Kilanyi v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 4557 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E022 OF 2023

REA OUGO, J

MARCH 14, 2024

BETWEEN

MESHAK KILANYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the conviction and sentence of the accused person by Hon. J.O. Manasses (RM) in Sirisia PMCC No. E008 of 2022 on 28/2/2022)

JUDGMENT

1. The appellant, Meshack Kilanyi, was charged and convicted of 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 that on diverse dates between September 2021 and 10th February 2022 at [particulars withheld] in Bungoma West Sub-County within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of V.B a child aged 15 years. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The appellant dissatisfied with the judgment of the court and the ruling on the sentence lodged his petition of appeal on the following grounds:

    1. That the appellant pleaded not guilty to the charges.

    2. That the trial magistrate erred in law and fact in conducting proceedings that violated the appellant as per the provisions of the law of Kenya hence null and void.

    3. That the trial magistrate erred in law and fact not to adduce age assessment or birth certificate in the judgment making.

4. That the trial magistrate erred on law and fact in failure to appreciate that the prosecution case lacked crucial evidence that was supposed to be used for determination while delivering his judgment.

5. That the trial magistrate court acted with bias by relying on the prosecution side in decision-making.

6. That the trial magistrate court failed in rejecting the defence adduced by the appellant.

7. That the sentence imposed upon the appellant is harsh and excessive in the circumstances.

8. That I wish to raise more grounds of mitigation in support of this appeal when the same comes up for hearing.

3. The role of this Court as the first appellate Court is well settled. It was held in the case of Okeno vs. Republic (1972) EA 32 that a first appellate Court is duty-bound to re-evaluate the evidence tendered before the trial court afresh, evaluate, analyze it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

4. The prosecution witnesses at the lower court testified as follows:

5. VB (Pw1) testified that she is 15 years old and used to attend [Particulars Withheld] School. On 20/11/2021 at 2:00 p.m., Pw1 was at the farm and after cutting sugarcane she met the appellant who asked to speak to her. She told the appellant that she would first go home and talk to him later. Pw1 later went to the appellant's house where he told her that he wanted her to be his wife and that she should bear his children. Pw1 testified that they had sex and slept over at the appellant's house. They continued with their relationship for 2 months and on 4/1/2022 she left home and went to the appellant's house where they stayed together for one and a half weeks. When people realized that she was staying with the appellant, the appellant suggested that they should elope to his sister's place. NB (Pw2), Pw1's mother, subsequently contacted the appellant's sister and asked her to permit Pw1 to return home. Two days later, Pw1's brother and father arrived to pick her up and escorted her to Namwela Police Station.

6. Pw2 testified that Pw1 was her daughter and in October 2021 she received information that the appellant was seducing her daughter. She later heard that Pw1 was pregnant. She went to the village elders who sent her to the chief. The chief sent her with other elders but the appellant denied ever seeing Pw1. Pw2 then reported that the girl was missing and later received a call from the appellant's sister that she had sent away the appellant and Pw1 following Pw2's report. Pw2 proceeded to the police station and was taken to the appellant's house and the appellant was arrested. She testified that Pw1 was 15 years old and that she took her to the hospital on 25/02/2022.

7. Benedict Wanjala Wanyonyi (Pw3) told the subordinate court that he is a clinical officer attached to Sirisia Sub-County Hospital. On 25/02/2022 Pw1 came to the hospital accompanied by Pw2 and her brother. Pw3 noted that the child was in fair general condition. She claimed to have been defiled by a person known to her on various occasions. They started their relationship in September 2021 and she confirmed that they had engaged in sexual intercourse without protection and Pw1 realized that she was pregnant. Pw3 carried investigation on her HIV status and urinalysis which revealed that she had a UTI infection. A vaginal examination revealed that the hymen had been broken and there was a white discharge. He administered antibiotics to help do away with the infection. He also produced an age assessment report showing that Pw1 was 15 years old. On cross-examination, he testified that he never confirmed whether Pw1 was pregnant.

8. The investigating officer Nyang'au Nyarangi Douglas (Pw5) testified that on 25/2/2022 at 11:00 hours HB, Pw1's father, made a report that Pw1 who was a pupil at [Particulars Withheld] School went missing on 4/2/2022. Pw1's father had information that his daughter had been seen in the appellant's house. They went to the appellant's house and found both the appellant and Pw1. Pw1 in her statement confirmed that she was in a relationship with the appellant. They took Pw1 to Sirisia Sub-County Hospital to confirm whether she was defiled. Once defilement was confirmed the appellant was charged with the offence of defilement.

9. The appellant in his defence testified as Dw1. He denied committing the offence. He testified that in August 2021 HB loaned him Kshs 1,000/- but when he failed to pay the said H threatened him by saying that 'utanilipa kwa serekali'. On 20/2/2022 H sent a boy by the name Isaac Barasa for the money but when he failed to pay the money back, they took him to the police station and locked him up in the cells. He was later transferred to Sirisia Police Station and charged with the offence of defilement.

10. The appellant in his submissions questions whether there is a charge described in section 8(1) (3) of the *Sexual Offences Act* and whether the sentence was lawful. He advanced that the charge sheet was not amended to reflect the correct charge. The non-existent charge should not be the base of conviction.

11. On penetration, the appellant argues that the charge indicates that on diverse dates between September 2021 and 10th February 2022 Pw1 was defiled. The victim was taken to the hospital on 25/2/2022 and it was noted that there was a white discharge. The appellant questioned whether the white discharge could be seen after such time had lapsed. He further argued that the absence of a hymen is not sufficient proof of penetration/defilement – see P.K.W v Republic (2012). The appellant further argues that there are contradictions in the prosecution case as Pw1 testified that she is not in school while Pw4 testified that a report was made that the child was a class 7 pupil.

12. The appellant also submits that the prosecution failed to prove the age of the complainant. There was no certificate of birth produced to enable the court to ascertain the exact age of the complainant. He relied on the case of Kisumu High Court Criminal Case No. 46 of 2009 Stephen Ouma Opiyo v Republic where the court held that there was no cogent proof of the complaint's age as there was no birth certificate that was produced. The court in that case further stated that there was no sufficient evidence to prove the age despite the testimony of the complainant's mother and the baptismal card that was produced. He also argues that vital witness was not called to testify and that their testimonies would have led to his acquittal. He pointed out that none of the elders nor the people who saw him living with the complainant were called as witnesses.

13. On the sentence, he argues that the mandatory minimum sentence is unjust and unfair because it takes away the discretion of judicial officers.

14. The respondent in its submissions argues that there was overwhelming evidence against the appellant. The age of the minor was proved by the testimony of Pw1 who testified that she was 15 years. The age assessment produced, Pexh3, also confirms that she was 15 years. Penetration was proved through the testimony of Pw1 and the complainant's mother who was also looking for her, Pw3 also testified that he examined the complainant and produced the treatment notes as Pexh2 and the P3 form as Pexh3. The medical documents confirmed that the complainant's hymen was broken and that she was pregnant. The appellant was positively identified by the complainant as the perpetrator.

15. The appellant alleged that his defence was rejected by the trial court. The respondent submitted that the trial court considered the appellant's defence and found that it could not dislodge the overwhelming evidence mounted by the prosecution against him, thus dismissed it.

16. The sentence of 20 years is appropriate as provided by section 8(3) of the Act and also just in the circumstances. Considering that the victim was 15 years old and a school-going child, the damage the act caused the victim by interfering with her education and the fact that the appellant denied any wrongdoing despite the overwhelming evidence does not merit any reprieve from this court. They urged the court to find that the sentence meted was not grossly disproportionate to warrant interference.

Analysis and Determination

17. I have considered the grounds of appeal and the submissions by parties and the issues for determination is whether the prosecution proved its case to the required standard and whether the sentence meted was harsh.

18. However, before I delve into the merits of the appeal, I turn to consider whether the charge sheet was utterly defective. The appellant was charged with "Defilement contrary to section 8 (1) (3) of the *Sexual Offences Act*...". Sections 8 (1) and 8 (3) of the *Sexual Offences Act* provide as follows:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) .....
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> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

19. The appellant in his submissions contends that the words 'as read with' were missing in the charge sheet and he was charged with a non-existent charge. However, he did not show that he suffered prejudice or that there was failure of justice occasioned. The Court of Appeal when faced with a similar issue inCornel Ogutu Mikwa v Republic [2016] eKLR stated:

> " 19. As already mentioned, the appellant says that section 8(1) and 8(3) of the *Sexual Offences Act* were 'pooled together' thereby rendering the charge sheet defective. If we understand the complaint correctly, the appellant's grievance is that in drafting the charge sheet, the function word "and" should have been inserted between section 8(1) and 8(3) instead of lumping "section 8(1) (3)" together as was done here. Section 8(1) creates the offence with which the appellant was charged and provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Section 8(3) prescribes a penalty and provides that a person who commits an offence of defilement with a child between the age of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
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> 20. Whereas more care should have been exercised in drafting the charge sheet so that a clear distinction is made in the statement of the offence of the charge sheet between the statutory provision of the *Sexual Offences Act* creating the offence and the provision of the same statute prescribing the penalty, the appellant has not demonstrated what prejudice he suffered on account of the omission or that there was a failure of justice as a result. Furthermore, the appellant could and should have raised this matter before the trial court. He

did not do so. Neither did he do so on his first appeal. The omission is one which, in our view, is excusable under section 382 of the Criminal Procedure Code. We hold that there is no merit in the complaint that the charge sheet was defective."

20. I now turn to consider whether the prosecution proved its case beyond reasonable doubt by establishing all elements of the offence of defilement. First, the prosecution must establish that the victim is a child aged 12-15 years. In the case of Joseph Kieti Seet V Republic [2014] eKLR, H.C. At Machakos, Criminal Appeal No. 91 of 2011, the learned Judge held as follows:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:
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> > "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 the 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 …."

21. In this case, the evidence led to prove that the age of the minor was clear. Pw2 who was the victim's mother testified that she was 15 years old. Pw3 also produced an age assessment form in which the age of Pw1 was estimated to be 15 years.

22. On the issue of penetration, the clinical officer, Pw3 testified that the hymen was broken and that Pw1 in her history told she was pregnant. A vaginal examination revealed that she had a white discharge. The P3 form notes that Pw1 was sexually assaulted and contracted a urinary tract infection and teenage pregnancy. The evidence of Pw3 was further corroborated by Pw1 who testified that she engaged in sexual intercourse with the appellant for two months before they finally moved to his home.

23. The only person who saw and identified the appellant as the perpetrator was Pw1. Regarding the evidence of a single identifying witness in Sexual offences, the proviso to section 124 of the *Evidence Act* is that:

> " Where there are no eyewitnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator."

24. In this case, Pw1 first met the appellant on the sugarcane farm in broad daylight. She was able to see him clearly and she later met up with him as he wanted to talk with her. After the appellant informed her that he wanted to her to be his wife they continued meeting for another two months. She was clear in her testimony that she had sex with the appellant and her evidence was not shaken on cross-examination. Having considered the record of the subordinate court, I find that Pw1 was being truthful. The appellant was a person well known to Pw1 and was positively identified. Pw4 further testified that when they arrested the appellant, he was found in the company of Pw1. The appellant was therefore positively identified as the perpetrator of the offence. and thereafter spent more than two months with him.

25. On the sentence, the appellant in his submissions has maintained that the sentence meted by the trial court was harsh. In the case ofMaingi & 5 others v Director of Public Prosecutions & another (Petition

E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where Odunga J. (as he then was) held that:

> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of *the Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.
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> 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed."

26. It is clear from the above cases that the sentences prescribed under the *Sexual Offences Act* are not unconstitutional and can still be meted out in deserving cases. Section 8 (3) of the *Sexual Offences Act* provides thata person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

27. In this case the trial magistrate imposed a sentence of 20 years. The complainant in this case was 15 years old at the time of the offence. As a consequence of the offence, the child became pregnant and was not in school because of the pregnancy and her elopement with the respondent. The appellant in his mitigation told the court that he is the breadwinner and he has 2 children. Therefore, having considered the circumstances of this case, I find that a 15-year sentence would be most appropriate. I therefore set aside the sentence of 20 years and substitute it with a sentence of 15 years from the date of sentence. The appellant has a right of appeal within 14 days

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14TH DAY OF MARCH 2024.

R.E. OUGO

JUDGE

In the presence of:

Meshack Kilanyi/ Appellant - present

Miss Kibet For the State/ Respondent

Wikister -C/A