Kariuki v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 998 (KLR) (2 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E012 OF 2023

M THANDE, J

FEBRUARY 2, 2024

BETWEEN

LUKAS WANJOHI KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. B Kabanga, SPM delivered on 25.1.22 in Hola Criminal Case No. E007 of 2020)

JUDGMENT

1. The Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 (SOA). The particulars of the offence are that on diverse dates between April 2020 and 20.10.2020 at Tana River Sub-County in Tana River County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FS, (the Complainant) a child of 17 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *SOA*. The particulars of this offence were that on the same diverse days in the same place, the Appellant intentionally touched the vagina of the Complainant with his penis. The Appellant was convicted of the main charge and sentenced to serve the minimum mandatory sentence of 15 years' imprisonment.

2. Being aggrieved by the conviction and sentence, the Appellant appealed to this Court. The summarized grounds of appeal as set out in his amended grounds of appeal filed on 5.12.23 are that the trial Magistrate erred in fact and in law by:

    i. failing to appreciate and that the case was never proved beyond reasonable doubt.

    ii. failing to consider that a that a DNA test was not done.

    iii. relying on an unreliable, questionable and erroneous exhibit to convict the Appellant.

iv. failing to appreciate and that this matter was not investigated sufficiently.

v. failing to consider and appreciate the alibi of the Appellant.

3. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.

4. The Complainant testified that she is 17 years old and that the Appellant was her boyfriend from around March 2020. They used to meet in a forest near where they live and have sex. The Appellant would undress her and put his penis in her vagina. They did this several times in a month and this continued for a while. In April 2020 she missed her monthly periods and informed the Appellant. In October of that year, they agreed and set out to travel to the Appellant's home in Nairobi. After realizing the Complainant was missing, her parents made calls and someone from Hola confirmed that she and the Appellant was in a Nairobi bound bus. They were intercepted at Madogo and taken to Hola Police Station. The Complainant was examined in hospital and confirmed to be pregnant. The child however died in the womb.

5. The Complainant's cousin OS PW2's testimony was that the Complainant was at home as schools had closed due to Covid-19. On the night of 21.10.2020, the Complainant went missing and they saw her footprints and those of a man heading to the road. They alerted all road blocks that the Complainant had been stolen and requested checks on all vehicles from Hola. At Makutano, the Complainant and the Appellant boarded a bus in which the Complainant's brother was travelling to Nairobi. He made arrangements for them to be arrested and were taken to Hola Police Station. PW2 went to the police station and saw the Complainant and the Appellant. They recorded statements and the Complainant was escorted to hospital. Later the Complainant developed complications and delivered a still born baby.

6. No. 238304 PC Kennedy Gitonga PW3 stated that he was escorting Diamond Bus from Hola to Madogo on the day of the incident, when one passenger informed him that the Complainant who had been reported missing was in the bus. On being questioned, the Complainant stated that she and the Appellant who was seated next to her was her husband and that they were travelling to Nyeri to wed. They rescued her and arrested the Appellant and both were taken to Hola Police Station.

7. No. 62592 Cpl Zainab Dhadho, PW4, the investigating officer stated that the Complainant was brought to the station. She was 17 years old and in form 2. A report had been made about her disappearance and later interception in the Diamond Bus together with the Appellant. She escorted the Complainant to hospital where she was examined and confirmed to be pregnant.

8. The Appellant contends that the charge against him was not proved beyond reasonable doubt. The Respondent however submitted that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt.

9. For an accused person to be convicted of the offence of defilement, the ingredients set out in *Charles Wamukoya Karani v Republic,* Criminal Appeal No. 72 of 2013 must be established. The Court in that case stated:

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

10. From the evidence, it is clear that the Complainant was a minor. Her birth certificate (Pex 1), which was produced in evidence indicated that she was born on 15.6.2003 making her 17 years old at the time of the incident. As such, the fact that the Complainant was a child aged 17 years was established.

11. As regards penetration, the Appellant submitted that the trial Magistrate relied on questionable and doubtful documents. He contended that the P3 form and the treatment notes produced by Dr. Hashako Mohamed PW5 are shoddy and a fabrication. He argued that there is no way a doctor can indicate that the Complainant had an old scar indicating that her hymen had been broken and at the same time stated that her vagina had evidence of sperm and semen of less than 24 hours. His contention is that the presence of sperms and semen in the vagina of the Complainant is not proof that it was the Appellant who committed the offence. The Respondent submitted that the Complainant was taken to hospital on the day of the arrest and the doctor confirmed that she had had sex approximately 2 days before.

12. The testimony of PW5 is that he examined the Complainant on 21.10.2020 at Hola County Referral Hospital and confirmed she was 7½ months pregnant. The Complainant told him she had been having sex every 2 days from April. She had an old scar indicating her hymen was long broken and that her vagina had evidence of sperm and semen of less than 24 hours He concluded that there was defilement. I have considered the testimony of PW5 coupled with that of the Complainant and I am satisfied that penetration was established beyond reasonable doubt.

13. I now turn to the ingredient of identification. The Complainant stated that the Appellant was her boyfriend since April 2020 and that they had been having sex frequently. When she told the Appellant that she was pregnant, they agreed to relocate to his home in Nairobi but were intercepted at Madogo in a Nairobi bound bus. This testimony was corroborated by the evidence of the Complainant's cousin OS PW2's who stated that after the Complainant went missing on the night of 21.10.2020, they alerted requested checks on all vehicles from Hola at all road blocks. At Makutano, the Complainant and the Appellant boarded a bus in which the Complainant's brother was travelling to Nairobi. He made arrangements for them to be arrested and were taken to Hola Police Station. PW2 went to the police station and saw the Complainant and the Appellant. They recorded statements and the Complainant was escorted to hospital. Later the Complainant developed complications and delivered a still born baby. The evidence of No. 238304 PC Kennedy Gitonga PW3 also supported the Complainant and PW2's testimony. Accordingly, I am satisfied that there was clear identification of the Appellant as the person responsible for the penetration.

14. The Appellant contends that there ought to have been a DNA test done on the vaginal swab taken from the Complainant to ascertain the paternity of the stillborn child. While a DNA test would be necessary to determine the paternity of a child, my view is that this was not in issue in the circumstances. The fact that the Complainant said she had been having sex with the Appellant and became pregnant and that they had been intercepted together on route to the Appellant's Nairobihome, leaves no doubt in the Court's mind that the Appellant was the perpetrator of the offence in question. Indeed, the trial Magistrate considered the Appellant's contention that the charges were fabricated and stated:

> If indeed it is true that this entire case was a fabrication as alleged by the accused, then how comes a total of 5 prosecution witnesses, including 2 police officers and a doctor all agreed to testify against him and yet they had no known disputes with the accused prior to the incident? If indeed the sole intention of the victim's family was to take his plot of land, then how comes medical evidence is so consistent with the victim's account of events?

15. I concur with the learned Magistrate and also wonder what the Appellant was doing in a Nairobi bound bus with the Complainant. The testimony of the Appellant and his witnesses did not dispel the veracity of the prosecution case which was consistent all through. Accordingly, I find and hold that the evidence of this case, all taken together, is inconsistent with the innocence of the Appellant.

16. Section 8(4) of the *SOA* 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 15 years.

17. The circumstances herein, are that the age difference between the Appellant and the Complainant is 3 years. The Appellant was 19 years old while the Complainant was 17 years old in the period in question. The Complainant stated that the Appellant was her boyfriend and had sex with him frequently. They were even intercepted in a Nairobi bound bus en route to the Appellant's home to live together due to her pregnancy. My view is that this was a mutual Romeo and Juliet type of relationship, the consequences of which have befallen the Appellant with none on the Complainant.

18. In the case of *Evans Wanjala Siibi v Republic* [2019] eKLR, the Court of Appeal had this to say about the consequences of such relationships where young man, such as the Appellant herein, are punished but young women are not:

> We think, with respect, that had the two courts below adopted a more fair-minded and-even-handed approach to the case, they would at the very least have sought to establish the appellant's age. Instead, what emerges is a rush to punish him in a zealous deployment of the *Sexual Offences Act* for the supposed protection of the complainant. Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term.

19. In *Dismas Wafula Kilwake v R* [2018] eKLR, the Court of Appeal was of the view that the reasoning in the *Francis Karioko Muruatetu & another v Republic* [2017] eKLR should also apply to the penal provisions of the SOA and stated:

> Being so persuaded, we hold that the provisions of section 8 of the *sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

20. At 19 years of age, the Appellant was an adult while the Complainant at 17 years, was a child, It is trite law that a child has no capacity to consent to sex. See *Nehemiah Kiplangat Ngeno v Republic* [2018]

eKLR. When a crime is committed, it must be punished and a person who commits a crime is upon conviction subjected to the penal provisions of the law. It is however accepted that while crime must be punished, there must be rationality and proportionality. Excessive punishment, does very little to serve the interests of justice or those of society. Mandatory sentences strip judicial officers of the discretion to mete punishment that is in proportion to the crime committed. While the Court does not condone the Appellant's conduct, it finds that the sentence of 15 years excessive, given the circumstances.

21. My view is that this is an appropriate case in which circumstances demanded that the trial court, freely exercising its discretion should have been able to impose a sentence other than that prescribed by law.

22. In the end, after reevaluating the evidence, my finding is that the Appellant was properly convicted and I do hereby uphold the conviction. As regards the sentence of 15 years' imprisonment imposed by the trial court however, my finding is that the same is excessive in the circumstances of the case. Indeed, the trial Magistrate appeared of the same mind and stated, "even though I sympathize with the accused for his situation, my hands are tied as far as reducing the sentence period is concerned". In light of the foregoing, I do hereby set aside the said sentence and substitute therefor a sentence of the period already served. The Appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIA MS TEAMS THIS 2ND DAY OF FEBRUARY 2024.

M. THANDE

JUDGE