Wafula v Republic (Criminal Appeal E025 of 2021)
[2024] KEHC 4250 (KLR) (11 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E025 OF 2021

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

DENNIS WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. N. Wairimu in Eldoret Law courts Cr. S.O No. 32 of 2021)

JUDGMENT

1. The Appellant was charged with 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 of the offence were that between 28th January, 2016 and 30th January, 2016 in Eldoret West District within Uasin Gishu county, the appellant unlawfully and intentionally cause his genital organ to penetrate the genital organ of SN a girl aged 14 years.

2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were more less the same.

3. The Appellant was found guilty as charged, convicted and sentenced to serve 20 years imprisonment. He was aggrieved with both conviction and sentencing after which he timeously instituted the present appeal. The appeal is based on the amended grounds as follows:

    i. That the learned magistrate erred in law and fact by failing to find that the ingredients of the offence were not proved by the prosecution.

    ii. That the learned trial magistrate erred in law and fact by conducting unfair hearing contrary to Article 50(2)(c) (g) (h) (j) and Section 200(2) of the *Criminal Procedure Code*.

iii. That the learned trial magistrate erred in law and fact by awarding a sentence that is not only excessive but also harsh in circumstances of the offence.

4. This being the first appellate court, it behoves me to re-evaluate and analyse the evidence adduced in the trial court afresh for me to come up with an independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified. See Okeno vs. Republic [1972] EA 32.

5. At the trial court, the prosecution marshalled 5 witnesses in support of their case. PW1 was aged 15 years at the time she testified. She told the court that on the material day, she was in the farm as she had gone to fetch firewood. She stated that the farm belonged to their neighbour. That the accused person came and requested her to show him the way to the main road and when she was doing so, the accused took her into his house and locked the door. She further testified that she struggled with the accused but he over powered her and had sexual intercourse with her for a long time causing her to feel pain.

6. The witness testified that the accuse kept her in his house until the 30th January, 2016 when church members found her and took her to Baharini police post and she was later treated at Moi Teaching and Referral Hospital.

7. Upon cross examination, the witness denied that she had told the accused that she was lost and that she does not go to school. The witness also denied that she had told the accused she was 27 years old and reiterated that the accused forced her to his house and locked her in it. She stated that she did not recall the date on which she met the accused at the centre during a wedding.

8. PW2 was the Complainant's cousin. He testified that the complainant insisted she wanted to go and fetch firewood but did not return. The witness stated that on 30th January 2016, they announced in church that the complainant had gone missing and when they went around looking for her, she was found at the accused person's place after the neighbours reported to have seen her there.

9. Upon cross examination, the witness stated that they were passing by the accused's house when they heard banging on the door and she saw the complainant inside the accused's house. The witness stated that the accused went to the AP camp voluntarily and was not arrested.

10. PW3 – the complainant's teacher confirmed that he heard an announcement in church on 30th January, 2016 concerning the complainant who had gone missing. The witness stated that when they found the complainant at the accused's house, he sent PW2 to get AP officers from a nearby camp.

11. PW4 the investigating officer stated that a report had been made at Baharini police post that the complainant had gone missing and lived with a man in the village for 3 days. The witness stated that the accused had surrendered himself at Kapyemit AP camp and was later taken to Baharini Police Post where the witness recorded statements.

12. The witness produced the complainant's school leaving certificate which indicated that the complainant was born on the 7.07.2001.

13. PW5 testified on behalf of her colleague and produced a P3 form in which it was indicated that the complainant was examined on the 1st of February 2016 after she had been treated on 31.01.2016. the witness stated that the complainant had tears on the hymen at 7 O' clock, 3 O' clock, and 6 O' clock and also had redness. The witness stated that the injuries were 3 days old at the time of examination and that the complainant had an infection.

14. The witness further stated that there were no spermatozoa seen and that the Dr. Concluded the child had been defiled because of the hymeneal tears and the bacteria in the urine.

15. From the above prosecution evidence, the trial court concluded that the prosecution established a prima facie case and proceeded to put the Appellant on his defence.

16. The accused person gave unsworn testimony and stated that he lives at Soy Tanning and he is a turn boy in a lorry and that he has a family.

Findings And Determination.

17. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court. The issues for determination in this appeal are:

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether or not the sentence was excessive.

Elements of offence of defilement

18. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement
>
> 8(3) "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

19. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant.

20. In the case of *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013 it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. What does the evidence portend?

Age of the complainant

22. The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

23. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of *Hillary Nyongesa Vs Republic*(Eldoret Criminal Appeal No.123 of 2000) stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

24. Therefore, in a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child, and ii) the age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

25. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

26. PW1 testified that she was a minor as she was aged 15 years old as at the time and in this respect. PW4, the investigating officer then produced PW1's school leaving certificate, indicating the date of birth as 7/7/2016. The trial court rightly found that the complainant was 14 years old at the time the charges were being leveled against the accused person.

27. I find the age of the victim was 14 years old.

Penetration

Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

28. In dealing with this issue, I shall revert to the record. The complainant in her testimony took the court through the events leading to the incident. She stated that on the material day, she was in the farm as she had gone to fetch firewood. That the farm belonged to their neighbour. The accused person came and requested her to show him the way to the main road and when she was doing so, the accused took her into his house and locked the door. She further testified that she struggled with the accused but he over powered her and had sexual intercourse with her for a long time causing her to feel pain.

29. The findings of the medical officer whose report was produced by PW5 support the complaint's testimony that she was defiled. On examination, he noted the complainant had tears on the hymen and she also had redness indicating an infection. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

30. On the flipside, my attention is drawn to the testimony of PW2, who testified as the Complainant's cousin and stated that the complainant had insisted to go fetch firewood even when he proposed to go and buy firewood as the Complainant stayed at home.

31. I have equally perused through the Accused's one page submission where he states that they were friends with the accused person and that they had made arrangements to meet on that material day. This was however not clearly stated when he was put on his defence. To my mind, there must have been something more into the incident but the same again did not come out clearly.

Was the appellant the perpetrator?

32. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia. It was the prosecution's evidence that the victim spent three days with the accused person, during which period the accused defiled the complainant.

33. It is therefore the finding of this court that the appellant was rightly identified as the perpetrator.

34. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

35. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

36. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

37. The appellant in his grounds of appeal argued that the sentence meted was not only excessive but also harsh in the circumstances. What is the appropriate sentence? Section 8 (3) of the *Sexual Offences Act* to Convict provides as follows:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

38. The sentence therefore prescribed for such an offence is a term not less that twenty years. However, in the "*Muruatetu Case*", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

> " (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

39. In issuing out a reasonable sentence, The sentencing guidelines 2023 have captured the following objectives to be considered:-

    i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

v. Community protection: to protect the community by incapacitating the offender.

vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society.

40. There trial court while sentencing the appellant, stated that mitigation was considered but still went ahead to issue a mandatory sentence of 20 years. In my considered view, and as I have stated over and again elsewhere the accused mitigation ought to count in sentencing. The objectives of sentencing should be equally considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

41. In the persuasive case of *S vs makwanyane* 1995 Case No. CCT/3/94. For example Chaskalson, the president of that country's Constitutional Court, stated as follows as paragraph 46: " Mitigation and aggravating circumstances must be identified by the court, bearing in mind that the anus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be deterrence, prevention, reformation and retribution. In this process any relevant consideration should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence .

42. The law in our Kenya system recognizes that in any sentencing process there is a risk that the judicial officer may it be a judge or magistrate may err for example he or she may not give appropriate weight to factors such as general deterrence, individual instances, in which judges and magistrate have erred may give rise to legitimate concerns about a particular sentence which has been handed down. However, the same time the law considers that this scope for error is adequately addressed by the system of review or appeal which allows both parties to draw attention to any possible errors and to provide further material that may be irrelevant to the review or Appeal's Court to ensure a fair and proportionate sentence for the crime. The modern approach of sentencing in our system is to make the punishment fit for the crime and the criminal. How do these principles equally apply to the facts of this case? First and foremost, mitigation, personal antecedents, age of the Appellant, objective and subjective factors, don't seem to have adequately addressed by the trial court. The learned trial magistrate seems to have gone straight to the prescribed sentence with no evidence of exercise of judicial discretion to arrive at a 20 years imprisonment. Balancing one factor after another in the mixed grill of principles and objectives of sentencing the sentence so imposed is reviewed and substituted with that of 15 years imprisonment.

43. The Appeal on conviction fails but on sentence the same be and is hereby interfered with to a particular ordained decision of 15 years custodial sentence with effect from 2.2.2016 to give credit for the period spent in a pre-trial detention as expressed in Section 333(2) of the *CPC*.

44. Orders issued accordingly.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Mark Mugun for the State