AMN v Republic (Criminal Appeal E066 of 2022)
[2024] KEHC 1219 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1219 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E066 OF 2022

JN ONYIEGO, J

FEBRUARY 9, 2024

BETWEEN

AMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. M. Kimani (S.R.M.) delivered on 05.12.2021 in sexual offence case number E034 of 2021 Mandera law courts.)

JUDGMENT

1. The appellant herein, AMN 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 main charge were that the appellant on diverse dates between 11.09.2021 and 13.09.2021 at Central Location within Mandera County, intentionally and unlawfully caused his penis to penetrate the vagina of SYA, a child aged 15 years.

2. 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. Particulars were that on diverse dates between 11.09.2021 and 13.09.2021 at Central Location within Mandera County, intentionally touched the vagina of the SYA, a child aged 15 years.

3. 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 serve a term of imprisonment of twenty (20) years to be calculated from when the appellant took plea.

4. Aggrieved by the said conviction and sentence, the appellant lodged a petition of appeal dated 09.12.2022 and filed on 20.12.2022 setting out the following grounds:

i. The learned magistrate erred in law and fact by convicting the appellant by considering extraneous facts.

ii. The learned magistrate erred in law and fact by convicting the appellant yet the prosecution had not discharged its duty of proving the case beyond any reasonable doubt.

iii. The learned magistrate erred in law and fact by convicting the appellant and thereafter meting out a harsh sentence not commensurate to the circumstances herein.

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

The appellant's submissions

6. The appellant submitted that the case was not proved beyond any reasonable doubt by the prosecution. That the trial magistrate in convicting him relied on extraneous evidence thus reaching a determination that was not just. He argued that at no time did he get linked to the offence herein as the evidence that was used by the trial court was purely circumstantial. It was contended that the sentence meted out was not only harsh but also not commensurate with the offence committed. In the end, the appellant urged this court to quash the conviction herein and set aside the sentence as meted out by the trial court.

The respondent's submissions

7. The prosecution counsel, Mr. Kihara while relying on his written submissions dated 18.05.2023 submitted that the prosecution had proved to the required degree the three ingredients of proving the offence of defilement namely; age of the victim, penetration and identity of the perpetrator.

8. Reliance was placed on the cases of *Hudson Ali Mwachongo v Republic* [2016] eKLR where the importance of proof of age was emphasized. The court was further referred to the case of *Francis Omuroni v Uganda* Criminal Appeal No. 2 of 2000 where the Ugandan Court of Appeal held that in defilement cases, medical evidence is paramount in determining the age of the victim. That apart from medical evidence, age may also be proved by a birth certificate, evidence of the the victim, parent/s or guardian and or by observation or common sense'.

9. On sentence, Counsel contended that the same was not only legal but also appropriate bearing in mind the circumstances of the case. This court was therefore urged to uphold the said sentence.

Analysis and determination

10. I have considered the record of appeal herein, appellant's grounds of appeal, and submissions by both parties. The key issue for determination is whether the prosecution proved the offence herein to the required standard.

11. 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."

12. PW1, SYA testified that on 11.08.2021, a vehicle approached her and upon the windows being rolled down, she noticed the appellant seated at the co-driver's seat. That the appellant exchanged pleasantries with her prompting her to board the said vehicle to metameta where upon entering the very house where they were found, she met PW4. It was her evidence that PW4 was the appellant's sister. That the appellant left and upon returning, brought a 'tamu' juice which upon drinking, she passed out.

13. She testified that upon waking up, she realized that she was not in her hijab dress but only her trousers. That she continued staying in the said house because she could not trace her way back home. It was her testimony that while there, they engaged in sexual intercourse until when she was rescued. She proceeded to state that she did not leave the house as the appellant used to lock her up and would only return at night.

14. PW2,YAA father to the victim recalled that on 11.09.2021, he had left home and upon returning, he found PW1 missing. That he informed the chief who advised her to make a formal report to the police. On 14.09.2021, he heard that there was a girl at metameta and so, he and some people made their way there. Upon reaching the said place, they raided the house of the appellant and in the house, found PW1 together with the appellant.

15. PW3, AC testified that on 14.09.2021 while on patrol with PC A, he received a call from Cpl. N who informed him of a suspect who was at large. He thus requested him to effect arrest upon the suspect, the appellant herein. That upon reaching the homestead where he had been directed, he found a crowd of people who had already arrested the appellant with a girl covered in a hijab. He stated that he proceeded to re-arrest the suspect together with the minor after which he took them to the police station.

16. PW4, Fauzia Hussein cousin to the appellant testified that on 11.09.2021, while at home, the appellant arrived with the complainant. That he told her that he had married her and so, she gave them a room in the plot. That the duo stayed for a period of three days and on the third day, she advised PW1 to return home but in the evening, the complainant returned to the said house claiming that her family had moved to Ethiopia. It was her case that on 14.09.2021, a group of ladies went to their place enquiring on the complainant and so she led them to the house where the appellant lived.

17. That thereafter the police came along and arrested the appellant together with the complainant. She reiterated that the appellant and the complainant lived together for a period of three days. On cross examination, she stated that the appellant told her that the girl was known as Fardosa.

18. PW5, Dr. Abdullahi Ali testified that he examined the complainant upon being presented to the hospital. He noted on vaginal examination that there was no vaginal bleeding but there was presence of whitish vaginal discharge and that the hymen was not intact. He further stated that on high vaginal swab, no spermatozoa were seen but there was presence of puss cells suggesting infection.

19. That upon conducting urinalysis examination, there was blood in urine thus suggesting infection. He produced a P3 Form and laboratory report as Pex 4 and 5 respectively. On cross examination, he stated that the hymen being a membrane, the same could be broken by many ways. On re-examination, he stated that he could not say whether there was defilement as there was no spermatozoa seen.

20. PW6, Joshua Mwamia testified that he was the investigating officer in the matter and upon PW2 reporting of the disappearance of his daughter, he embarked on trying to trace her. That on 14.09.2021, together with the help of PW2, they got information that the complainant was at metameta. He stated that the appellant and the complainant were arrested and upon interrogation, he established that the

appellant had spent three days with the complainant in the very house. He recorded statements of the witnesses and thereafter charged the appellant before the court. He produced a copy of birth certificate of the complainant as Pex 1.

21. DW1, Abdijabar in his sworn testimony denied committing the offence herein. He stated that there existed a grudge between his family and that of the complainant. It was his evidence that when they were taken for medical examination, it was established that there was no harm occasioned on either of them. According to him, the doctor's evidence was not conclusive as to whether the complainant was indeed defiled. He went further to state that at the material time he was at his place where he was operating business.

22. The appellant was charged with the offence of defilement. It is trite that the duty to prove a criminal case purely lies with the prosecution. The appellant has raised various grounds of appeal which when summarized leads to one issue that the prosecution evidence was not sufficient to convict him.

23. Therefore, the specific 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.

24. Proof of the said elements was succinctly stated in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013].

25. 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."

26. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court expressed itself on the issue of proof of age as follows; -

> " 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 v 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)..."

27. As regards the age of the complainant in this case, pw1 stated that she was aged 16 years. Further to that, a birth certificate produced by the investigating officer showed that the complainant was born on 21.06.2006. It is noted that the offence herein was allegedly perpetrated between 11.09.2021 and 13.09.2021. As such, the complainant was aged roughly 15 years at the time when she was allegedly defiled. I am therefore convinced that the age of the complainant was determined appropriately.

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

> " 3"the partial or complete insertion of the genital organs of a person into the genital organs of another person"

29. 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*."

30. In the instant case, PW1 testified that on the diverse dates, together with the appellant, they engaged in sexual activity. PW5 testified that he examined the complainant and that there was no vaginal bleeding but there was presence of whitish vaginal discharge and the hymen was not intact.

31. The appellant urged that the medical officer's report did not support the charge herein as the same was not conclusive. It is trite that where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. Of importance to note is the fact that such medical evidence is not mandatory for an accused person to be convicted in sexual offences cases. It therefore follows that a court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. [See *Kassim Ali v Republic* [2006] eKLR].

32. Further, under section 124 of the *Evidence Act*, the court can convict an accused person on uncorroborated evidence of the victim as long as it is convinced that the victim is truthful. [See the case of *Arthur Mshila Mange vs Republic*, Criminal Appeal No. 24 of 2014 [2016] eKLR].

33. PW1 testified that for the three days that she spent with the appellant, they engaged in sexual intercourse. PW4 cousin to the appellant also testified that the appellant had informed her that the complainant was his wife. It would not leave a lot of imagination on what exactly the duo were doing in the said house for all the time they spent in there having in mind that they were not related in any way. Taking into account the evidence at hand and general circumstances surrounding the commission of the offence, there cannot be any other conclusion other than that that the two clearly engaged in sexual intercourse. The alibi defence raised by the appellant was misplaced and an after-thought.

34. On identification, the same was not controverted as the complainant testified that she knew the appellant prior to the incident. The appellant also testified that the complainant was a person known to him. Besides, pw4 cousin to the appellant clearly stated that she was the one who provided a room to pw1 and the appellant where they stayed allegedly as a married couple for three days.

35. It is my finding that the appellant in the instant case was properly and positively identified as the person responsible for the perpetration of the offence herein. In the same breadth, the amount of time that the duo spent together also supported positive identification for the complainant to properly identify her aggressor. It therefore follows that grounds 1 and 2 of the appeal fail as conviction of the appellant was safe.

36. On sentence, the appellant urged that the trial magistrate did not consider his age when meting out the sentence. It is trite that sentencing is an exercise of discretion by the trial court which should never 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 Republic* 2018) e KLR and *Wilson Waitegei v Republic* [2021] eKLR].

37. It follows that 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* 2006 which provides that upon conviction the offender shall be sentenced for a term of not less than twenty years. The appellant was sentenced to serve twenty (20) years imprisonment to be calculated from when he took plea.

38. I therefore find no merit in the appeal herein on conviction. However, on sentence, am inclined to find the same to be excessive taking into account the mitigation on record and the age of the complainant vis a vis her complicity to the commission of the offence. The appellant who is 27years old needs a chance to reform and catch up with life a fresh. Accordingly, the sentence of twenty (20) years is substituted with that of 10 years to be calculated from when the appellant took plea.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 9TH DAY OF FEBRUARY 2024

J. N. ONYIEGO

JUDGE