Kachila v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 4416 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E029 OF 2023

RB NGETICH, J

MAY 2, 2024

BETWEEN

MUNYOTO KACHILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement, conviction and sentence of Hon. Edwin Mulochi, Senior Resident Magistrate, Kabarnet delivered on the 2 nd day of November, 2023 vide Kabarnet Chief Magistrate's court Criminal Case (SO) No. E002 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of Gang defilement contrary to Section 10 of the *Sexual offences Act* No.3 of 2006. The particulars of the offence were that on the 17th day of June,2021 at within Baringo County jointly, the Appellant jointly with another before court intentionally and unlawfully, caused their genital organs (penis) to penetrate the genital organ (vagina) of a female child named C.N aged 17 years.

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 on the 17th day of June, 2021 within Baringo County jointly, the Appellant jointly with another before court intentionally and unlawfully committed an indecent act with C.N a girl child aged 17 years by touching her private parts namely vagina.

3. The Appellant denied the charges and the case was set down for full trial. Upon conclusion of trial, by judgement delivered on the 12th day of October,2023, the trial court found the accused persons guilty of the charge of gang defilement and convicted them under Section 215 of the CPC. On the 2nd November,2023 the trial court sentenced the appellant to 15 years imprisonment and the sentence was to run from the date of conviction 12th October,2023.

4. The Appellant being aggrieved and dissatisfied by the trial court decision filed this appeal dated 7th November,2023 on both conviction and sentence on 09th November,2023 on the following grounds: -

   i. Thatthe trial magistrate erred both in law and fact by convicting and sentencing the Appellant on a charge that was not proved beyond reasonable doubt as required by law.

   ii. Thatthe trial Magistrate erred in law and fact by convicting the appellant on a charge in which the exact age of the complainant was not established.

   iii. Thatthe trial Magistrate erred in law and fact by relying on medical reports and records that did not support the charge of defilement.

   iv. Thatthe trial Magistrate erred in law and fact by ordering for age assessment of the complainant when there was no compelling reason for such action thereby displaying outright bias against the appellant.

   v. Thatthe trial Magistrate erred in law and fact by failing to put into serious consideration the defence of the appellant.

   vi. Thatthe trial Magistrate erred in law and fact by failing to exercise the court's inherent power to investigate the person responsible for the pregnancy of the alleged minor if he was truly convinced that the complainant was below the age of 18 years.

   vii. That the trial magistrate erred in both law and fact by applying the wrong principles of law.

   viii. That the trial magistrate erred both in law and in fact by meting out a sentence which was excessive against the appellant in the prevailing circumstances.

5. The Appellant prays that this appeal be allowed. Directions were given for the appeal to proceeded by way of written submissions. The Appellant filed their written submission dated 3rd January,2024 while the Respondent did not file submissions.

Appellant's Submissions

6. The Appellant submits that in the case of John Mutua Munyoki =vs= Republic [2017] eKLR, the court of appeal held that for the offence of defilement to be committed, the prosecution must prove each of the following ingredients beyond reasonable doubt that the victim is a minor, there was penetration of the genital organ and such penetration need not to be complete or absolute, that Partial will suffice.

7. The appellant further cited the case of George Opondo Olunga [2016] eKLR where the court held that for the prosecution to secure a conviction against any accused person charged with the offence of defilement, they ought to prove beyond reasonable doubt three ingredients being Identification, Penetration and the age of the victim.

8. On the issue of the exact age of the complaint, the appellant submit that the complainant testified that she knew her age to be 18 years and was confident about her exact age and the P3 dated 17th June,2021 states the age of the complainant to be 18 years and on 15th July2021, it appeared to the prosecutor that the complainant and the accused persons were in talking terms and he requested for age assessment of the complainant, which was allowed. The appellant submits that the application for age assessment was tainted with malice as it was aimed at making it difficult for the complainant to withdraw the case.

9. The Appellant submits that from exhibit 6, the doctor observed that the patient was expectant and could not do pelvic radiology and although the doctor indicated the age of complainant as 17 years, the

examination was not conclusive because the complainant was expectant; and submit that the evidence on record about the age of the complainant is contradictory and ought to have been resolved in favor of the appellant as the doctor's assessment of her age was incomplete. The appellant further submits that subsequent amendment of the charge sheet to that of gang defilement amount to miscarriage of justice.

10. On the issue of Penetration, the appellant submits that apart from the testimony of the complainant, there is nothing else on record to suggest that the complainant had recently been penetrated and the evidence on penetration is not conclusive. The Appellant further submits that the P3 was filled within 5 hours and nothing abnormal was observed; and from the treatment notes exhibit 3 all tests were negative except pregnancy test and the doctor concluded that there were no conclusive results resolving that she had soon been raped.

11. Further that in his judgement, the trial magistrate failed to evaluate the content of the P3 and the treatment notes; that the complainant was examined after five hours and failure to trace even a bruise would suggest that the said gang defilement never took place. Further that there was no evidence that the complainant took bath or changed clothes and this position supports the testimony of the applicant that the entire charge was a fabrication to settle scores.

12. And in the absence of proper medical proof of such occurrence, it is not safe to rely on the word of the complainant alone because it merely remains the word of the complainant against that of the accused person who has denied ever engaging in such act and the charge was a fabrication to settle domestic scores.

13. The appellant submits that the evidence of PW2 is consistent with the evidence of PW1 whereas the evidence of PW3 contains a contradiction. He questioned how the complainant was in Chemolingot in dirty clothes, goes to police station, gets escorted to hospital and comes back to the police station without the clothes and the eye witnesses did not say she had taken a bath except the Clinical Officer and Police Officer.

14. In respect to sentence, the appellant submit that it was excessive sentence and contend that the complainant was above 18 years and if the appellant was found guilty, he would be jailed for ten (10) years on rape and not fifteen (15) years for defilement.

15. Further that the appellant adduced defense of alibi and cited bad blood between his family and the family of the Nyumba Kumi elder, one Mr. Longura who arrested him and, in his judgement, the trial magistrate appeared biased and discredited it.

16. The appellant submits that in view of the contradictions apparent in the evidence on record, the conviction was not safe at all and the trial magistrate's failure to refer to medical material placed before the court reveals that he totally failed to make a proper analysis of the evidence on record.

17. He further submits that upon looking at the finding of the doctor stating the age of the complainant to be below eighteen (18), Voire Dire examination ought to have been conducted and relied on the case of Samuel Warui Karimi =vs= Republic [2016] eKLR, where the court of appeal discussed exhaustively the importance of Voire Dire. That it helps the court to evaluate if the complainant appreciates the value of saying the truth.

18. The appellant further submits that the complainant was six months pregnant by a fellow pupil and despite being custodian of the right of the child, the court was not even moved to make a proper enquiry of the violation of the Rights of the child. That it can only be concluded that the court was not convinced that the complainant was a minor; and submit that conviction was not safe at all and that the contradictions ought to have been resolved in favor of the appellant and urged this court to allow this appeal.

ANALYSIS AND DETERMINATION

19. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind the fact that I did not have an opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs Republic[1972] EA 32 where it was stated as follows: -

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 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, (See Peters v. Sunday Post, [1958] EA 424.)"

20. Further in 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."

21. In view of the above, I have perused and considered grounds of appeal together with record of appeal and submissions filed and consider the following as issues for determination: -

    i. Whether ingredients for the offence of Gang defilement were proved beyond reasonable doubt

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

22. The Appellant was charged together with another with the offence of a gang defilement contrary to section 10 of the *Sexual Offences Act* which provides as follows: -

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."

23. Under section 10 of the *Sexual Offences Act*, the ingredients of gang rape or defilement are offence committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. For the offence of gang defilement, the prosecution is required to prove the ingredients of defilement and in addition prove that the suspect committed the offence in association with another/s or in company of other/s.

(a) Whether the appellant committed the offence in in association with another or others

24. In her evidence, the complainant testified that the appellant was with another called Ruto who was accused 2 in the trial court. She testified that the two were his neighbors and the incident occurred

during the day. She said Ruto appeared first and after greeting the complainant, he told her that he was with the appellant herein. Shortly after, the appellant emerged from the thicket also and they both wrestled her down and Ruto told the appellant to defile her. The incident occurred in broad daylight. The complainant testified that the appellant started by defiling her and after the appellant having carnal knowledge of her, the second attacker who was waiting at the scene had carnal knowledge of her. From the evidence adduced, none of the two attackers removed himself from the scene of crime and further, Ruto talked to the complainant about the appellant before the Appellant emerged from the thicket. From the foregoing, there is no doubt that the appellant and the said Ruto had common intention and committed the offence together against the complaint.

(b) Proof of penetration

25. 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. 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.

26. The complainant who was a standard 4 student at Chemolingot primary school testified as Pw1. She said that on 17th June,2021 at 4 p.m., she was in the river to fetch water when she saw Ruto who greeted her and after she responded to his greeting the said Ruto he informed her he was looking for her with Munyoto who is the Appellant herein and as she was talking to Ruto, the appellant arrived. They asked her to fetch so that they could walk together back home. She said Appellant had worn gumboots and another boy appeared exchanged shoes with the appellant while Ruto followed her from behind and caught up with her near the road and requested her to be appellant's wife. Shortly the Appellant caught up with them and inquired from her if she had heard what Ruto had informed her.

27. She further stated that the two went the other side way using a short cut and they caught up with her and Ruto ordered her to put down the Jerican she was carrying and when she refused, Ruto took the Jerican and walked away and as she attempted to run , the appellant held her and requested to go back to where her Jerican was; Ruto walked back to where she was, picked a stone and asked her to stop screaming but the appellant asked him not to hit her then the appellant pushed her.

28. She said that Ruto asked the appellant to finish with her meaning to have sex with her. The Appellant threw her on the ground where they struggled and he removed her clothes, pant and inserted his penis in her vagina after which Ruto arrived, got on top of her and inserted his penis in her vagina. The complainant screamed and Ruto threatened her with a small sharp knife if she continued screaming. She said after Ruto having carnal knowledge of her, he left with the appellant as as she tried to wake up. she got up and went home crying as she felt pain in her stomach. On the way she met her sister who asked her what happened and she informed her that Ruto and Muyoti had raped her.

29. They reported the incident to police and went to Nginyang hospital She said she knew the two accused persons. She said she was taken to hospital for age assessment and was told she was 17 years old. She said when the incident occurred, she was pregnant with the child whom she said was for Bronix's.

30. Pw4 Isaiah Matundara, a clinical officer at Chemolingot Sub- County Hospital examined the complainant who gave history of having been defiled by 2 men well known to her. He produced P3 Form dated 17th June, 2021.He confirmed that the complainant was approximately 5 months pregnant and the injuries he saw on her were about 5 hours old. He said her genitalia was intact, there was no

discharge, no bleeding and from the laboratory examination, there was no discharge, blood or vagina infection, and no traces of spermatozoa. He stated that the complainant had taken bath before going to the hospital and that they did not do a high vaginal swab. He said that there were no conclusive results resolving that she had soon been raped.

31. In situations where the doctor's evidence is not conclusive, the court is required to weigh with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration. Record show that immediately after the incident, the complainant went home and informed pw3 who confirmed that her clothes were dirty an indication that there was struggle between the complainant and her attackers. This was also confirmed by pw3 who took her to hospital. Pw4 the investigating officer also stated that he visited the scene and confirmed that the bush where the complainant was defiled was disturbed. The doctor also confirmed that the complainant was 5 pregnant at the time of the incident which means it was not her first sexual encounter and possibility of her genitalia remaining intact were high.

32. From the complainant's evidence, her clothes including the pant were forcefully removed by the appellant and his co-accused which confirm the struggle between the complainant and the two accused persons/appellant and Ruto.

33. Having weighed the evidence adduced by the complainant together with evidence of pw3 and pw4, I am convinced beyond reasonable doubt that the appellant and the said Ruto defiled the complainant.

(c) Proof of age

34. In respect to age, in the case of Nyambogo Onsongo vs. Republic (2016) eKLR the court of appeal had this to say: -

> " ... 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."

35. Pw1 the complainant herein in her testimony in court stated that she was aged 18 years old. The complainant's parents did not testify and no birth certificate nor any other documents showing her date of part was availed in court. Age assessment by a doctor showed that the complainant was 17 years old. In the absence of any other prove of age or evidence to challenge assessment by the doctor, the age assessment document produced in court is credible document to prove the complainant's age.

(d) Identity of assailant

ARA 36.

The complainant stated that she knew the accused persons before as they are neighbors. The incident occurred during the day and being persons known to the complainant, issue of mistaken identity could not arise. From the foregoing, the complainant recognized the appellant and his colleague as they were known to her.

(f) Whether trial magistrate erred by not conducting Voire dire examination

37. The Appellant has faulted the trial court for failing to conduct a voire dire examination on the complainant who was a minor. In the leading case of Kibangeny Arap Korir v Republic, [1959] EA

92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

38. Further, there are recent decisions where the court of appeal pronounced itself in respect to voire dire examination. In the case of Patrick Kathurima v Republic, [2015] eKLR, the Court of Appeal held: -

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

39. Further in the case of Maripett Loonkomok v Republic [2016] eKLR the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voire dire examination and stated as follows: -

> " The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R Criminal Appeal No.16 of 2014* where it categorically stated that the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.

40. In the above case, the court further stated as follows: -

> " It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination. It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

41. The age assessment showed that the complainant was 17 years old and in view of the above authorities, the complainant being over 14 years, the trial magistrate was not required to do voire dire examination.

(e) Whether appellant's defence was considered

42. On whether the appellant's defence was considered, I note from the judgment that the learned magistrate considered the appellant's defence which he found as mere denial of the crime and did not cast any doubts on the prosecution case.

(ii) Whether sentence imposed was harsh and excessive

43. On whether the sentence meted on the appellant by the trial court was harsh and excessive, it is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code. Sentencing is the discretion of the trial court but such discretion must

be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

44. Further, 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."

45. Section 10 of *sexual offences Act* provides that any person who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

46. The trial court-imposed sentence of 15 years imprisonment. Considering the authorities cited above and the circumstances of the offence herein, I am of the view that the sentence imposed by the trial court is appropriate in the circumstance. I therefore decline to interfere with sentence imposed by the trial court. However, I note from the record that the trial magistrate ordered that the sentence to start from the date of conviction. Section 333(2) of the criminal procedure code provide that period served in remand should be computed in sentence imposed. I therefore order that period served by the appellant in remand to be computed in sentence herein.

47. Final Orders: -

    1. Appeal on both conviction and sentence is hereby dismissed.

    2. Period served in remand to be computed in sentence imposed by trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 2ND DAY OF MAY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state.

Mr. Kipkenei for Appellant.

Appellant present.