Kairu v Republic (Criminal Appeal 92 of 2023)
[2024] KEHC 5263 (KLR) (Appeals) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

APPEALS

CRIMINAL APPEAL 92 OF 2023

CM KARIUKI, J

MAY 2, 2024

(FORMERLY NAIVASHA HCRA E058 OF 2022)

BETWEEN

SAMUEL MBUGUA KAIRU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the Judgement of Hon. D. Sure, PM delivered on 8th November 2022 in Naivasha CMCC No. E053 of 2022)

JUDGMENT

1. The Appellant herein was charged with the offense of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 particulars being that on the 22nd day of May 2022 within Nyandarua County, the Appellant intentionally caused his penis to penetrate the vagina of MWK, a child aged 12 years.

2. In the alternative count, he was charged with the offense of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

3. After the trial, the Appellant was found guilty of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to 20 years imprisonment.

4. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following 5 grounds of appeal set out in the petition of appeal dated 21st November 2022:-

    i. The Appellant pleaded not guilty in the instant case.

ii. That the learned trial magistrate erred in law and fact when she convicted the Appellant in a prosecution case where age was not proved.

iii. That the learned trial magistrate erred in law and fact when she convicted the Appellant in the prosecution case where penetration was not proved.

iv. The learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.

v. That the learned trial magistrate erred in law and fact by convicting the Appellant but did not consider the Appellant's defense.

5. Reasons wherefore the Appellant prayed this appeal be allowed, conviction quashed, sentence aside and the Appellant set at liberty unless otherwise lawfully held.

Appellant's Submissions

6. The Appellant further submitted the following grounds of appeal:-

   1. That the learned trial magistrate erred in law by convicting the Appellant and sentencing him to serve a sentence of 20 years which was awarded in mandatory form without considering the circumstances that prevailed during the commission of the offence and other constitutional provisions Article 50 (2)(p)

   2. The trial magistrate erred in law and fact by holding that the offense of defilement was proved but failed to note that the ingredients of the offense were not proved by the prosecution.

   3. That the learned trial magistrate erred in law and fact when he failed to consider the defense evidence given by the Appellant alongside other prosecution evidence.

7. The Appellant averred that the trial magistrate did not consider his mitigation when sentencing him that the sentence was harsh and excessive considering the circumstances of the case and that he was prejudiced by the sentence. Reliance was placed on Article 48 & 159 of the *Constitution*, Constitutional and Judicial Review Division Pet. No. 97 of 2021, Petition No. E017 of 2021 *Phillip Mueke Maingi & 5 Others vs DPP*

8. It was asserted that the ingredients for defilement were not proved in evidence as against the Appellant. The age of the victim was in doubt because the birth certificate was not produced. Reliance was placed on Charles Wamukoya Karani vs Republic, *Geoffrey Thiongo Wangui vs Republic*, *Kimatu Mbuvi t/s Kimatu Mbuvi & Bros CS Augustine Munyao Kioko*, Civil Appeal No. 203 of 2007, Juma Kalio vs Rep, Cr. Appeal No. 71 of 2020

9. The Appellant argued that penetration was not proved because the victim has a history of defilement, the hymen was broken with old tags and there was no discharge during P3 filling. That the evidence of PW1 and PW2 could not prove penetration. Reliance was placed on *PKW vs Republic*

10. It was contended that the Appellant gave sworn testimony that he was in Nakuru and did not go to Miharati on 22.4.2022. that the people who arrested him were not called to testify for the court to consider what he said after his arrest. He stated that his defense of alibi was not considered and prayed that this honorable court reevaluate the evidence and make an independent finding on both conviction and proper sentence.

Respondent's Submissions

11. The Respondent stated that all the ingredients for the offense of defilement had been proved beyond reasonable doubt. On age, it was stated that the victim was 12 years of age according to the P3 form, PW3 testimony, and her Birth Certificate (ph. 4) which indicated that she was born on 27th May 2009.

12. On penetration, it was submitted that PW1 testified that the Appellant had asked her to accompany him to the forest to fetch firewood and when they got there, he threw the *panga* and asked her to go get it. When she bent to get it, the Appellant followed her from behind then covered her eyes with a cloth, removed her clothes, and defiled her. PW1 asserted that although she could not see what was happening, she felt the Appellant touch her private parts with his *"kasusu"* and when he finished defiling him, she unbound her eyes and told her it was him.

13. This evidence was corroborated by that of PW2 with respect to the medical reports. The treatment notes from the first hospital that handled PW1's case stated that she had been defiled severally before by other men but in respect to this case, she stated that the Appellant lured her into the forest and defiled her. That the treatment did not show that she had a mildly swollen vagina and the PRC showed that she had a sticky whitish discharge, the hymen was broken with old tags and she had a freshly healing laceration on the right *labia*.

14. On identification, PW1 testified that the Appellant used to visit her mum/aunty's house a fact that was confirmed by the Appellant himself since he stated that he used to see PW1 at her said mum/aunty's place doing some domestic work. When they went to the forest, the Appellant confirmed to her that he was the one who defiled her before asking her not to tell anyone about what had happened.

15. It was contended that the identification of the Appellant was one of recognition that both PW1 and the Appellant admitted that they had seen and/or known each other before and that the offense took place during the day and PW1 saw the perpetrator well.

16. The Respondent argued that the Appellant's defense was a mere denial and did not shake their case and strong evidence against him. The testimony of the witnesses called in defense was marred with contradiction and inconsistencies which demonstrated that their evidence was not truthful and they aimed to help the Appellant at the expense of the victim who is a minor and their direct relative.

17. Lastly, on sentence the Respondent asserted that a sentence of 20 years considering the circumstances of this case is more than sufficient and lenient compared to the gravity of the offense, the age of the victim, and the lifetime damage that the same is likely to have on PW1. That the Appellant's mitigation was taken into consideration while sentencing and there was no reasonable reason to interfere with the sentence. The Respondent urged the court to uphold the conviction and sentence of the lower court.

Analysis and Determination

18. This being a first appeal, I am expected to review and analyse the evidence afresh to form an independent opinion and draw my conclusions bearing in mind that I do not have the benefit of seeing and observing the witnesses. The principles were set out in the case of *David Njuguna Wairimu vs. Rep* [2010] eKLR where the Court of Appeal stated: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything

objectionable in doing so, provided it is clear that the court has considered the evidence based on the law and the evidence to satisfy itself on the correctness of the decision."

(See *Okeno vs. Republic* [1972] EA 32 and *Kiilu & Another vs. Republic* [2005] 1 KLR, 174).

19. The main issue that arises from the instant appeal is the conviction and subsequent sentence of the Appellant.

20. In a charge for defilement, the prosecution must prove the age of the Complainant, penetration, and the identification of the perpetrator of the crime.

Age of the Complainant

21. In regards to the victim's age, PW3 produced a birth certificate indicating PW1 was born on 29th May 2009 proving that she was 13 years of age at the time of the offence. In *Joseph Kiet Seet v Republic* (2014) eKLR, the court held that:

> "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni – versus Uganda,* Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In a defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

22. Accordingly, I concur with the trial magistrate's finding that the prosecution had proven PW1's age.

Penetration

23. On the second issue i.e. penetration, PW1 gave a clear narration of what had ensued between her and the Appellant on the material day. The Appellant asked her to accompany him to the forest to fetch firewood and when they got there, he threw the *panga* and asked her to go get it. When she bent to get it, the Appellant followed her from behind then covered her eyes with a cloth, removed her clothes, and defiled her. PW1 asserted that although she could not see what was happening, she felt the Appellant touch her private parts with his *"kasusu"* and when he finished defiling him, she unbound her eyes and told her it was him and warned her not to tell anyone. I find that her testimony was consistent and credible as to the occurrences of the fateful day and in proving that penetration happened.

24. Additionally, from the treatment notes produced by PW2, it was indicated that PW1 had been defiled before but at the time of examination her vagina was mildly swollen with sticky whitish discharge, and a freshly healing laceration was noted on the *labia minora*. The Appellant argued at length that penetration was not proved because the victim has a history of defilement, the hymen was broken with old tags and there was no discharge during P3 filling.

25. I have thoroughly considered the trial court's analysis on whether PW1's previous defilement negates the allegation of penetration on the Appellant's part and having examined the trial record and evidence thereto, I fully agree with the trial magistrate's determination on the same. It is not in dispute that PW1, unfortunately, was exposed to sex at a young age by her mother according to the evidence of DW2 and DW3. DW2 testified that PW1's mother exposed her to sexual abuse and the same was corroborated by DW3 who stated that she had rescued her from the same.

26. Notwithstanding, I concur with the learned trial magistrate's assertion that the previous sexual conduct of a victim is immaterial unless an application is made and allowed by the court and it touches

on the issues under Section 34 (3) of the *Sexual Offences Act*. In this case, no application was made and according to DW3, the victim had already started living with her as early as 2020 but she was defiled in 2022. I, therefore, agree that there is no nexus between the victim's previous sexual abuse and the offense which the Appellant is charged with, they happened on different dates. The victim having been exposed to sexual abuse at an early age does not mean that she was not defiled by the Appellant herein.

27. Unfortunately, PW1 did not receive the urgent medical care that she needed when she reported to DW2 who ignored her. When she was taken to the first hospital more than a week later, the treatment notes dated 30th May 2-022; indicated that there was a whitish sticky vaginal discharge, a fresh healing laceration on the right *labia minora*, a large fresh wound on the left *labia minora*, the hymen was absent and healed and the vaginal opening was freshly reddened with no laceration but mildly swollen.

28. The P3 form was filled a day later on 31st May 2022 and it was indicated that there was normal external genitalia, a hymen broken with old tags, and no discharge at the time of examination. I concur with the trial court's finding that PW1's would not have healed by 31st May 2022 thus the doctor's examination was questionable but the same does not negate the results as seen from the treatment notes from the clinical officer at Manunga Hospital who alerted the police of PW1's condition and the PRC form. Consequently, I find that the prosecution proved that penetration had indeed occurred beyond reasonable doubt.

Identity of the Perpetrator

29. On the final issue of identification, I am satisfied that the Appellant was positively identified as the one who defiled PW1. She stated that he took her to the forest, defiled her and after he unfolded his eyes he revealed that he was the one who had defiled her and asked her not to tell anyone. The Appellant was a person who was known to the victim as he had done some work where she used to live at DW2's homestead, a fact that even the Appellant confirmed. He stated that he knew PW1 as he used to see her at her auntie's place.

30. The Appellant in his defence stated that he was not around the location where the victim was defiled, a statement that cannot be further from the truth. His evidence of alibi was also an afterthought and untruthful. I find that the witnesses he called to his defense were also marred with lies as per the learned trial magistrate's analysis. These witnesses were only interested in clearing the Appellant's name perhaps because DW2 was married to his brother.

31. In the result, I find that the prosecution proved its case against the Appellant beyond all reasonable doubt.

32. On sentencing, the Appellant asserted that the learned trial magistrate erred in law by convicting the Appellant and sentencing him to serve a sentence of 20 years which was awarded in mandatory form without considering the circumstances that prevailed during the commission of the offence and other constitutional provisions. He also stated that the trial magistrate did not consider his mitigation.

33. While I agree that it has been held that mandatory minimum sentences were declared unconstitutional, the sentence of 20 years meted by the trial magistrate is not unlawful. Moreover, it is untrue that the trial magistrate did not consider his mitigation as according to the sentencing proceedings dated 8.11.2022, the trial magistrate indicated that she had taken note of his mitigation.

34. I agree with the trial magistrate that considering the victim's vulnerabilities and the circumstances of the offense, the sentence of 20 years imprisonment was appropriate and I find no reason to interfere with the same. I find no justifiable reason to disturb the finding in the sentence.

35. Consequently, I find that the appeal herein lacks in merit and make the orders;

i. The appeal is accordingly dismissed and i uphold both the conviction and sentence.

DATED AND DELIVERED IN NYANDARUA THIS 2ND DAY OF MAY 2024

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CHARLES KARIUKI

JUDGE