Opati v Republic (Criminal Appeal E005 of 2022)
[2024] KEHC 1467 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1467 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E005 OF 2022

FROO OLEL, J

FEBRUARY 14, 2024

BETWEEN

ARTHUR MARAGA OPATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein Arthur Maraga Opati was charged with the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offence Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 17th and 18th February 2020 at Athi-River Sub County within Machakos County, the Appellant intentionally and unlawfully caused his genital organs (penis to penetrate the female organ (vagina) of one W.N a child aged 14 years.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The particulars were that on diverse dates between 17th and 18th February 2020 at Mlolongo Township in Athi-River Sub County within Machakos County, the Appellant intentionally and unlawfully caused his genital organs (penis to penetrate the female organ (vagina) of one W.N a child aged 14 years.

3. The Prosecution called six witnesses who testified in support of their case and at the close of the Prosecution case, the Appellant was put on his defence, gave sworn evidence but did not call any witness. Upon considering the evidence as presented, the trial court did find that the accused was guilt on the 1st count of charge of defilement which had been proven beyond reasonable doubt, he was declared guilty and the court proceeded to convict him under section 215 of the CPC. The trial court did consider the mitigation made by the appellant and proceeded to sentence him to serve twenty (20) years imprisonment.

4. The Appellant being dissatisfied with the said conviction and sentence filed his petition of appeal on 28th February 2022, where raised four (4) grounds of appeal. The grounds of appeal raised included;

   a. That, the learned trial Magistrate erred in law and fact by convicting the appellant on evidence which did not meet the required threshold.

   b. That, the prosecution's case was marred with material discrepancies, contradictory statements and incurable inconsistencies.

   c. That, the trial magistrate erred by failure to appreciate the fact that the evidence adduced by the prosecution lacked credibility and the same ought not to have been relied upon.

   d. That, the failure by the prosecution to avail material witnesses was fatal to the prosecution's case since the evidence adduced was so underwhelming to warrant a conviction.

   e. That the learned trial magistrate failed to consider the appellant's defence and did not give any valid reason for blatantly rejecting the Appellant's revenge.

Facts of the Case

5. PW1, N.W underwent voire dire examination and was affirmed before she testified. She testified that she stayed with her mother and uncle and that there were 8 houses in the plot where they stayed, their house was the first. She testified that on 17.02.2020, she was in the appellant's house where she had gone to pay him a visit. A village elder found them doing nothing and they were taken to Mlolongo police Station. She stated that they had sexual intercourse several times in the Appellant's house by him inserting his penis on her vagina. That they had known each other for 3 months and he was her boyfriend. He knew that she was a school going child in class 8. She stated that village elders found them in the house and she had not reported the ordeal to anyone before they were found.

6. PW1, stated that she knew why she was arrested and she did not know it was wrong to have intercourse with the accused and they were not using any protection during the intercourse. They were placed in custody at Mlolongo police station and then taken to hospital. She was issued with documents such as PRC Form, P3 Form, Certificate of age Assessment, Baptismal card which shows she was born on 30.12.2016, and hospital treatment book, all of which were marked for Identification.

7. PW1 on cross examination by the accused stated that she was born on 30.12.2006 and stayed with her mother and that the accused house was not far from theirs. On 18.02.2020, she was on midterm and could not recall the time she went to his house. She stated that she did not collude with the caretaker to have the accused charged.

8. PW2, JW testified that she had two children, PW1 and another child. She was staying with her brother and PW1 in Mlolongo. She recalled that on 18.02.2020, she was doing house chores when she received a call from a police officer who told her that PW1 was at the police station as she had been found with a boy and her baptismal card was required. She went to the police station and found that they had been taken for medical examination and was told that her daughter used to go to the accused house and her daughter intimated that the accused had promised to educate her yet he was having sexual intercourse with her.

9. On cross examination, PW2 stated that PW1 was 14 years old as she was born on 30.12.2006, she was on midterm break and, on the material day, she had not talked to her daughter. She stated that she did not know where the accused person resided and that her brother was not a witness in the said case. It was also not true that her brother had wrongly implicated the appellant with false charges. PW1 was taken to hospital by the police officer.

10. PW3, Paul Nzau stated that he was a businessman and a village elder in Mlolongo Phase 3. He recalled that on 18.02.2020, he received a call from the chief of Mlolongo Peter Ndunda that he had received information from a caretaker that there was a boy Opati who had taken a girl from Ngwata Primary school. He then together with other members of the Community Policing went to the house of the accused. They knocked severally and stayed outside for a while (about 30 minutes) before the accused opened the door. The accused was wearing a pair of shorts, while PW1 was seated on the mattress, which was on the floor. They asked them what they were going and the accused said that he found the girl in his house after work. PW1 was naked and looked like she had washed the accused clothes. They told her to dress up and they proceeded to Mlolongo Police station and recorded statements.

11. On cross examination, he stated that the area chief had received report from the caretaker who gave them directions to the house. The information they had was that PW1 used to frequent the accused house and community members were complaining about his affair with the girl. He stated that both of them did not have clothes on and that he did not take any photographs at the scene. The caretaker told them that PW1 used to go to the accused house in her school uniform.

12. PW4, Sylvester Musyoki testified that he was a caretaker at Mlolongo Phase 3 and that on 18.02.2020, one of the tenant went to his house and told him that there was something wrong going on. That a pupil from Ngwata Primary used to go to the Accused house. He went there and found PW1 washing clothes. He then called the area chief who said he would send someone to arrest him. After a while the accused arrived and entered the house with PW1, before closing the door behind them. He peeped through the gap in the window and saw both of them with no clothes. He described that the accused house was made of iron sheets and the window had metal frames. The accused had partitioned his house using a short curtain. The accused opened the door on seeing many people outside. The accused was arrested and taken to mlolongo police station.

13. On cross examination PW4 stated that he was the caretaker of Blessed Assurance Houses, he did not know the name of the tenant who gave him the information, and had no relationship with the said lady-tenant who had informed him of what was transpiring. He was the first one to reach the scene and was later joined by the village elder. He stated that he did not take the clothes the girl was washing as exhibits and had not talk to the accused when he arrived on the fear that he would escape. He had alerted the area chief once he had arrived and had peeped through the window and saw them engaging in sexual intercourse.

14. PW5, a police officer named Mwamaisha Magumba Force No. 88876 who was the investigating officer in the case testified that the matter was reported on 18.02.2020 and that the accused and the complainant had been brought to the station by the village chairman and caretaker. She recorded their statements, mother of the complainant also recorded her statement. On 19.02.2020, she took the accused and the victim to Athi-River Hospital for filling of the P3 form and PRC form. She further testified that she established that the accused and the victim were neighbours. One 17.02.2020, the complainant had visited the accused person. He cooked rice and meat, then asked for sex. He removed the Victim's shirt and skirt then carried her to the bed. He defiled her once without using protection, he asked her to go back to his house on 18.02.2020 which she did. While they were in the house, they were accosted by the caretaker and village chairman and were taken to Mlolongo police station and charged. She stated that an age assessment was done.

15. On cross examination she stated that she did not visit the scene of the crime. She interrogated the witnesses and recorded their statements. She did not investigate which tenant gave the information to the caretaker and that the complainant was composed when she was brought to the station. she did

not receive any clothes as exhibits. Only the village elder and the caretaker recorded their statements. She did not interrogate the neighbours or call them as witnesses.

16. PW6, Stephen Kioko Kiio testified that he was a clinical officer at Athi River Level 5 Hospital that on 19.02.2020,a patient W.N (the complainant) was brought to the hospital with the allegations of having been defiled. He stated that he filled a PRC form and on examination the hymen was torn and had an old tear. A vaginal swab test did not show any spermatozoa. She had changed clothes and according to her, she had been in a relationship with the accused for about 2 months. She was alleged to have had sex with the accused on various occasions. She had no injuries. Hymen was normal, had no discharge, external genitalia was normal.

17. On the P3 form, it was reported that she had sexual intercourse on several occasions at the accused house and was not sure whether they used a condom. Her vulva was normal, her hymen was absent and had no lacerations in the genital organ. On cross examination, he indicated that he took the history of the incident from the complainant and did general physical examination and that majorly the hymen is broken through sexual intercourse but blunt trauma to the genetalia can cause breakage to the hymen. She did not bring any clothes and had changed her pant. He stated that he did not find any discharge on the pant.

18. The Appellant was placed on his defence and testified that on 18.02.2020, he was off duty because he was unwell, he had a knock at his door and when opened it was the caretaker and a man who claimed to be a police officer who informed him that he was required at the police station and when he inquired the reasons, he was assaulted. He screamed and the neighbours came to his rescue. He was taken to mlolongo police station and put on custody and then he was informed by the investigating officer of the charges he was facing. He denied knowing the complainant nor having sexual intercourse with her. He was later charged in court and he denied the charges. He stated that the offence was created by his caretaker, the complainant and the village elder. That he had a difference with the caretaker over a girl named Jane Njeri and that created animosity between them. It was the caretaker who had an affair with the complainant and was being used to have him charged in the case. He denied having any affair with the complainant.

19. On cross examination, he stated that he did not have any witnesses in court and that when he was arrested, he lost his phone and was unable to contact any friends and neighbours. The caretaker framed him because they had differences. He was not found with the complainant in his house and that the prosecution should have availed the neighbours as witnesses, there were no clothes at the custody of the police. The complainant was being used to frustrate him and he did not defile her.

Appellant Submissions

20. The Appellant submitted that the issues for determination was whether the prosecution has proved their case beyond any reasonable doubts as required by law, whether the failure by the accused to avail material witnesses was fatal to the Prosecution's case , whether the appellant's defence shook the prosecution's case and whether failure by the trial magistrate to consider the same shifted the burden of proof to the defence.

21. On the first issue, it was submitted that there were contradictions, inconsistencies and material deficiencies and that a brief analysis to the prosecution witnesses' testimonies demonstrate that their evidence lacked credibility. That it was clear that the evidence of PW3 and PW4 was controverted by PW1 and that it was clear they were in a mission to fix the appellant at all costs. Reliance was placed in the case of Felix Luwambe Gonzi Vs Republic (2006) where the appellate court held that it was difficult

to know the position of the matter as the witnesses therein had given contradictory evidence. Similarly, reliance was made in the case of Philip Nzaka Watu Vs Republic (2016) eKLR to buttress this point.

22. It was submitted that the prosecution's evidence was so underwhelming and way below the minimum threshold as required by the law and that the trial magistrate erred in making conclusions that sexual intercourse occurred whereas the contrary was proved by the complainant. Reliance was placed in the case of Pandya v Republic [1957] EA 336 where it was held that it is trite law that where evidence is contradictory and inconsistent, such evidence shall not be relied upon as true. Also the case of Pius arap Maina v Republic [2013] e klr where it was held that the cardinal principle in criminal law is that contradictions , inadequacies and inconsistencies should be resolved in favour of the accused.

23. On the second issue raised, it was submitted that there were number of witnesses whom reference was made but were not called by the prosecution as witnesses such as the tenants who were allegedly complaining about the relationship of the accused and the complainant. It was clear that PW4 was trying to shift focus to unknown witnesses. It was submitted that the failure by the prosecution to call in key witnesses was for the benefit of the appellant. Reliance was placed in the case of David Mwingirwa v Republic [2017] eKLR to buttress the consequences of not calling key witnesses and that this was detrimental to the prosecution's case

24. Finally the appellant submitted that the burden of proof rest with the prosecution and reference was made to section 111 of the *Evidence Act*. Reliance was made to the case of Koinange and 13 others vs Koinange (1986) KLR where it was held that it is well established rule of evidence that whoever asserts a fact is under obligation to prove it in order to succeed and the same is enunciated at section 107(1) of the *Evidence Act*, and the case of Dhalay Siggh v Republic Cr. No. 10 of 1997, where it was held that the prosecution's case was not proved to the required standards of proof, therefore the appellant deserves an acquittal as buttressed in the case of WoolMington vs DPP (1935) E.A P 462 at 481.

25. The appellant thus prayed that his appeal be allowed and both conviction and sentence be set-aside.

26. The Respondent in this Appeal did not file and submissions.

Analysis and Determination

27. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno v Republic [91972]EA 32 & Pandya v Republic [1975] EA 366.

28. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v R [1975] EA 57. Where it was stated that;

> " it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, 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 made the advantage of hearing and seeing the witnesses."

29. Also in Peter's v Sunday Post[1958] E.A. 424 it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

30. Having analyzed the grounds raised in the Petition , the main issue is whether the prosecution proved its case beyond reasonable doubt and I will therefore proceed to analyze the same

Section 8(1) of the *Sexual Offences Act* No 3 of 2006 provides as follows;

> (1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child aged between twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

31. The ingredients for the offence of defilement can be summarized as follows;

a. Age of the victim (must be a minor),

b. penetration and

c. Proper identification of the perpetrator.

(see Wamukoya Karani v Republic Criminal Appeal No 72 of 2013 and George Opondo Olunga v Republic [2016] eKLR)

32. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in Edwin Nyambogo Onsongo v Republic [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

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

33. In the case of Francis omuroni v Uganda, court of Appeal criminal Appeal No 2 of 2000, it was held thus

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense

34. I have analyzed the evidence tendered with respect of the complainant's age. The charge sheet stated that she was 14 years old and in Court the evidence given confirmed that the age of the complainant was not in dispute. The minor's mother, testified that the minor was born in 30.12.2006 and the baptismal card produced as an exhibit also confirmed the same.

35. The second element is penetration. Section 2 of the *sexual offences Act* defines penetration as;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

36. The complainant. PW1 did testify that the complainant was her boyfriend and they had on several occasion had sexual intercourse with the appellant and that she never knew it was wrong to have

intercourse with him. She even confirmed that the accused inserted his penis on her vagina. PW3 the village elder testified that when he went to the appellant's house, the appellant opened the door, when he was only wearing shorts, while PW1was naked and seated on the mattress, which was on the floor. They directed them to dress up and escorted them to the police station. PW4 testified that when he peeped through the Appellant's window, he saw them having sexual intercourse

37. PW5 who was the clinical officer Stephen Kioko testified that upon examination of the complainant, her hymen was broken. He produced the P3 form and PRC forms as exhibits. He stated that the complainant had informed him that she had sexual intercourse with the appellant for about two months.

38. A review of the above evidence, clearly shows that the appellant and the complainant were involved in a romantic relationship, which was freely and openly admitted by PW1. PW4 also peeped through the window of the appellant's house and saw then engage in intercourse. The medical evidence also confirmed that PW1 was sexually active. The question of penetration was therefore not proved.

39. The final element to be proved was identification. The complainant PW1 identified the Appellant and stated that they were neighbours and that she had sexual intercourse with him severally and that they used to stay in the same plot at some point and she even identified him court. The other prosecution witnesses also identified the accused particularly the caretaker, the village elder, and the investigating officer. Given the above facts identification was by way of recognition and was free from any error, thus reliable. See Wamunga v Republic [1989] KLR at 426.

40. The final issue this court will consider is whether the sentence passed was appropriate. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirely so as to arrive at appropriate sentence. The Court of Appeal Thomas Mwambu Wenyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

41. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under *Sexual Offences Act*. It observed as follows: -

> 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.

42. After conviction, the Appellant was called upon to mitigate and the trial court proceeded to sentence him to serve a prison term of 20 years. While it was necessary to pass a deterrent sentence, the trial court failed to adhere to Judiciary Sentencing policy guideline under section 23.1 to 23.4 which provides for sentence hearing. It would have been necessary to have the probation department provide a pre-sentence report detailing the appellants age, social background, and any aggravating/ mitigating circumstances, hear the accused mitigation before sentence was handed down.

43. The applicant has a legitimate expectation that during trial he is subjected to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied in his favour where the circumstances allow . See Ahmad Abolfathi Mohammed & Another v Republic [2018] Eklr & Bethwel Wilson Kibor v Republic [2009] eKLR

Disposition

44. The upshot after considering all the evidence adduced is that the appeal as against conviction lacks merit and the same is dismissed.

45. The appeal as against sentence is allowed. The appellant will be referred back for re sentencing, which will be done before the trial court at Mavoko.

46. The trial court and/or (if already transferred), the chief Magistrate-Mavoko court will call for a fresh social inquiry report from the probation department and take fresh evidence of the Appellant's mitigation before re sentencing the applicant.

47. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 14th day of February, 2024.

In the presence of;

Applicant present form Kamiti Medium prison

Mongare for Respondent

Sam - Court Assistant