Ejikon v Republic (Criminal Appeal E025 of 2023)
[2024] KEHC 3238 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3238 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E025 OF 2023

RN NYAKUNDI, J

APRIL 4, 2024

BETWEEN

MOSES EKIRU EJIKON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offences were that on 3rd December, 2021 at Turkana County, the appellant intentionally caused his penis to penetrate the vagina of E.M. a child aged 16 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence being similar.

3. The appellant was convicted on his own plea and sentenced to serve seven (7) years' imprisonment.

The Appeal

4. The appellant, being aggrieved by the said decision, has now filed the instant appeal on both conviction and sentence.

   The appellant has relied on the following grounds:

   i. That the learned trial magistrate erred in law and in facts by failing to observe that the age of the complainant was not proved.

   ii. That the learned trial magistrate erred in law and in facts by failing to observe that penetration was not proved by the clinical officer.

iii. That the learned magistrate erred in law and in fact by failing to observe that the identification of the appellant in this instant case was not clear.

iv. That the trial magistrate erred in law and facts by failing to observe contradictions in this instant case.

The Proceedings

5. The appellant on 12th July, 2022 on his own volition changed his plea. The charge was read to him again and explained to him in Kiswahili, which he admitted to be true.

6. The court entered a plea of guilty and the appellant in his mitigation prayed for mercy given that he has a family to take care of, including his mother who is an old lady. He was thereafter sentenced to seven (7) years' imprisonment.

The appellant filed his submissions, which I have considered.

Appellant's Submissions

7. The appellant submitted that the critical ingredients forming the offence of defilement were not proved. He submitted that age is such a critical element that ought to be conclusively proved given that it determines the punishment under the *Sexual offences Act*. He submitted that the trial magistrate gave a court order for the victim to be taken for age assessment, which was not availed to the court.

8. He further submitted that the element of penetration was equally not proved. He stated that the clinical officer did not establish whether there was penetration in the vagina of the victim.

9. The appellant submitted that the element of identification was not equally established. That he was not positively identified by the victim in the present case. That the testimony of PW1 and PW2 did not place him at the scene of crime.

10. I have considered the appeal and submissions. I have also read the record of the trial court and its sentencing.

Analysis and Determination

11. This is a first appeal and thus 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 analyze 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. The major issue I think should be addressed is whether the plea was unequivocal.

The requisite steps to be followed in plea taking were enunciated in the case of Adan v Republic (1973) E. A 445, wherein the court held as follows

i. The charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands.

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

iv. If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and the change of plea entered.

v. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded"

13. In *Joseph Kathini Kivuva V Republic* [2016] eKLR the court held that:

" Caution in accepting a plea of guilty is built into the provisions of the *Criminal Procedure Code* where section 207 provides as follows:

207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads -

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

14. I am of the considered view that the trial court took the right steps in ensuring that the appellant understood the consequences of pleading guilty. In my view, at best the appellant should have sought a re-trial.

15. In any event, for a re-trial to be ordered under Article 50 (6) of the *Constitution*, the appellant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available.

16. That being the case, it is the court's finding that the appellant has not met the threshold established in the said provision. The appeal on conviction is therefore upheld.

On Sentencing

17. The court of appeal in *Benard Kimani Gacheru v Republic* [2002]eKLR restated the law on jurisdiction of an appeals court on sentence imposed by the trial court.

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend 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. Even if, the appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist".

18. Applying the above principles the prescribed minimum sentence under the provisions for defilement of a child aged 16 years is 15 years imprisonment. The appellant herein was sentenced to 7 years. I find that the sentence issued was appropriate and he should serve it to completion. I see no reason of interfering with the sentence imposed by the trial court. The appeal therefore lacks merit and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

In the presence of;

Mr. Onkoba for the state

Appellant present in person

R. NYAKUNDI

JUDGE