Kamau v Republic (Criminal Appeal E040 of 2020)
[2024] KEHC 3772 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3772 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E040 OF 2020

CW GITHUA, J

APRIL 3, 2024

BETWEEN

JOSEPHAT MWANGI KAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. I. Gichobi (P.M), in Sexual Offence case No. E009 of 2022, delivered on the 24th August, 2022 at the Senior Principal Magistrate's court at Kangema)

JUDGMENT

1. The appellant, Josephat Mwangi Kamau, was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, No. 3 of 2006.

   The particulars alleged that on diverse dates between the year 2021 and 2022 at Weithaga location within Murang'a County, he caused his penis to penetrate the vagina of NMN ,a child aged 13 years.

2. Upon conviction, the appellant was sentenced to serve twenty years imprisonment. He was aggrieved by both his conviction and sentence hence this appeal.

3. In his undated petition of appeal, the appellant advanced a total of four (4) grounds of appeal in which he principally complained that the learned trial magistrate erred in law and fact by: Convicting him on the basis of evidence which was scanty, contradictory and unreliable and was thus insufficient to prove the charge of defilement to the required legal standard; sentencing him to the minimum mandatory sentence of twenty (20) years imprisonment instead of exercising his discretion in line with decisions of the superior courts regarding the constitutionality of the mandatory minimum sentences prescribed by the *Sexual Offences Act* in respect of sexual offences.

4. The appeal was canvassed by way of written submissions. The court record shows that the appeal was initially meant to be heard during the service week in January 2023 and this is when parties were directed to file written submissions in prosecution of the appeal. Hearing did not however proceed as scheduled because although the respondent filed its submissions on 24th January 2023, the appellant did not file his submissions within the timelines set by the court. He eventually filed his submissions on 28th November 2023 and the appeal was scheduled for hearing on 14th February 2024. On the hearing date, both parties chose to rely entirely on their written submissions. It may be necessary to point out at this juncture that the appellant prosecuted his appeal in person.

5. In his submissions, the appellant reiterated the now established legal principle that for the prosecution to sustain a conviction for the offence of defilement, it must prove beyond all reasonable doubt all the three ingredients of the offence being age of the victim, penetration and identification of the accused as the perpetrator.

6. While not disputing the age of the complainant as stated in the charge sheet, the appellant argued that he was not positively identified as the perpetrator of the offence claiming that the charges were a fabrication by the victim following coercion by her school principal and her grandmother (PW2). He further submitted that the learned trial magistrate erred by relying on the evidence adduced by PW2 to PW5 which amounted to hearsay and that penetration was not proved beyond reasonable doubt. He also asserted that the prosecution failed to adduce evidence linking him to the commission of the offence as charged.

7. The appeal was contested by the respondent. Learned prosecution counsel Ms. Nzuki in her submissions supported the appellant's conviction and sentence contending that the prosecution proved all ingredients of the offence beyond any reasonable doubt through credible and cogent evidence adduced by its witnesses. She urged me to find that the appellant was properly convicted and sentenced and that the appeal should be dismissed for lack of merit.

8. This being a first appeal to the High court, am enjoined to thoroughly scrutinize the evidence presented before the trial court to arrive at my own independent conclusion on whether or not the appellant was correctly convicted and sentenced but in doing so, I must remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage.

9. The full scope of the above duty has been reiterated in many authorities but it will suffice to cite the locus classicus case of *Okeno V Republic* (1972) EA 32 where the predecessor to our Court of Appeal expressed itself 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 v. R.*, [1957] EA. 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. Ruwala v. R.*, [1957] EA. 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..."

10. I have carefully considered the grounds of appeal, the rival written submissions filed by both parties together with the authorities cited as well as the evidence on record. Needless to state, I have also read

the judgement of the trial court and having done so, I find that the issues arising for my determination are twofold, namely;

i. Whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

ii. If the answer to issue No.1 is in the affirmative, whether the trial court erred by imposing the minimum mandatory sentence prescribed by the law for the offence in light of the emerging jurisprudence on such sentences.

11. I will begin my analysis of the first issue by reminding ourselves of what I had stated earlier that in order for the prosecution to establish the offence of defilement, it must prove beyond doubt the three essential elements of the offence, that is, that the victim was a minor; that there was penetration and, that the accused was the perpetrator.

12. In this case, it is clear from the evidence on record and from the parties written submissions that it was not disputed that at the time the offence was allegedly committed, the victim who testified as PW1 was a minor aged 13 years as stated in the charge sheet. As the age was not disputed, it did not require to be proved although the prosecution proceeded to prove it through production of the minor's birth certificate. The trial court was therefore right in concluding that the victim was 13 years old at the time of commission of the alleged offence.

13. The question that now begs an answer is whether the prosecution proved the other two ingredients of the offence to the standard required by the law. I must point out at the outset that the burden of proof in criminal cases remains with the prosecution throughout the trial and never shifts to an accused person even in cases where an accused person decides to remain silent upon being placed on his defence like the appellant did in this case. An accused person does not have any obligation to prove his innocence.

14. That said, in order to determine whether the prosecution sufficiently discharged its burden of proof in relation to the other two ingredients of the offence, it is crucial to look at the evidence adduced before the trial court. The court record shows that after a brief voire dire examination , PW1 testified that one Saturday in the year 2021 around midday as she walked home from delivering bananas at a place known as Itara, the appellant who was her uncle called her and led her to his house where he forcibly removed her clothes and had sexual intercourse with her.

    The same thing happened on a certain Thursday still in the year 2021 when the appellant defiled her in a bush. On each occasion, the appellant threatened to beat her if she disclosed her ordeal to anyone.

15. In addition, PW1 testified that other than the appellant, two other men namely, Kenneth Kimani and Josephat Mwangi Maina who were her neighbours had also sexually assaulted her in the year 2021. She did not disclose the above information to anyone till about an year later on 17th February 2022 when PW2, her grandmother escorted her to school after being summoned by the school's Principal (PW4) who wanted to know why PW1 was missing school, was untidy and was not doing her homework. After a beating, PW1 narrated how the appellant and the two other men had defiled her.

16. The above information was reported to PW5 Cpl Benson Muema who escorted PW1 together with PW2 to Kangema Sub- County Hospital for medical examination. She was examined by PW3, Jediel Muturia Joseph, a clinical officer in the hospital. According to her evidence, apart from noting the victim's hymen was broken though not freshly broken, the victim's genitalia was normal. She completed a P3 form which she produced as P Exhibit 2.

17. As noted earlier, when placed on his defence, the appellant chose to remain silent which he was entitled to do in the exercise of his rights to a fair trial which includes the right to remain silent and not to testify during his trial which is guaranteed under Article 50 (i) of the *Constitution*.

18. Upon my independent appraisal of the evidence on record as summarised above, i am unable to agree with the learned trial magistrate that the evidence adduced by the prosecution was sufficient to prove the charge of defilement against the appellant beyond reasonable doubt for the following reasons:

    To start with, whereas there was no doubt that the appellant was well known to the victim being her uncle, I find that the prosecution failed to prove beyond doubt the element of penetration or a clear

    linkage between the appellant and the alleged defilement.

19. I say so because apart from the testimony of PW1, the only other evidence relied on by the prosecution to prove penetration was the medical evidence presented by PW3 to the effect that upon examination, the victim's hymen was found to be broken. It is trite that evidence of a broken or lost hymen without more, is not by itself proof of penetration since as held by the Court of Appeal in the case of *PKW V Republic* [2012] eKLR which was also cited by the appellant, a hymen can be broken or lost through many other means other than sexual intercourse. To buttress the point that a broken or lost hymen does not constitute conclusive proof of penetration, the court proceeded to observe that some girls are even born without a hymen.

20. It is also pertinent to note that the victim was examined about an year after the alleged defilement which compounded the matter even further. The long time lapse between the dates of the alleged defilement and the medical examination made it difficult to establish beyond doubt that the victim's hymen was broken by the appellant's penile penetration as alleged by PW1 and not through any other means.

21. Besides, in her evidence, PW1 stated that other than the appellant, two other men who were his neighbours had also sexually assaulted her in the year 2021. Given this admission, even assuming that the broken hymen was evidence of penile penetration, it was impossible to tell with certainty whether the said penetration was caused by the appellant's alleged defilement or that of those two other men. Interestingly, the said men though well known to the victim even by name were not arrested and prosecuted for the alleged offence although PW5 who was the investigating officer admitted that PW1 had informed him about the incidents involving the other two men.

22. Having found that the medical evidence adduced in this case was not useful to the prosecution case, the only other evidence available to support the prosecution case on the element of penetration was that of the victim herself. It is apposite to note that under the proviso to Section 124 of the *Evidence Act*, a trial court can safely convict an accused person solely on the evidence of a minor victim in sexual offences provided that the learned trial magistrate was satisfied that the victim was telling the truth and recorded the reasons for such belief. In this case, however, the learned trial magistrate who saw the victim as she testified did not make an express finding regarding her credibility. Further, the learned trial magistrate did not seek to rely on the above proviso and it did not therefore form the basis of convicting the appellant.

23. In view of the foregoing, it is my finding that the evidence on record was not sufficient to prove the charge of defilement against the appellant beyond any reasonable doubt. The evidence presented by the prosecution had yawning gaps which created doubts whether or not the appellant committed the offence as charged. The learned trial magistrate erred by failing to thoroughly interrogate the evidence in its entirety and thereby arrived at the erroneous conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt which was not the case. The appellant ought to

have been given the benefit of doubt as required by the law. In the premises, I am satisfied that the appellant's conviction was unsafe and it cannot be sustained.

24. For all the above reasons, it is my finding that the appellant's appeal is merited and it is hereby allowed. His conviction is accordingly quashed and the sentence set aside. The appellant is consequently set free unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 3RD DAY OF APRIL 2024.

In the presence of :

The appellant

Ms. Muriu for the respondent

Ms. Susan Waiganjo, Court Assistant