Ngetich v Republic (Criminal Appeal E039 of 2022)
[2024] KEHC 3188 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3188 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E039 OF 2022

RB NGETICH, J

APRIL 4, 2024

BETWEEN

RAPHAEL KIPLAGAT NGETICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. J. Wanjala (CM) delivered on the 29{{^th}} September, 2022 in Kabarnet Chief Magistrate's Court S/O No. 21 OF 2020)

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 23rd August, 2020 at around 1300Hrs in Baringo Central Sub- County within Baringo County willingly and unlawfully caused his penis to penetrate into the vagina of AJ a girl aged 4 years in contravention of the said Act.

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 the Appellant on 23rd August,2020 at around 1300Hrs in Baringo Central Sub-County within Baringo County willingly and unlawfully caused his penis to touch the vagina of AJ a girl aged 4 years in contravention to the said *Act*.

3. When called upon to plead to the charge, the Appellant denied and after hearing, the appellant was convicted and sentenced to life imprisonment. The Appellant having been aggrieved and dissatisfied with the above-mentioned judgment, appeals to the High Court of Kenya against the above entire sentence and conviction on the following grounds:

i. That the learned trial Magistrate erred in law and fact in convicting the Appellant to life imprisonment yet the prosecution did not prove its case beyond reasonable doubt.

ii. That the learned trial Magistrate erred in law and fact in convicting the Appellant to life imprisonment yet the prosecution failed to prove the ingredients of defilement.

iii. That the learned trial Magistrate erred in law and fact in convicting the Appellant to life imprisonment while relying on insufficient medical evidence

iv. That the learned trial Magistrate erred in law and fact in convicting the Appellant to life imprisonment while relying on contradictory evidence.

v. That the learned trial Magistrate erred in law and fact in convicting the Appellant to life imprisonment and failed to consider the strong evidence of the defence including evidence of alibi and submissions.

vi. That the learned trial Magistrate erred in I.aw and fact by passing a harsh sentence against the appellant.

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

5. The appeal proceeded by way of written submissions.

Appellants Submissions

6. The Appellant submits that the ingredients of the charge of defilement were established in the case of *George Opondo Olunga v Republic* [2016] eKLR as was referenced in Criminal Appeal NO.1 OF 2020 Benard Kiptoo v Republic to be identification or recognition of the offender, penetration and the age of the victim.

7. On the issue of penetration, the Appellant submits that PW2 and PW 3 testified that when they got back to the shamba the appellant had not removed his clothes; he had his clothes on and if the appellant had penetrated the victim, then he could not be fully dressed. He states that the medical evidence also did not disclose any bleeding or tearing on the vaginal walls. That proving penetration beyond reasonable doubt is paramount in proving a charge of defilement and relied on the case of Criminal Appeal No. 2 Of 2020 Mohamud Omar Mohamed v Republic.

8. The Appellant submits that PW4 the alleged victim gave unsworn evidence which should have been collaborated by the medical evidence and the evidence of PW2 and PW3 but the evidence was marred with contradictions as to whether the appellant really penetrated PW4 considering PW2 and PW3 indicated that he never removed his trouser. He relied on the case of Criminal Appeal No. 16 Of 2019 Nicholas Kipngetich Mutai v Republic.

9. The Appellant argues that the medical report indicated that there was no bleeding and no tears visible on the vaginal wall. That the hymen was broken but it failed to indicate approximately the age of the broken hymen/when it was broken. That there was also no evidence of whether or not upon examination, spermatozoa were present. That spermatozoon is not necessary when establishing whether defilement occurs but it aids in corroborating assertions of the victim.

10. The Appellant further states that the medical examination report indicates that the victim alleged to have been defiled by a person well known to her yet PW3 and PW4 said the accused person was only known to their brother Roy (PW2); and it was also the evidence of PW2 that the appellant had a black trouser and a red shirt whereas PW4 testified that the appellant had a black shirt and a black

trouser. He submits that these are contradictions that touch on one of the key ingredients of the offence of defilement being identification of the perpetrator and these contradictions cannot allow for a safe conclusion that the appellant was positively identified without doubt as the perpetrator.

11. The Appellant further argues that his defence of alibi was not considered. He states that he was tendering to cows and weeding at Tenges Kaptilatin village which is approximately one and a half kilometers away from the scene of the crime. That DW2 confirmed the appellant's testimony and indicated to the trial court that he never lost sight of the appellant since he was herding. He further states that during investigations, he was not given a chance to explain himself.

12. The Appellant submits that the trial court sentenced him to serve life imprisonment without considering that he was a first-time offender aged 38 years at the time as raised in mitigation. That the life sentence denies the appellant the opportunity to reform, be rehabilitated and re-integrated to the society. He relied on the case of Criminal Appeal No. E001 Of 2021 [SO] Waka Evans Amira v Republic.

13. It is the Appellant's submissions that life imprisonment for the offence of defilement is a legal sentence but was excessive considering the circumstances of this case. He submits that the prosecution failed to prove penetration and the identity of the penetrator beyond reasonable doubt.

Respondents Submissions

14. The Respondent submits that it is trite that the burden of proof in criminal cases lies with the prosecution and the standard of prove is beyond reasonable doubt as was explicitly captured in the case of Miller -VS-Minister of Pensions (1947) 2ALL ER 372-373.

15. The Respondent submit that the prosecution proved the elements of defilement before the trial court; that the age of the complainant was sufficiently proved by a certificate of birth of the complainant produced as exhibit 3 which showed she was born on the 15th of August, 2016. That the incident occurred on the 23rd of August, 2020 and the minor had just turned 4 years old.

16. On whether penetration was proved, the respondent submit that the act of penetration in a sexual offence case was explained to great extent in the case of Alex Chemwotei Sakong v Republic [2108] eKLR where the court stated as follows:-

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. That this position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013J eKLR.

17. Further that penetration can be proved circumstantially by taking into account circumstances under which the act was committed and relied on the case of Kassim Ali v Republic (2006) eKLR. That in this case, the doctor PW5 testified that that she examined the child aged 4 years old on the 23rd of August, 2020 in the evening around 7.00 pm and found the hymen was broken but there was presence of Red Blood cells which proved that the child was indeed defiled. She produced P3 form and treatment notes as exhibits 1 and 2 respectively.

18. The respondent further submits that the evidence of the minors pw2 to pw4 was consistent and detailed as to what exactly happened. That pw2 and pw3 explained how the appellant targeted the minor pw4, took her to the bush and when pw2 and Pw3 heard the screams of pw4, they went to the bush and found the appellant on top of PW4 with her clothes removed and this evidence was not

rebutted. The respondent submits that there was sufficient evidence to prove the act of penetration and urged this court to find so.

19. On identification of the appellant, the respondent submits that Pw2 who witnessed the ordeal properly described the appellant herein; he referred to him as Kiplangat and described him as a person who takes cows to the dip. He went on to point at the appellant in court. That the description matched the work the appellant was doing on the day of the incident; that in his defence, the appellant confirmed that he was grazing cattle on the said day; and on the other hand, Pw3 said the appellant was new to him but he properly identified him as the person who had removed the clothes of pw4 and he saw on top of PW4. He further stated that pw3 said that he even threatened to stone the appellant.

20. The respondent further submitted that complainant described the appellant as the person who defiled her and pointed him on the stand. She urged this court to find that the appellant was positively identified identified.

21. On whether the appellant's evidence was considered by the trial court, they submit that the evidence of the appellant herein was considered by the trial court. That in the judgment, the trial court clearly made a reference to the appellant's evidence and made a judgment that the appellant's evidence did not shake the prosecution's case.

22. The respondent agreed with the trial court that the appellant did not adduce evidence to support his allegation that the mother of the minor fabricated the case as he did not show that there were any differences between the two of them and the appellant's evidence did not shake up the prosecution's case.

23. On argument that sentence imposed by the trial court was harsh or illegal, the respondent submit that the *sexual offences Act* prescribes the mandatory minimum sentence of life imprisonment for defilement of a child aged 7 years and below and during sentencing, both the prosecution and the appellant's counsel submitted authorities which the court sufficiently considered.

24. The respondent submits that whereas there are recent authorities on constitutionality of life imprisonment, the court ought to consider the effect the act of defilement will have on the 4 year old child; she will live with the trauma all her life and is therefore life sentence for her and urge this honorable court to consider the rights of the victim as well. The state counsel urged this court to look at the effect of setting aside a lawful sentence. That the sentence in such cases should act as a deterrence for future offenders and post a question that if sexual predators will have to know that they can still have a life upon preying on the lives of young innocent children, will there be the justice?

25. In conclusion the sate counsel submitted that the sentence meted out by the trial court was within the limits of the law and was not harsh nor excessive and urged this court to find so and proceed to uphold the sentence.

Analysis And Determination

26. This is the first appellate court and our duty as such was well set out in the case 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."

27. 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."

28. In view of the above, I have perused the petition of appeal, the record of appeal and the rival submissions by the parties and it comes out clearly that the issues for determination in this matter are as follows: -

i. Whether the charge against the accused was proved beyond reasonable doubt.

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

i. Whether the charge against the accused was proved beyond reasonable doubt.

29. 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). I wish to consider whether the three ingredients were proved beyond reasonable doubt.

(a) Penetration

30. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person.

31. 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.

32. The complainant in this case who testified as Pw4 stated that on the 23rd August, 2020, she went with Pw2 and Pw3 to fetch firewood and that the accused whom she named as Kiplangat arrived where they were and talked to Roy. She said that he carried her to the bush as Roy and Daniel took their dog away. She stated that the accused put dirt in her jujuli after removing her trouser and a pant. She stated that he used his juju from his trouser after removing his trousers to the knees. She stated that Daniel came to scene and screamed and the accused ran away through the fence. She said when her mother returned home, they informed her and she was taken to hospital.

33. Pw5 Dr. Nancy Kerubo a doctor at Baringo Referral Hospital testified that on 23rd August,2020 in the evening, she received the complainant in the company of her mother with the history of having been defiled. She said that her clothes were dirty with soil, her underwear had brownish discharge (mucus like). That she was not bleeding but there were visible signs of penetration as the vagina was wide and open. The hymen was broken and the vaginal wall had no tears.

34. She stated that on doing a vaginal swab for urinalysis red blood cells were seen. She concluded that the child was defiled from the absence of the hymen and the presence of the red blood cells which was consistent with defilement. She produced the P3 Form as exhibit 1 and the treatment notes as Exhibit 2. Evidence of penetration by pw4, pw3 and pw2 was therefore confirmed by medical evidence of Pw 5.

(b) Proof of age

35. In respect to age, 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."

36. Record show that birth registration No. 76xxxxx. produced by No. 79468 Corporal Lydia Yator of Kabarnet Police station who testified as PW7 confirms the child was born on 15th Augsut,2016 and she was therefore 4 years old at the time of the offence. This evidence was not challenged by the appellant and age of the minor was therefore proved beyond reasonable doubt.

(c) Identity of perpetrator

37. From evidence adduced, PW4's knew the accused who was their neighbor, she knew him as Kiplangat. The complainant also positively identified the accused in the dock. PW2 and PW 3 who were the brothers of the complainant and who were with her fetching firewood on the date of the incident all confirmed that it was the Appellant who took their sister to the bush in their presence and chased them away. After being chased, they went back and found the appellant on the act and after they screamed, the appellant run away. The incident happened in broad daylight hence there was no possibility of mistaken identity. From the foregoing, pw2, pw3 and the complainant pw4 all identified the appellant as the person who defiled pw4.

38. On whether the appellant's defence was considered, it is clear from the judgment that the trial court considered appellant's evidence but found it did not shake the prosecution evidence.

(ii) Whether sentence imposed by the trial court was harsh and excessive.

39. 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."

40. The charge against the appellant was under Section 8 (2) of the *Sexual Offences Act* which provides sentence of mandatory life imprisonment. The trial court imposed sentence of life imprisonment against the appellant. However, the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

41. I take note of the fact that the appellant defiled an innocent child aged 4 years. At that age, the young child may not have understood what happened to her but she was subjected to serious pain and the act may traumatize her for the rest of her lifetime. The appellant deserved deterrent sentence. However, in view of the fact the life sentence has been outlawed by caselaw, I am inclined to set aside sentence of life imprisonment and sentence the appellant to 30 years.

Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Life sentence is hereby set aside.
3. The appellant is sentenced to 30 years imprisonment.
4. The period served in remand & prison to be considered in sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 4TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Sitienei.

Ms. Rotich H/B for Mr. Mongeri for the Appellant.

Ms. Ratemo for the state.