Kariro v Republic (Appeal E004 of 2022) [2024] KEHC 5038 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

APPEAL E004 OF 2022

GL NZIOKA, J

MAY 13, 2024

BETWEEN

ANTHONY MUNGA KARIRO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision of Honourable Daffline Nyaboke Sure Senior Resident Magistrate (SRM) delivered on 20{{^th}} January 2022 vide Engineer Senior Principal Magistrate's Court criminal sexual offence case No. E003 of 2021)

JUDGMENT

1. The appellant was arraigned before the Principal Magistrate court at Engineer charged *vide* criminal case No. S/O No E003 of 2020 with the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offence Act* No. 3 of 2006 (herein "the *Act*"). He is charged with an alternative of count of committing indecent at with a child contrary to section 11 (1) of the *Act*. The particulars of each charge are as per the charge sheet.

2. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution called a total of four (4) witnesses whereas the accused defended himself without calling any other witnesses. It is the prosecution case that J.W.W (herein "the complainant") aged sixteen (16) years old and a student at Mwihoko Primary School, went looking for firewood in the forest on 21st November 2020. That, the appellant approached her, held her by the shoulder, put her on the ground, pulled up her stocking and pants, then her dress, and removed his trouser and boxer and defiled her.

3. That when the appellant was done he dressed up and left her. The complainant also dressed up and left for home. That, she did not tell her parents what had happened until the following day when she informed her mother who then informed her father, and on 26th November 2020 the matter was reported to the police station at Kinangop. The complainant was then issued with a P3 form which was filled upon her medical examination. The appellant was thereafter charged after investigation.

4. At the close of the prosecution case the court ruled that the accused had a case to answer. He denied the offence and testified that he had a dispute with Kamau PW2, the father of the complainant, who was arrested and Kenya Forest Services officers demanded for a bribe of Kshs. 15,000. That, later the complainant took his daughter to the police station on allegation that the appellant wanted to sleep with her in the forest. The appellant further testified that, Kamau sent two men to demand Kshs. 15,000 and costs from him but he did not oblige.

5. The appellant argued that, the complainant did not testify as to where he came from or if he was in the forest, and that although she claims she had gone to collect firewood, there is no authorized access to the forest, as under the law, the children are not allowed to enter the forest. He denied the allegation by PW2 Kamau that his wife was "insane" arguing that, they have been married for two (2) years, while the complainant had lived with PW2 Kamau for one (1) year. He argued that the case was based on lies and that the real issue was the Kshs. 15,000 PW2 Kamau demanded from him and that KWS officer lied by saying the scene to his house was three (3) kilometres yet it is a meter.

6. At the conclusion of hearing the entire case, the trial court delivered a judgment dated 20th January 2022, and found the appellant guilty of defilement, convicted him and sentenced him to serve fourteen (14) years imprisonment.

7. However, the appellant is aggrieved with the decision and appeals against it based on the following grounds: -

   a. That, the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case where the age of the appellant was not proved.

   b. That, the learned trial magistrate erred in law and fact by holding that penetration of the complainants' genitals (vagina) was penetrated by the appellant while there was no evidence tendered to prove the same.

   c. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard.

   d. That, the appellants defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.

8. The appeal was opposed by the respondent vide grounds of opposition dated 6th March 2023, in which the respondent states : -

   a. That the charge sheet was proper before court and not defective.

   b. That the court conducted a proper voire dire examination on the minor and all the ingredients of the offences which includes age, identification and penetration were sufficiently proved beyond reasonable doubt. The prosecution witnesses' testimony corroborated.

   c. That the sentence imposed on the Appellant was as provided by law in line with the circumstances of the offence.

   d. That the Appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld

9. The appeal was disposed of vide filing of submission. The appellant in submissions filed on 16th February 2023 argued that, the charge sheet was defective as he was charge with the offence of defilement instead of defilement as provided for in section 20 (1) of the *Act*. That, PW2 Kamau's wife was his cousin and therefore the complainant was his niece.

10. The appellant submitted that, the age of the complainant was not conclusively proved to the required standard. That, PW2 Kamau had only lived with the complainant for two (2) years and therefore was not a competent person to conclusively state the age of the complainant.

11. Further, the element of penetration was not proved beyond reasonable doubt. That, the trial court misdirected itself in basing penetration on a broken hymen and relied on the case of, P.K.W vs Republic [2012] eKLR where the Court of Appeal stated that, the two court below placed a high premium on the finding that the child's hymen was broken as there are times where the hymen is broken by factors other than sexual intercourse such as use of tampons, masturbation, medical examination, or engaging in vigorous activities such as horseback riding, bicycle riding or gymnastics.

12. Finally, the appellant submitted that the sentenced of fourteen (14) years imprisonment imposed by the trial court was harsh as it does not serve the objectives of sentencing listed under paragraph 4.1 of the Sentencing Policy Guidelines.

13. However, the respondent in submissions dated and filed on 6th March 2023, argued that, the charge sheet was not fatally defective as the particulars supported the main charge the appellant was facing, and the evidence was not at variance with the charge. That, the blood relation alleged by the appellant was far fetched as PW2 Kamau was the step father to the complainant and that PW2's brother married into the appellant's family. Further, the complainant knew the appellant as a village mate and not a friend or relative.

14. The respondent submitted that, the prosecution proved the elements of the offence being age, identification, and penetration beyond reasonable doubt. That, the complainant testified that, she was born on 18th October 2004, which was corroborated by the complainant's birth certificate produced by PW4 PC Lemanian. Further, the complainant's evidence on penetration was corroborated by the P3 form produced by PW3 that concluded the complainant was defiled. Furthermore, the complainant knew the appellant very well as she had seen him for a period of over a year and positively identified him in court.

15. Lastly, the respondent submitted that, the sentenced imposed by the trial court was within the law and urged the court to find the same was lawful.

16. At the conclusion of hearing of the appeal and in considering the role of the first appellate court as to re-evaluation the evidence adduced in the trial court afresh and arrive at its own decision as stated by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32. I have considered the material placed before the court. I note from the outset the appellant was convicted of and sentence over an offence of defilement the offence is stipulated under section 8(1) of the *Act* as follows: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

17. Pursuant thereto, the ingredients of the offence are settled in case law as stated in the case of Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, where the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable

doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

18. In the instant matter, I note that as regards age, the particulars of the charge states that the complainant was sixteen (16) years old at the time the offence was committed. She told the court that she was born on 18th October 2004. Her evidence was supported by PW4, No. 116315 PC Lesle Lemanian who produced a birth certificate which confirmed that indeed the complainant was born on 18th October 2004. The offence is alleged to have occurred on 21st November 2020 therefore she was sixteen (16) years old, thus the element of age was proved beyond reasonable doubt.

19. As regards penetration the same is defined under section 2 of the *Act*, as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In that regard, the complainant pointed out at the appellant as the one who defiled her. No one else witnessed the incident. Of course, the appellant has denied committing the offence hence the need of further evidence to reconcile the two varying version. In that regard, PW3 Dr. Julius Murimi Ntwiga produced a P3 form on behalf of Dr. Gitonga who examined the complainant. He told the court that upon examination of the complainant following a history of defilement, it was established that she had normal genitalia but the hymen was broken and blood noted. From the aforesaid, and in the absence of any contrary evidence, it is logical to conclude the hymen was broken when the complainant was suspected to defilement. Consequently the element of penetration was proved.

20. The last ingredient relates to who committed the offence. Once again the evidence in this matter was led mainly by the complainant, and the appellant; so that whereas, the complainant points at the appellant, the appellant denies commission of the offence and alleges that he was implicated due to a grudge between him and the complainant's father. As such there is need to interrogate the entire evidence and establish whether there is any other circumstantial evidence to prove whether the appellant committed offence or not.

21. In answer to the afore, I find that the appellant and the complainant were not strangers to each other. The complainant testified that, she knew the appellant whom she referred to as Munga. That, he was a village mate and she had seen him for one (1) year. At this stage it suffices to note that, in his evidence in chief, the appellant equally testified that, the complainant had stayed with his father for one (1) year. Be that as it may the complainant further stated that they were not friends but they would greet each other.

22. In the same vein, PW2 Kamau testified that the appellant was his very close friend and that he (PW2) was shocked to hear that he had defiled his daughter. That, he considers the appellant as a family member, PW2's brother has married in his family. That his wife is the appellant's cousin. It suffices to note that during cross-examination of both the compliant and her father PW2 Kamau, the appellant never cross examined him on the issue of the relationship, or the fact that he was well known to them. In fact it is in evidence as confirmed by his evidence that his home was just about one (1) kilometer from that of PW2 Kamau where the complainant was staying.

23. Furthermore the offence is alleged to have occurred at 2.00pm, in broad daytime where the complainant had all the opportunity to identify the perpetrator. This evidence was not rebutted in cross examination of PW1 or the defence case. In fact, a consideration of cross examination of the complainant and PW2, it is clear the appellant was concerned with whether the complainant had authority to be in the forest than the accusation against him.

24. In considering the defence mounted by the appellant several issues arise. First and foremost, the appellant did not testify as to where he was on the alleged date of 21st November 2020, when the offence is alleged to have taken place. Secondly, he does not expressly deny the offence to the contrary he shifts

his line of defence to a grudge by PW2 Kamau. Thirdly, it suffices to note that, the issue of the grudge was not put to PW2 Kamau during cross examination. All that, the appellant asked him is whether he had ever been arrested and PW2 Kamau readily admitted he was arrested over liquor and forest produce but added that even the appellant was arrested over game products. At no time did the appellant cross examine on the alleged Kshs, 15,000 alluded to. Fourthly, PW2 Kamau stated that the appellant sought for reconciliation and he declined. In his evidence in chief, the appellant stated that he was told to pay Kshs. 15,000 and 'costs' and he did not. He thus stated:

> " He (PW2) sent two (2) men and required I pay Kshs. 15,000 because I did not do anything. He also wanted me to pay some costs."

25. From the aforesaid, it does appear there was an attempt to compromise the matter herein (from whichever side) and that points to observation that, if the alleged defilement did not take place there would be no room for attempted reconciliation.

26. Be that as it may, the defence by the appellant is an afterthought and holds no water. I don't believe the appellant's evidence that, the complainant's father PW2 Kamau used the daughter (PW1) to frame him. If anything it cannot be an issue of framing when medical evidence revealed that the complainant was defiled. Furthermore, the Investigating officer testified that, the appellant's disappeared after the incident and was arrested on 9th January 2021. He further stated that the appellant's house was near the forest, and again that evidence was not rebutted.

27. The upshot of the afore is that I find sufficient evidence was adduced to prove the appellant was involved in the commission of the offence. The conviction is thus upheld.

28. As regards sentence, the law under section 8(4) provides that: -

> " (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

29. In sentencing the appellant the trial court indicated that; the court had considered:-

> " mitigation record, the date the plea was taken, what the law says and sentence the accused to fourteen (14) years in jail. 14 days right of appeal explained."

30. Pursuant to the provisions of section 8(4) of *Act*, the sentence of fourteen (14) years is unlawful and therefore I set it aside and enhance it to the minimum sentence of 15 years. The calculation thereof will take into account the period the appellant was in custody during the hearing of the case and the period served so far.

31. It is so ordered

Dated, delivered and signed on this 13th day of May, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

3 | Page