Atila v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 1520 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E029 OF 2022

PJO OTIENO, J

FEBRUARY 16, 2024

BETWEEN

ALLAN MUKHWANA ATILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. Eric Malesi (PM) in Kakamega CMCC SO Case No. E059 of 2021 dated 16th March 2022 and 6th April 2022 respectively)

JUDGMENT

1. The Appellant was arraigned before the Principal Magistrate Court at Kakamega, in Sexual Offences Case No. E059 of 2021, charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were given to be that on diverse dates between 20th September to 24th September, 2020 at [particulars withheld] in Kakamega Central Sub County within Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AS a child aged 16 years.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between 20th September to 24th September, 2020 at [particulars withheld] in Kakamega Central Sub County within Kakamega County, the Appellant intentionally and unlawfully caused his penis to come into contact for the vagina of AS a child aged 16 years.

3. The Appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of five (5) witnesses.

4. PW1, the victim, testified that she was 15 years old and a class 5 pupil at [particulars Withheld] Primary School and that she came to know the Appellant in the month of September, 2020 when she met him

at a road at Emukaba between 3-4pm as she was coming from her brother's house. The Appellant asked her they go to his house but she first declined and later accepted to go and assist him wash his clothes. When they got to his house the Appellant left him and returned at 7pm and had sexual intercourse with her three times. The next day he locked her in the house and returned in the evening and again they had sex that night. The next morning a friend of the Appellant told him that her parents were looking for her and she asked the Appellant to take her to her grandmother's place at Ilesi which he did. Her mother then came to collect her and in the company of police officers she was taken to hospital.

5. On cross examination she stated that the Appellant was alone at his place and that she did not know the Appellant's friend who informed him that her parents were searching for her.

6. PW2, father to the victim testified that on 9/9/2020 which was a Sunday, PW1 left home at 3pm and when no one knew about her whereabouts, he decided to report her disappearance with the chief who advised him to look for her. On Thursday he received a call from his in laws that the complainant had been spotted in Ilesi prompting him to ask her mother to go get her. When the complainant returned she told them that she had spent three nights at the Appellant's home, having sex. He further claimed that the Appellant was a relative.

7. PW3 testified that she was the complainant's mother and that the victim was 15 years having been born the month of October, 2005 and stated that she had her dedication card with her. She stated that PW1 left home saying she had gone to see her brother. She stated that when PW1 was found she said that she met with the Appellant, whom PW3 claimed to have known before the incident, who told her that his wife had given birth and wanted PW1 assist them in washing clothes at a fee. Her husband was informed by his in law that PW1 had been spotted in Ilesi and she went to fetch her and that PW1 informed her that she had had sexual intercourse with the Appellant three times and they reported the matter with the police. On cross examination she stated that it was PW1 who mentioned the appellant to her.

8. PW4, a Clinical Officer at Matungu Hospital testified that PW1 was examined at the hospital and she had injuries in the vaginal area, bruises on the labia and that her hymen was missing. She further stated that one Dr. Mwangi conducted an age assessment on the victim which report was produced as PEXH 4.

9. On cross examination she stated that the assault appeared serial and not one off and that the perpetrator was not presented for examination.

10. PW5, the Investigating Officer gave evidence that on 25/9/2020 he was informed by the OCS about the disappearance of a child. He later got to interrogate the child who told him that he had gone to visit her elder sibling when she met with the Appellant, whom she knew, while he was riding a motorcycle and he asked her to go wash his clothes. The Appellant gave her Kshs. 100/- and she boarded his motorcycle. When they got to his house, the Appellant's wife was not there and that he locked her in the house for four days defiling her. When the Appellant realized that PW1 was being looked for he took her to her uncle's place who in turn informed PW1's parents with PW1's mother going to collect her. On cross examination he stated that the Appellant disappeared for six months after the incident.

11. The evidence of PW5 marked the close of the prosecution case with the Court ruling that a *prima facie case* had been established and the Accused person was put on Defence.

12. In his defence the Appellant gave sworn testimony then called one other witness, his wife. The Appellant herein, denied the charges and stated that on 2/3/2021 he was arrested by the police on allegations of defilement. He chose to say nothing about his whereabouts on the material day. He equally made no attempt to dislodge evidence by the victim.

13. DW2, the Appellant's wife testified that she was at home with the Appellant when he was arrested and that she did not know for what offence. She further stated that she had never left her matrimonial home. She equally failed to connect on the established events of September 2020.

14. After an analysis and review of the Judgment, the Court adjudged the Appellant guilty of the offence charged, convicted him and sentenced him to a 20 years' imprisonment term.

15. Dissatisfied with the Judgment of the trial Court, the Appellant has lodged this appeal vide a petition of appeal dated April 15, 2022 and proffered five grounds of appeal. The five grounds fault the trial Court for error of reaching a conviction when the age of the victim and medical evidence or penetration were deficient; by convicting the Appellant on inconsistence and contradictory evidence and for reaching a conviction against the weight of evidence.

16. The appeal was directed and has been canvassed by way of written Submissions which the Court has benefited from in coming to this decision.

Issues

17. The Court has considered the grounds of appeal, the proceedings of the lower Court in line with the Judgment on record and the Submissions by both sides and discerns the issues for determination to be only two: -

    a. Whether the offence of defilement was proved to the required standard against the appellant

    b. Whether the sentence was manifestly harsh and excessive

Analysis and Determination

18. It is now well settled position of the law that to sustain a conviction against an accused person for the offence of defilement, the prosecution has to prove three elements; the age of the victim, penetration of her genitalia and positive identification of the perpetrator.

19. Age of the victim can be determined through various ways such as a Birth Certificate, Baptismal Card, the evidence of a mother or even through an age assessment by a Doctor. It was the evidence of PW4, a Clinical Officer, that one Dr. Mwangi conducted an age assessment on the victim which report was produced as PEXH 4. At paragraph 19 of the Judgment of the trial Court, the age assessment report was deemed to have sufficiently established the victim to be 16 years of age. The Court finds no fault with that determination. It cannot be a basis to disturb the conviction.

20. On penetration, all the Prosecution needed to prove was the partial or complete insertion of the genital organ of the Appellant into the genital organs of the victim, PW1.

21. The evidence of the victim was consistent that for three consecutive days her and the Appellant had sexual intercourse. That evidence was supported with that of PW4, the Clinical Officer who found injuries to the *labia* of the complainant. In sexual offences, where the only evidence is that of the alleged victim of the offense, the Court is permitted by law, Section 124, *Evidence Act* convict the Accused person, provided the reasons for believing such witness are recorded and the Court gets satisfied that the witness is truthful.

22. The victim narrated how she was stopped by the Appellant on the road and lured to go with him to his place to help him wash his clothes. The Appellant then locked her in the house and had sex with her three times that night and the next day the Appellant again locked her in the house and left her for the entire day only to return in the evening when he again had sex with her that night.

23. In this matter the Court finds and holds that the evidence of PW1 was sufficiently corroborated by PW4 and that penetration was proved beyond reasonable doubt.

24. On the element of identification, it was the evidence of PW1 that he spent several days with the accused. Having been with the Appellant for three days having sexual intercourse, the Appellant became well known to her and hers was a case or recognition and not necessarily identification. The Court having perused the Judgment finds that the trial Court took into consideration only what was relevant and that there is no basis to disturb the conviction.

25. Since *Bernard Kimani Gacheru v Republic* [2002] eKLR, it is now settled law, from several authorities by this Court and the Court of Appeal, that sentence is a matter that rests in the discretion of the trial Court depends 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. Interference is discouraged even where the appellate Court feels that the sentence is heavy and that the appellate Court might have passed a lesser sentence is not sufficient grounds for interfering with the discretion of the trial Court on sentence. Presently the Court is guided by the sentencing guidelines 2023 which underscore, among others, the need to take into account any minimum sentences imposed by the statute.

26. In this matter however, there was a misstatement of the subsection of the law citing the offence which the trial Court failed to capture and thus imposed a sentence that was contrary to the law by being more severe.

27. Even though the statement of offence pointed the offence to Section 8(1)(3) of the *Act*, the evidence on age place the offence squarely under section 8 (1)(4). That disparity occasioned no prejudice to the Appellant and is thus curable by application of section 382 of the *Criminal Procedure Code*. Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 provides that 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.

28. The trial Magistrate convicted the Appellant to twenty (20) years' imprisonment as the least severe sentence under section 8(1)3. In doing so it erred. Article 50(2)(p) of the *Constitution* of Kenya, 2010 accords an Accused person the right to benefit of the least severe of the prescribed punishments for an offence.

29. I therefore find that the punishment meted by the trial Court was erroneous and harsh. The same is hereby set aside and substituted with a term of fifteen (15) years' imprisonment to be computed from the date of conviction.

30. Accordingly, for the reasons set out above, this appeal partially succeeds in that the sentence of twenty (20) years' imprisonment imposed on the Appellant is set aside and substituted with a sentence of fifteen (15) years' imprisonment computed from the date of the Judgment of the trial Court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 16TH DAY OF FEBRUARY 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of: -

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap