzed the defence which it ultimately dismissed as an afterthought. To add on to the allegation that the defence was not sufficiently considered, this Court notes that the defence also placed the Appellant

at the scene of crime on the alleged date. The evidence of DW2 did not aid the Appellant since it centered on what largely happened way after the occurrence of the incident in issue.

39. This Court, therefore, reiterates its position that the defence was duly considered by, and was rightly so, disregarded by the trial Court.

40. The upshot of the foregoing is that the prosecution discharged its burden to the required standard of proof in proving that indeed the perpetrator of the heinous act against the poor young girl was none other than the Appellant.

41. Having found as much, this Court will now deal with the other ground as raised by the Appellant to ascertain whether there were unreconciled contradictions.

42. This Court has carefully perused the record. As this Court has repeatedly stated, contradictions in evidence cannot be totally ruled out when parties testify. The reason being that people perceive and narrate same events differently. Therefore, unless the contradictions go to the root of the matter and prejudices the accused, such are reconcilable and not fatal to the case.

43. The alleged contradictions, if any, did not, however, go to the root of the case. They were easily reconcilable and did not prejudice the Appellant or at all.

44. Deriving from the foregoing, the Court now finds that none of the grounds of appeal succeeded. Having found that the three elements of the offence were sufficiently proved on each count, then the Appellant was properly found guilty and convicted. The appeal against the conviction is, hence, dismissed.

Sentence:

45. The Appellant was sentenced to 20 years' imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

46. The Court in *Wanjema v Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

47. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the *Sentencing Guidelines* published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

48. This Court does not see how the sentencing proceedings are to be impugned. The sentence rendered cannot be faulted.

Disposition:

49. Drawing from the above considerations, the following final orders of this Court issue: -

a. The appeal is wholly dismissed.

b. This file is marked as closed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2024.

A. C. MRIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered in open Court and in the presence of:-

Mr. Kisa, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.