Kariwo v Republic (Criminal Appeal E026 of 2022)
[2024] KEHC 4268 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E026 OF 2022

RB NGETICH, J

APRIL 11, 2024

BETWEEN

DAVID KARIWO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. N.M Idagwa (SRM) delivered on the 21st day of January, 2020 in Kabarnet Chief Magistrate's Court S/O No. 13 OF 2019)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence were that on the accused on the 2nd day of January,2014 at around 1300Hrs at East Pokot District within Baringo County, intentionally caused his penis to penetrate the vagina of CN, a child aged four years.

2. The Appellant faced 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 that on the 2nd day of January, 2014 at around 1300hrs at East Pokot District within Baringo County the appellant intentionally and unlawfully committed an indecent act by allowing his penis to come into contact with the vagina of CN a girl aged Four years.

3. When called upon to plead to the charges, the Appellant denied and the case was set down for hearing where the prosecution brought on board a total of 6 witnesses in support of the allegations against the appellant and upon hearing and determination of the matter, the court found the accused guilty of the charge of defilement and convicted him under Section 215 of the CPC. On 4th February, 2020 the appellant was sentenced to 60 years imprisonment.

4. The Appellant having been aggrieved and dissatisfied with the trial court's decision filed this appeal against both conviction and sentence on the following grounds: -

    i. ThatI pleaded not guilty on the above charges.

    ii. Thatthe learned trial Magistrate erred in law and fact when he convicted the Appellant on contradicting evidence.

    iii. Thatthe learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant without considering that the prosecution did not prove the age of the complainant.

    iv. Thatthe learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant without considering that the medical evidence did not sufficiently show that penetration occurred.

5. The Appellant filed amended grounds of appeal brought under the provisions of Section 350(2)(v) of the Criminal Procedure Code, citing the following grounds: -

    i. That the learned trial magistrate erred both in law and fact by holding that the offence of defilement was proved but failed to note that the age of the complainant and penetration was not proved.

    ii. That the sentence of 60 years imprisonment was too harsh considering the circumstances of the commission of the offence.

    iii. That the learned trial magistrate erred in law and fact when he failed to consider the defense evidence given by the Appellant.

6. The Appellant prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.

7. The appeal proceeded by way of both written and oral submissions.

Appellants Submissions

8. The Appellant submits that the ingredients of the charge of defilement were established. He submits that the age of the victim is a very important aspect that requires to be proved as it determines the sentence to be meted on the accused. That PW1 the complainant's mother told the court that the complainant was a minor aged 4 years. That PW5 the clinical officer produced the age assessment report dated 18th March,2014 showing that the complainant was aged 4 years old. He argues that even though age was proved, it is not the only applicable ingredient for prove of defilement and failure to prove penetration was crucial to the prosecution's case.

9. The Appellant submits that there was no evidence of defilement and that in fact the evidence before court is evidence of sexual assault defined under section 5(1)(a) (b) of the *Sexual offences Act*. He submits that this was a grievous misdirection which went to the root of the prosecution's case. That the evidence of penetration was premised on evidence of the complainant PW2, the complainant's mother PW1 and PW5 the clinical officer. The Appellant submits that PW2 asserted in her evidence that the appellant laid her down, inserted his fingers in her vagina, he then removed his penis and inserted in her vagina which was contrary to the evidence of PW1 who stated that PW2 was crying because the accused had inserted his hand in her vagina which describes an offence under section 5 of the *sexual offences act* as sexual assault not defilement.

10. He submits that PW5 the clinical officer gave a history of the complainant being defiled on the 2nd January,2014 by a person who inserted his finger in her private parts and she felt the pain and blood oozed. That the clinical officer stated that on the external genitalia, there were bruises and on the vulva and labia's, no blood stain or discharge was seen and the hymen was broken and he formed an opinion that the child had been defiled which evidence describes an offence under section 5 of the *Sexual offences Act* which is sexual assault punishable by minimum sentence of 10 years imprisonment and a maximum sentence of life imprisonment, and a sentence of 60 years was manifestly harsh as defilement was not proved.

11. The Appellant further submits that he was 38 years old at the time of the sentence and considering that life expectancy is 70 years, it would mean he was sentenced to a term that would go beyond life expectancy. He relied on the case of Ali Abdalla Mwanza Vs Republic {2018} eKLR, the case of Godfrey Ngotho Mutiso Vs. Republic Criminal Appeal No. 7 of 2008 which was affirmed by the supreme court of Kenya in Francis Karioko Muruatetu & Another Vs. Republic Petition No. 15 of 2015 consolidated with petition No. 16 of 2015.

12. The Appellant further submits that his defence was not considered. He states that he gave unsworn statement of defence and did not call any witness. He submitted that in his defence, he stated that the alleged offence was fabricated due to a grudge he had with the complainant's family. He relies on the case of Mwendwa Mulinge Vs Republic in support of his case. He argues that the burden of proof never shifts to the defence and section 107(1)(2) of the *Evidence Act* puts this burden wholly on the prosecution and in the instant case, he denied the charges, but the prosecution did not table evidence to prove the offence charged. He places reliance in the case of Karanja Vs Republic (1983) and submits that he told the court that the family of the complainant framed him of this offence and made him to relocate which evidence cannot be termed as remote since the family was known to the Appellant and evidence adduced showed they were neighbors and there is evidence that he relocated from his home area.

Respondents Submissions

13. The Respondent submits that the prosecution proved beyond reasonable doubt that the victim in this case was defiled. That the age assessment was done at Nginyang Health centre and the report availed confirmed she was 5 years old meaning the age apparent at the time of examination was 4 years old. On penetration, the P3 Form by the doctor indicated that the minor had bruises on the vagina, blood stains were seen and the hymen was broken and the approximate age of the injuries was 5 days on the 5th January, 2014 when P3 Form was filled hence the prosecution proved the aspect of penetration.

14. On identification, they submit that the minor gave proper account of what happened to her. She identified the Appellant as Lodukus; that she knew the appellant before the incident and stated appellant forced her to lie down and threatened to stab her with a knife and upon being asked who Lodukus was, she pointed at the Appellant at the dock and during the cross examination, the identification of the appellant was not challenged. The appellant did not ask any question on identification hence identification was proved beyond reasonable doubt.

Analysis And Determination

15. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity

to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs. Republic [1972] E.A 32 as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 had the advantage of hearing and seeing the witnesses."

16. Further in the case of Mark Oiruri Mose –Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

17. In view of the above, I have considered evidence adduced before the trail court together with grounds of appeal and submissions filed herein and consider the following as issues for determination: -

    i. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt

    ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

18. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR).

    (a) Penetration

19. Penetration is defined under Section 2 of the *Sexual Offences Act* as partial or complete insertion of the genital organ of a person into the genital organs of another person. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

20. The mother to the complainant Pw1 testified that she had gone to the market where she stayed up to 5:00P.M and on arrival, she found the children crying and on enquiring, they informed her that appellant had inserted his hand in the vagina of C the complainant herein. She stated that she found her lying down on her back facing down crying and upon examining her vagina, she saw that she was bleeding and there was white substance on her private part. She stated that on interrogating the complainant, she confirmed that the appellant found her holding a child, he fell her down, when she clung onto the child, the appellant snatched the child and threw her. Pw1 said when she arrived home, she saw the appellant running away from where the children were.

21. The complainant said on a Thursday her mother had gone to the market and she was at home with her younger siblings C and C when the appellant who was armed with a knife went there and asked her to lie down and inserted his fingers in her vagina. After that, the appellant who was dressed in a

shuka tied his shuka around his neck and inserted his penis into her vagina. She said after defiling her, the appellant went to steal their maize from their house and left. She said the appellant threatened to stab her if she screamed. She informed her father and mother what had happened who then took her to Chemulingot hospital where she was treated.

22. Record show that the complainant was able to narrate what the appellant did to her and this evidence is corroborated by medical evidence by the doctor who examined the victim and filled the P3 Form which confirmed that the victim was defiled and that there was penetration. Her evidence was further corroborated by evidence of her mother pw1 and the teacher pw3.

23. Pw5 was Dr. Sammy Lorot a clinical officer from Chemulingot who stated that a P3 Form was taken to him from Nginyang police station and he was to examine CN who was aged 4 years and who alleged to have been defiled by a person well known to her. He said he examined her and her clothes were not torn and did not have blood stains. That she gave a history of being defiled on 2nd January,2014 by a person known to her; that the person inserted his finger in her private part and she felt pain and blood oozed. He stated that on examination of her vagina, the external genitalia was normal, there were bruises on the vulva and labia. There were no blood stains or discharge seen and the hymen was broken. He said that he formed an opinion that the child had been defiled this is as a result of the injuries sustained. He produced the P3 Form as exhibit 1 in court.

(b) Proof of age

24. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in Edwin Nyambogo Onsongo vs. 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."

25. Pw1 the mother of the victim testified that the minor was aged 4 years old, the P3 Form indicates the age of the minor as 4 years old. The age assessment report was produced as exhibit 2 in court which confirmed that the victim was apparently four years old. In view of the above, there was sufficient proof of the age of the victim that she was 4 years at the time of the offence.

(c) Identification

26. PW2 the complainant testified that the accused whom he named as Lodukus and who is well known to her having seen before came to hurt her. Pw1 confirmed that the incident occurred at 5:00P.M, and the appellant was their neighbor. He was known to them.

27. PW2's testimony is that she knew the accused who was called Lodukus. The complainant was able to positively identify the accused in the dock. PW1 the mother of the complaint saw the accused escaping from the scene and she was able to identify him. The incident happened in broad daylight hence there was no possibility of mistaken identity. PW1 and PW2 were able to recognize and identify the appellant as the perpetrator.

28. From the foregoing, it is clear that the Appellant was not a stranger to the victim having interacted with him at home severally. It is therefore plausible that the victim was able to not only identify him but to

recognize him as the person who committed the act. From the foregoing, it is conclusive therefore that the offence of defilement was proved beyond reasonable doubt.

29. The appellant alleged in his ground of appeal that the magistrate did not consider his defence. I have perused the judgment and note that the defence was considered; it is therefore clear that the accused's defence was considered by the trial court contrary to his allegations in the appeal. I agree with the trial court's finding that the Appellant's defence of alibi was an afterthought which fails test. The evidence of the victim together with that of her mother was clear and precise on what the appellant did to her. The complainant described how the appellant defiled her.

(ii) Whether sentence imposed was harsh and excessive

30. On whether the sentence meted on the appellant by the trial court was excessive, the Appellant argues that the sentence imposed was harsh and excessive in the circumstances. It is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code.

31. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

32. Further, the Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated as hereunder: -

> " 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."

33. Section 8 (2) of the *Sexual Offences Act* provides mandatory life imprisonment. The appellant was sentenced to 60 years imprisonment on the basis of the sentence stipulated by Section 8 (2) of the *Sexual Offences Act* which I feel was excessive. The appellant was 38 years old at the time he defended himself which means at the time of completion of sentence if he is to live to that age, he would be about 98 years. Considering that life expectancy under WHO as found by the court of appeal in the case of Ali Abdalla Mwanza vs Republic [2018] eKLR is 67 years, this goes far above the life expectancy age which in my view goes beyond life imprisonment. In view of the above I am inclined to set aside sentence imposed by trial court and considering the age of the minor defiled which is 4 years, I find sentence of 30 years imprisonment will be appropriate for the appellant.

Final Orders: -

1. Appeal on conviction is hereby dismissed.

2. Sentence of 60 years is hereby set aside.

3. Appellant sentenced to 30 years imprisonment.

4. The sentence to start from the date the appellant was arrested.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 11TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Sitienei.

Ms. Ratemo for state.

Appellant present.