Koech v Republic (Criminal Appeal E025 of 2021)
[2024] KEHC 3664 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3664 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E025 OF 2021

F GIKONYO, J

APRIL 16, 2024

BETWEEN

LEONARD KIPNGETICH KOECH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the conviction and sentence of Hon. A. N. Sisenda (S.R.M) in Narok SOA No. 40 of 2018 on 25th November 2021)

JUDGMENT

1. The appellant is serving a life sentence for defilement of a 9-year-old girl.
2. Aggrieved by the conviction and sentence thereof, he filed the undated memorandum of appeal received in court on 21.12.2021.
3. But, he filed amended the grounds under section 350(2)(iv) of the Criminal Procedure Code, which was in court on 22.01.2024 as follows;
   i. That the learned trial magistrate erred in law and fact in awarding an excessive sentence.
   ii. The effect of section 333(2) of the Criminal Procedure Code.

Brief facts

4. On 05.05.2018 at [Particulars Withheld] Village, Mulot location in Narok South sub-county within Naok county intentionally and unlawfully caused his penis to penetrate the vagina of S.C. a girl aged 9 years. On 05.05.2018 at 6. P.m. she was at home. Her grandmother sent her to buy soap. She went to the first shop but did not find the soap. She went to the second shop. On her way home, she met the appellant. The appellant removed her trousers and did 'tabia mbaya' to her near his maize farm. No one was near. He removed his clothes and did not tell her anything. She felt pain in her private parts but did

not bleed. He then told her to wear her clothes and not tell anyone. Her mother took her to the hospital and the doctor examined her. The complainant identified the appellant as a neighbor with a child called J. PW2- SN the grandmother of the complainant stated that she noticed the complainant walking with difficulty the following day after she had sent her to the shop the previous day. She checked her and PW1 stated that Baba J raped her. She called the village elders who arrested the appellant. PW3-David Rotich a village elder together with three nyumba kumi members arrested the appellant. PW4- Felix Rotich a clinical officer at Ololulunga Hospital examined PW1. He confirmed that PW1's hymen was freshly broken and had a whitish discharge. She also had bruises on her left and right labia majora.

5. The appellant was found guilty of the offence and was sentenced to serve life imprisonment.

Directions of the court.

6. The appeal was canvassed by way of written submissions.

Appellant's submissions.

7. The appellant submitted that he is a young man whose whole life is in his hands. He prays that he may be awarded a definite sentence that will allow him to eke a meaningful life. He relied on the cases of Evans Nyamari Ayako Criminal Appeal No. 22 of 2018, Mwangi V Republic (Criminal Appeal 84 of 2015) [2022] KECA 1106(KLR) (7 October 2022)(judgment), Dismas Wafula Kilwake Vs Republic [2019] eKLR, Wilson Kipchirchir Koskei V Republic [2019] eKLR and Baragoi Rotiken V Republic [2022] eKLR.

8. The appellant submitted that this court in awarding the sentence, to commence from the date he took the plea. He contends he was arraigned in court in 2018 and was in custody throughout the hearing.

The respondent's submissions.

9. The respondent submitted that the prosecution proved their case against the appellant beyond reasonable doubt. The respondent relied on the case of Charles Wamukoya Karani Vs Republic, Criminal Appeal No. 72 of 2013.

10. The respondent submitted that the trial court correctly relied on the documentary evidence (P Exh 5) to ascertain the minor's age. PW1 testified that at the time of the commission of the offence, she was in baby class. Her evidence was corroborated by PW4(clinical officer) who produced the age assessment proving she was 9 years old. The respondent relied on the case of Nahayo Syprian Vs Republic [2016] eKLR.

11. The respondent submitted that penetration was proved through the testimony of PW1 who stated that the appellant dragged her into the maize plantation and did 'tabia mbaya' to her. PW2 stated that she noted her granddaughter was walking with a lot of difficulty. She checked her and noted that she had been defiled. Penetration was corroborated by the P3 form, treatment notes, lab request form, and the PRC form that were produced by the clinical officer, PW4 as P EXH1,2,3 and 4 respectively who found evidence of penetration by a freshly broken hymen.

12. The respondent submitted that the identification of the assailant was that of recognition and not needing identification. The complainant testified had personal knowledge of her assailant. She pointed him in court as the man who did 'tabia mbaya' to her. She knew the appellant as their neigbour. The incident took place during the day hence she was able to recognize the assailant. PW2 identified the appellant as Baba J. PW, the village elder identified the appellant as from his village. The respondent relied on the case of Anjoni & Others V Republic [1980] KLR 57.

13. The respondent submitted that in this particular case, no relevant witness was left out by the prosecution. The respondent relied on the case of Donald Majiwa Achilwa and 2 Other V R [2009] eKLR and Section 143 of the *Evidence Act*.

14. The respondent submitted that the appellant was never prejudiced in any way and fully participated in the proceedings and was aware of the charges facing him.

15. The respondent submitted that failure to comply with section 169(1) of the CPC does not render the judgment a nullity as a technical failure of this nature does not vitiate the trial particularly because the evidence on record is sufficient to support the conviction for the offence of defilement as the appellant had been charged with. The respondent relied on section 169(1) of the Criminal Procedure Code, Hawanga Joseph Ansanga Ondiasa Vs Criminal Appeal No. 84 of 2001, Samwiri Senyage V R [1953] 20 EACA.

16. The respondent submitted that the sentence was based on evidence presented by the prosecution. The sentence meted out to the appellant was fair and lenient. the appellant was duly sentenced to life imprisonment as is provided. Therefore, no prejudice is suffered by the appellant as the sentence serves the purpose of retribution. The sentence was within the law. The respondent relied on section 8(1) as read with section 8(2) of the *Sexual Offences Act* and the cases of Bernard Kimani Gacheru Vs Republic [2002] eKLR, Denis Kinyua Njeru Vs Republic [2017] eKLR, Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15 of 2015 and Abdalla V Republic (Criminal Appeal 44 of 2018) [2022] KECA 1054 (KLR) (7 October 2022) (judgment).

ANALYSIS AND DETERMINATION.

Court's duty

17. The duty of first appellate court is to re-evaluate the evidence and make its own conclusions, but, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

Issues

18. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the appellant's alibi defense was considered.

    iii. Whether the sentence was manifestly harsh and excessive; and

    iv. The time of commencement of sentence.

Elements of the offence of defilement

19. 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:

    1) Age of the complainant;

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

    3) The accused was the assailant.

20. See the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013.

Age of the complainant

21. The trial court noted that SC did not understand the consequence of an oath. She therefore gave unsworn evidence.

22. PW1 testified that she was in baby class.

23. PW4, a clinical officer produced an age assessment report as P Exh 5.

24. Based on the evidence adduced, the age of the victim was 8 years old.

Penetration

25. Penetration is defined as:

> "The partial or complete insertion of the genital organs of a person into the genital organ of another person." (Section 2(1) of the *Sexual Offences Act*)

26. Penetration was further defined in the case of Mark Oiruri Mose v R [2013] eKLR by the Court of Appeal as follows:

> "Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

27. PW2 in her testimony stated that on the material day, she had gone to the shops to buy soap. On her way home, she met the appellant who removed her clothes. He removed his trousers and did 'tabia mbaya' to her at his maize plantation. She did not bleed. She felt pain. She told her mother. She was taken to the hospital.

28. PW2, SN testified that she had sent PW1 to the shop on the material date. The following day she noticed that PW1 was walking with difficulty. She checked her she told her that Baba J had raped her. She examined her and saw that she was defiled.

29. PW4, examined PW1. He observed that she had bruises on her left and right labia majora. Her hymen was freshly broken. She had a whitish discharge. He produced a P3 form, lab request form, pre-rape care form, and age assessment as P Exh 1,2,3,4, and 5 respectively.

30. The evidence by the prosecution proved beyond reasonable doubt that penetration did occur of SC-a child.

31. But by whom?

Was the appellant the perpetrator?

32. PW1 and PW2 confirmed that they know the appellant who is their neighbor. PW3, the village elder also confirmed that the appellant was a resident of his village.

33. The appellant confirmed that they were neighbours with PW1 and PW2.

34. The incident happened during the day. PW1 identified the appellant as Baba J and as the person who caused penetration of her. Medical evidence and other evidence by the prosecution witness proved penetration.

35. There was no mistaken identity that the appellant caused penetration of the girl herein.

36. The alibi by the appellant that, on the material date, he was at work at Mulot Town where he operated bodaboda, and that he returned home at 9 p.m. did not give any specific details of any place or transaction, of which the prosecution could be expexted to check out. He did not call or allude to any witnesses to collaborate the same.

37. He also claimed that, PW1's mother was previously his lover and she had sown to teach him a lesson when they fell out. These matters and issues of frame-up, did not feature during cross-examination, thereby rendering the allegations mere afterthoughts.

38. This court does not find any credibility in the alibi defense as the issue of this relationship with PW1's mother never came up during the prosecution's case.

39. The court does not find anything that shows that there was a grudge between the complainant's mother and the appellant.

40. Thus, the court does not also find anything which shows any collision between SC, and PW1's mother to frame the appellant for the offence herein.

41. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled SC. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW1's mother. The defense was a red herring and an afterthought. It is dismissed.

42. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.

43. In the upshot, the appeal on conviction is dismissed.

On sentence.

44. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which provides that:

> 8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

45. The prosecution submitted that the sentence was within the law.

46. This appeal relates to section 8(2) of SOA which provides for a mandatory sentence, and in respect thereto, the court is content to cite the Court of Appeal in Dismas Wafula Kilwake vs. Republic [2018] eKLR that: -

> " 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 the 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."

47. It appears from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law for the offence; a life sentence and to which she condemned the appellant. She stated, thus: -

> ' .... I have also considered Section 8(2) of the *Sexual Offences Act* which is coined in Mandatory terms. The accused is therefore sentenced to serve life imprisonment."

48. In so far as the trial court felt it did not have and did not exercise discretion, was a misconception of the law and error in principle.

49. The court will exercise discretion in sentencing, and impose an appropriate sentence- which must be dictated by the circumstances and facts of the case.

50. The court has considered the fact that the accused is a first offender, and is remorseful.

51. The court has also considered that the offence is serious. The victim was a child of tender age- she was 8 years old. The manner the offence was committed was brutality causing her injuries. Moreover, this kind of offence leaves the victim with post-traumatic effects on her life. Despite him being a first offender and remorseful, these factors as well as the prevalence of the offence, justifies a deterrent sentence.

52. Opinion is divided on whether a life sentence is unconstitutional. The concern now is fixing the definite period representing a life sentence. Some courts have stated that life sentence translates to 30 years imprisonment. Others posit 40 years.

53. Be that as it may, whereas punishing the offence as well as deterring others from committing similar offences are some of the objects of punishment, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free man at some point.

54. In the circumstances, the appellant is sentenced to 30 years' imprisonment.

Section 333(2) CPC.

55. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 08.05.2018. He remained in custody through the trial. The sentence will run from the date he was first arraigned in court; i.e. 8.05.2018.

Conclusion and orders

56. The appellant is hereby sentenced to 30 years' imprisonment.

57. The sentence will run from 8.05.2018 when he was first arraigned in court.

58. It is so ordered

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16TH DAY OF APRIL, 2024.

HON. F. GIKONYO M.

JUDGE

In the presence of: -

1. Appellant

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2. Ms. Rakama for DPP

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3. Otolo C/A