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Wabuke v Republic (Criminal Appeal E047 of 2023) [2024] KEHC 4243 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E047 OF 2023

AC MRIMA, J

APRIL 11, 2024

BETWEEN

PETER MOINGA WABUKE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. T. O. Omono (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. E158 of 2022 delivered on 3rd May, 2023)

JUDGMENT

Introduction:

1. Peter Moinga Wabuke, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 5th day of September 2022 within Trans-Nzoia County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of TCK, a child aged 7 years old.

2. Alternatively, the Appellant was charged with Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of TCK., a child aged 7 years old.

3. When the Appellant was arraigned before Court, he pleaded not guilty.

4. After full trial, he was found guilty and convicted on the main charge of defilement. He was sentenced to 30 years' imprisonment.

The Appeal:

5. The Appellant was aggrieved by the conviction and sentence. In his Amended Petition of Appeal, he basically raised two grounds that the offence was not proved and that his defence was not properly considered.

6. In the premises, he prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.

7. During the hearing of the appeal, the Appellant relied on his written submissions. He expounded on the grounds of appeal and referred to several decisions.

8. The Respondent, through its written submissions dated 14th November, 2023 extensively submitted that the conviction was safe, that the sentence was fair and legal and urged this Court to dismiss the appeal. Several decisions were referred to as well.

Analysis:

9. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

10. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

11. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant. However, a brief look at the prosecution's case is of importance.

12. The prosecution's case was fairly straight-forward. It was summarized with precision by the trial Court and as such this Court adopts it as part of this decision by reference.

13. PW1 was the complainant. She was one TCK. She testified on how the Appellant met her on her way home from school on the 5th September, 2022 and took her into a maize plantation and had her carnal knowledge.

14. PW2, was PW1's sister one FC. who, while on her way back to school from home after lunch, met both PW1 and the Appellant coming out of the maize plantation and became suspicious. She asked PW1 what had happened since her walking style had changed. PW2 took PW1 home and reported the matter to their mother one VJC who testified as PW3.

15. PW3 examined PW1's genital and found a whitish discharge. She took PW1 to the Appellant's home where she met the Appellant's wife. The Appellant was reportedly away. PW3 then reported the matter to Endebes Police Station where they were referred to hospital.

16. It was PW5 who examined PW1 at the Endebes Sub-County Hospital in the afternoon of 5th September, 2022. She found a lacerated labia minora and a freshly-broken hymen. She concluded that PW1's vagina had been penetrated. She filled and produced treatment notes and a P3 Form for the victim.

17. The age of PW1 was settled by PW4 who conducted an age assessment on 20th September, 2022 and found that PW1 was 7 years old. She produced an Age Assessment Report in Court.

18. When the matter was reported to the police, it was allocated to PW6 as the investigating officer. On completion of the investigations, PW6 charged the Appellant accordingly.

19. At the close of the prosecution's case, the Appellant was found to have a case to answer. He was placed on his defence.

20. In his sworn testimony, the Appellant denied committing the offence. He stated that he was framed by PW1's mother on account of differences with her. He further stated that he was arrested on issues of brewing and selling chang'aa and that he was a victim of tramped-up charges.

21. It was the foregoing evidence that led to the impugned conviction and sentence.

22. The Court will now look at the elements of the offence of defilement in this case.

Age of the complainant:

23. There was no dispute on the age of PW1. It was settled by PW4 who produced an Age Assessment Report for PW1. The age was assessed at 7 years old.

24. The Report contained expert evidence. Having gone through the record, this Court does not see how the expert evidence was impugned. The report was of high probative value and this Court agrees with the trial Court that the age of the complainant in this matter was as contained in the said age assessment report.

25. Accordingly, the complainant was a child within the meaning ascribed to the term under Section 2 of the Children's Act.

Penetration:

26. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The provision also defines 'genital organ' to include the whole or part of male or female genital organs and for purposes of the *Sexual Offences Act* it also includes the anus.

27. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

> .... 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).

28. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

> .... In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

29. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

30. The evidence on penetration was given by the complainant, PW3 and PW5, the Clinical Officer.

31. The trial Court analyzed the evidence of all the witnesses and found that the prosecution witnesses were truthful.

32. PW1 was quite candid in narrating the events as they occurred. PW3 examined PW1's vaginal area and found some whitish discharge.

33. PW5 corroborated the evidence on penetration. He produced the P3 Form for the complainant as well as the treatment notes. In examining PW1, it was PW5's evidence that the hymen was absent as it was freshly broken and the labia majora was lacerated. She concluded that there had been a penile penetration into PW1's vagina.

34. This Court has carefully perused the P3 Form and the treatment notes which were produced as exhibits. The Court is satisfied that they are of sound probative values.

35. This Court, thus, finds no difficulty in affirming the position that penetration into the complainant's vagina was proved to the required standard.

Identity of the perpetrator:

36. The prosecution had to lastly positively identify the perpetrator of the offence.

37. Apart from PW1 stating that it was the Appellant who took her into a maize plantation and had sex with her, PW2 also met the two as they came out of the plantation. PW2 noted that her younger sister was not walking properly and she interrogated her.

38. Both PW1 and PW2 knew the Appellant quite well. He was their neighbour. The Appellant even confirmed as much. Further, the incident took place in the day. Visibility was, hence, not an issue.

39. The Appellant, however, alleged that he had been framed by PW3 due to their differences.

40. PW3 testified before the trial Court. However, the issue of grudge was not taken up by the Appellant. Therefore, to this Court, the issue was an afterthought and was rightly rejected.

41. Having said as much, in consideration of the evidence on record, it is easily discernible that the defence does not hold. There is ample and well corroborated evidence on how the Appellant had a sexual encounter with PW1.

42. The upshot of the foregoing is that the prosecution discharged its burden to the required standard of proof in proving that indeed the perpetrator of the heinous act against the poor young girl was none other than the Appellant.

43. The appeal against the conviction is, hence, dismissed.

Sentence:

44. The Appellant was sentenced to serve 30 years in prison. He was treated as a 1st offender. He tendered his mitigations.

45. The High Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

46. There is no evidence that the trial Court erred in sentencing. The sentence is legal and offence extremely serious more so given the age of the victim.

47. The appeal against the sentence also fails.

Disposition:

48. In the end, the following final orders hereby issue: -

    a. The appeal is wholly dismissed.

    b. The file is hereby marked as closed.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Peter Moinga Wabuke, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.