ZBM v Republic (Criminal Appeal E059 of 2023)
[2024] KEHC 3387 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E059 OF 2023

AC MRIMA, J

APRIL 11, 2024

BETWEEN

ZBM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. Kassim Akida (Resident Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. E145 of 2022 delivered on 9th May, 2023)

JUDGMENT

Background:

1. ZBM, the Appellant herein, was charged in Kitale Chief Magistrates Criminal (S.O.) No. E1451 of 2022. He faced the charge of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that between the 17th and 27th September, 2022 at [particulars withheld], the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of MT, a child aged 9 years old.

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* whose particulars were that between the 17th and 27th September, 2022 at [particulars withheld], the Appellant intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of MT, a child aged 9 years old.

3. The accused denied the charges and was tried. After a full hearing, the Appellant was found guilty and convicted on the main charge of defilement and he was sentenced to serve a term of 30 years' imprisonment.

4. The Appellant was aggrieved by the conviction and sentence. He lodged an appeal which is under consideration in this judgment.

The Appeal:

5. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of applying wrong principles in convicting him, that the charge was defective for a wrong charge. He urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

6. The Appellant argued his appeal by way of written submissions. He expounded on the grounds of appeal.

7. On the part of the prosecution, through its extensive written submissions, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.

8. Both parties relied on various decisions in support of their respective cases.

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.

12. This Court will deal with each of the issues in turn.

Age of the victim:

13. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.

14. In this case, the age of the complainant was not in issue. PW6 assessed the age at 9 years old.

15. He produced an Age Assessment Report in evidence.

16. The complainant was, therefore, a child within the meaning ascribed to the term under the Children's Act.

Penetration:

17. 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."

18. This position was fortified in Mark Oiruri Mose v 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).

19. 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."

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

21. The issue of penetration was testified to by four witnesses. They are the complainant, [testified as PW2], two of PW2's teachers at [Particulars Withheld] Primary School [testified as PW1 and PW3 respectively] and a Clinical Officer attached at Kitale County Referral Hospital, [testified as PW4].

22. PW2 testified to how the Appellant used to have sex with her in their house as her mother was away in Bahrain working. The Appellant was PW2's stepfather.

23. It was PW1 who noticed that PW2 was undergoing a problem at school. PW1 noted that PW2 had suddenly withdrawn and, unlike before, appeared quite disturbed. Surprisingly, PW2 visited the toilet frequently and had uncontrolled urination and stool. On the instant day, PW2 had urinated on herself in class.

24. PW1 cautiously engaged PW2 who eventually opened up and disclosed what the Appellant had been doing unto her. PW2 even refused to go back home as she complained of being in too much pain and she feared the Appellant. PW1 reported the issue to the School's Deputy Head Teacher, PW3.

25. PW3 also interrogated PW2 who readily revealed the past odd events. PW3 took PW2 to Bikeke Hospital before she was referred to Kitale County Hospital. PW3 also reported the matter to the police. PW2 was eventually admitted into a Child Protection Unit.

26. It was one Sheila Ounga, a Clinical officer, who examined PW2 and filled in a P3 Form which was produced by PW4 in evidence. On examination, it was found that PW2's labia had stool, she had fresh bruises with a freshly torn hymen. She was passing urine and stool uncontrollably. It was concluded that there had been penetration.

27. With the foregoing cumulative evidence, there is no doubt that penetration of PW1's genitalia was proved.

Identity of the perpetrator

28. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.

29. The identification aspect in this matter was attested to by the complainant. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

30. Evidence by a single witness must be treated carefully and cautiously. In R v Turnbull & Others [1973] 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> .... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...."

31. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

32. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia v Republic [2008] eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

33. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi v Republic [2014] eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

34. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar

with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

35. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

36. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence as truthful.

37. The complainant was quite forthright on the identity of the assailant. The incident occurred over a period of time. The Appellant lived with PW1 as her stepfather. Her mother was away at working.

38. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events as narrated, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.

39. This Court has also considered the Appellant's defence. It was unsworn and centered on how he was arrested. That, did not in any way outweigh the prosecution's evidence and it was rightly declined by the trial Court.

40. The trial Court was right in finding that the Appellant was positively identified by way of recognition.

41. There was also another issue raised by the Appellant apart from the three ingredients of the offence. This Court will consider it.

42. It was that the charge of defilement was defective since the correct one was that of incest.

43. This Court will briefly render on this issue. Article 50(2)(b) and (n) of *the Constitution* provides as follows: -

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be presumed innocent until the contrary is proved;

(n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –

i) an offence in Kenya; or

ii) a crime under international law

44. Section 134 of the Criminal Procedure Code (hereinafter referred to as 'the CPC') provides as follows: -

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

45. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.

46. The then East Africa Court of Appeal in Yosefu and Another v Uganda [1960] E.A. 236 held as follows: -

> The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

47. In Nyamai Musyoka v Republic [2014] eKLR, the Court of Appeal expressed itself as follows: -

> The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

48. And, in Sigilani v R [2004] 2 KLR 480, it was held that: -

> The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

49. The Black's Law Dictionary defines 'defective' as follows: -

> Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

50. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.

51. Therefore, if on examination of a charge, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.

52. Applying the above to this case, the Appellant was charged with the offence of defilement. The particulars were given. The Appellant took part in the examination of witnesses. He even defended himself in denying the offence.

53. The offence of incest carries the same ingredients as that of defilement. The only difference is that the assailant in a case of incest is within the victim's consanguinity. As such, the investigator has the discretion of preferring any of the offences against an offender. The argument, therefore, fails.

54. Having dealt with all issues and since none of them has impugned the prosecution's evidence, this Court finds that the Appellant was properly identified as the perpetrator and that he was rightly found guilty and properly convicted. As such, the appeal against the conviction is hereby dismissed.

Sentence:

55. The Appellant was sentenced to 30 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

56. The 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.

57. I have considered this matter with caution and care. The sentencing Court received the Appellant's mitigations. The Court considered the age of the victim, the conduct of the Appellant and the general circumstances of the case. There is no doubt the offence is serious. The effects on the victim were catastrophic; inability to control stool and urine.

58. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR.

59. This Court does not see how the sentencing proceedings are to be impugned. The Court exercised its discretion correctly more so given the age of the victim, being 9 years old, and the injuries inflicted on her.

60. In the end, the following final orders of this Court do hereby issue: -

    a. The Appeal is wholly dismissed.

    b. This file is hereby marked as CLOSED.

    Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

ZBM, 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.