Ndungu v Republic (Criminal Appeal E309 of 2015)
[2024] KEHC 5826 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5826 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E309 OF 2015

HI ONG'UDI, J

MAY 24, 2024

BETWEEN

CHARLES NDUMIA NDUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. R. Amwayi – Resident Magistrate in Nakuru CMCR 168 of 2015, delivered on 4th October, 2022)

JUDGMENT

1. Charles Ndumia Ndungu the appellant herein 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 being that the appellant on 8th July 2014 within Nakuru county intentionally caused his penis to penetrate the vagina of JW a child aged 7 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The appellant was first arraigned in court on 18th July, 2014 when the charge was read to him and he pleaded not guilty. The matter proceeded to full hearing and the prosecution called four (4) witnesses. The appellant gave a sworn defence and called two witnesses. The learned trial Magistrate later convicted the appellant and sentenced him to life imprisonment.

3. Being dissatisfied the appellant filed this petition of Appeal and a supplementary petition of Appeal challenging both the conviction and sentence on the following grounds:

    i. That the Learned Trial Magistrate erred both in fact and law by proceeding to hear and determine the matter before the prosecution supplying the Accused Person with all the witness statements and materials that the prosecution intended, and subsequently relied upon and

produced as Exhibits before the trial court in spite of the clear provisions of *the Constitution* and established judicial precedents.

ii. That the Learned Trial Magistrate erred in law and in fact by convicting the appellant without factual, corroborative, scientific and/or medical evidence linking the appellant herein to the alleged offence.

iii. That the Learned Trial Magistrate erred in law and fact when he convicted the appellant in total disregard of the fact that the reliability, veracity and integrity of PWI's evidence 'adduced therein was questionable having suspected the commission of the alleged offence by the accused on 8th July, 2014, she deliberately failed to report immediately to the Police and only did so four days later on 12th July, 2014; and, also failed to take the victim minor to hospital within a reasonable time which could have established with precision if indeed the minor was defiled or the cause of the injuries at the minors private parts: the mother could have inflicted the injuries using a blunt object and framed the Accused for the charges of defilement.

iv. That the Learned Trial Magistrate erred in law and fact when she convicted the appellant despite the contradiction between the victim minor(PW2) and complainant mother(PW1) testimonies on account of refusal of the minor to incriminate the accused for the alleged offence herein in the first instance and only did so upon harsh, apparent coercion, duress, undue influence and insistence from PW1; and, failure to consider the conflicting statements on how PW2 reported the subject offence by the accused to PW1 i.e according to PW2, it was her younger sibling one GW who informed PW1 about the alleged offence and who apparently was also a victim of the same atrocity by the accused but no action was taken to address the allegation therein. However, PW1 clearly testified that it was her who initiated the subject conversation with PW2, who initially denied that the accused had committed the alleged offence and upon harsh insistence by PW1,-PW2 finally caved in to the pressure and falsely accused the Appellant.

v. That the Learned Trial Magistrate erred in law and fact by convicting the appellant despite the water-tight defence proffered by the Appellant and subsequently meting a harsh, and excessive sentence by failing to consider the Appellant's mitigations and the circumstances surrounding the commission of the alleged offence which clearly showed that the Appellant had been framed by his estranged wife to settle personal scores.

vi. That the Learned Trial Magistrate erred both in fact and law by holding that the prosecution/ respondent herein had proven the Offence of Defilement yet the entire evidence produced by the Prosecution did not prove all the ingredients of defilement as provided for by the *Sexual Offences Act* and the established judicial precedents.

vii. That the Learned Trial Magistrate erred both in fact and law by proceeding to convict the Appellant yet all the evidence, facts and the circumstances point to the innocence of the Accused Person, the Appellant herein.

viii. That the Learned Trial Magistrate erred both in fact and law by holding that the Prosecution had discharged its burden beyond reasonable doubt and thereafter convicting the Accused Person yet the conviction that was reached by the trial court was not supported by the facts of the case.

ix. That the Learned Trial Magistrate erred both in fact and law by proceeding to convict the Accused Person, the Appellant herein yet the prosecution evidence, case and testimony was marred with glaring contradictions and inconsistencies.

x. That the Learned Trial Magistrate erred both in fact and law by convicting the Accused person and thereafter ignored the mitigation of the Accused Person by meting out an excessive sentence in the circumstances of this case.

xi. That the Learned Trial Magistrate erred both in fact and law by ignoring the Accused Person's uncontroverted, unchallenged and unwavering defence which clearly pointed out to the innocence of the Accused Person.

4. The appeal was canvassed by way of written submissions.

Appellant's submissions

5. These submissions were filed by the firm of Gatitu Muchiri Advocates and are dated 18th March, 2024. Counsel identified two issues for determination.

6. The first issue is whether the offence of defilement was proven to the required standard thereby warranting the conviction. Counsel submitted that the prosecution failed to prove all the necessary ingredients for the offence of defilement. He placed reliance on the cases of George Opondo Olunga v Republic [2016] eKLR and Omus Kiringi Chivatsi v Republic [2017] eKLR, where both courts held that the ingredients of defilement were age of the complainant, proof of penetration and positive identification of the assailant.

7. On the first element of age, counsel placed reliance on the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, where the court held;

> "...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. In the case herein, the birth certificate was produced hence age is not an issue.

8. On the second ingredient of penetration, counsel cited Section 2 of the *Sexual Offences Act* which defines penetration as the partial or complete insertion of the genital organ of a person into the genital organs of another person. He submitted that the testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Further, that 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. He added that penetration was never proved at the trial court.

9. Counsel submitted further that the trial magistrate erred in law and in fact in convicting the appellant without collaborative, scientific and/or medical evidence linking the appellant with the offence of defilement. He placed reliance on section 36(1) of the *Sexual Offences Act* and the case of Williamson Sowa Mbwanga v Republic [2016] eKLR, where the court held as follows;

> "Section 36 (1) of the Act empowers the court to direct a person charged with the offence under the Act to provide samples for tests including for DNA test to establish linkage between the accused and the offence."

10. He went on to submit that there were glaring inconsistencies and contradictions in the prosecution's case and the witnesses' testimonies. The court's attention was drawn to the case of Joseph Maina Mwangi v Republic [2000] eKLR.

11. On the third ingredient, that is positive identification of the offender, counsel submitted that the appellant was the father of the complainant and that her mother PW2 coerced her to implicate him. He placed reliance on the case of Kariuki Njiru & 7 Others v Republic Criminal Appeal No. 6 of 2001(Unreported), where the court held as follows;

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that that the identification is positive and free from the possibility of error."

12. Lastly, on the issue whether the sentence imposed was appropriate, the court's attention was drawn to the case of Bernard Kimani Gacheru v Repulic [2002] eKLR, where the court stated as follows:

> " 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 one of the matters already stated is shown to exist."

13. In conclusion, counsel submitted that the inconsistencies by the prosecution witnesses portrayed were sufficient enough to create a doubt in their case. Further, that the threshold that requires the prosecution to prove a case beyond reasonable doubt was not achieved. He urged the court to allow the appeal, quash the conviction, the sentence be set aside and the appellant set at liberty.

Respondent's submissions

14. Learned counsel Edwin Kong'a for the ODPP filed undated submissions on 20th March 2024. He identified eight issues for determination by this court.

15. The first issue is whether the appellant was not supplied with witness statements by the prosecution at the time of trial. Counsel submitted that the trial court the trial court ordered that he be supplied with the same and his legal counsel never raised that issue thereafter.

16. On the second issue counsel submitted that the trial court did not fall into error when it found the appellant guilty of the offence as charged since there was enough corroborative evidence in light of the medical evidence. The same included; the medical notes, P3 and PRC forms which were produced, and the testimony of the complainant herself, as evidenced from pages 10 and 11 of the typed proceedings. He placed reliance on section 24 of the *Evidence Act*.

17. The third issue is whether the appellant was convicted via testimony from the complainant whose testimony was unreliable and her integrity questionable. Counsel submitted that the complainant gave out her testimony and the court conducted a voire dire examination on her, vide page 10 lines' 10

and 11 of the proceedings. Further, that the court made a finding that the complainant was a truthful witness and it went ahead to order that she gives sworn evidence.

18. Counsel submitted further that the complainant was subjected to cross examination by counsel for the appellant in which the truthfulness of her testimony was tested. The fourth issue is whether there were contradictions and inconsistencies in the testimonies of PW1 and PW2. He submitted that the testimonies of both PW1 and PW2 were clear, with no contradictions. He placed reliance on Siaya high court criminal appeal no 11 of 2020, Too v Republic [2020] eKLR where the court citing the Court of Appeal case of Richard Munene Republic [2018] eKLR,held:

> "It is a settled principle in law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witnesses that will be fatal to its case, it is only when such inconsistencies and contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from."

19. The fifth issue is whether the ingredients of the offence were proved, and counsel answered in the affirmative. On whether the defence case was considered by the trial court, counsel submitted that the trial court did analyse the defence case in its judgement and it made a finding. Further, that the same did not controvert the case for the prosecution, as is evident from pages 39 and 40, of the trial court's proceedings.

20. On the seventh issue as to whether the sentence meted out on the appellant was harsh and excessive, counsel submitted that section 8(2) of the *Sexual Offences Act* provided for a life sentence and the same was a mandatory sentence. Therefore, the sentence as meted out was neither harsh nor excessive and the same was justified under the circumstances.

21. Lastly, on whether the appellants mitigation was considered by the trial court, he submitted that the same was considered by the trial court which alluded to the same when it sentenced the appellant. That the same was evident at page 41 of the proceedings lines 18 and 19. He urged the court to dismiss the appeal.

Analysis and Determination

22. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh before arriving at its own decision while bearing in mind that it did not see nor hear the witnesses. In Kiilu & another v Republic [2005] 1 KLR the Court of Appeal held:

    i. The appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    ii. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence so support the lower courts' 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.

23. I have carefully considered the evidence on record, grounds of Appeal, submissions and the law. In my opinion the issues for determination are:

    i. Whether PW1 was defiled

ii. Whether the Appellant was identified as the defiler.

24. In addressing the first issue, I will look at what defilement is. Section 8(1) of the *Sexual Offences Act* defines defilement as follows:

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

25. It goes further under section 8(2) to state the punishment for such defilement as follows:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

26. In Dominic Kibet Mwareng v Republic [2013] eKLR the court reinforced the same when it stated that -

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

27. In light of the above provisions of the law and authority, there must be proof of (i) age, (ii) penetration and (iii) identity of the perpetrator.

28. Regarding the age of the complainant, PW2 the minor told the court she was aged eight (8) years old. Her mother (PW1) in her evidence stated that the child was born on 6th October 2006 and she was eight (8) years old. The birth certificate which was produced by the investigation officer (PW3) as (EXB1) shows it was issued on 27th May 2014 with PW1 as the mother and one Peter Mugo Mwai as the father. I therefore find the age of PW2 was proved. She was a minor.

29. Penetration, is defined under section 2 of the *Sexual Offences Act* as:

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

30. In the present case, the minor (PW2) testified that on 8th July 2014, the appellant came to their bed, removed their clothes and he inserted his thing for urinating into hers for urinating. She testified further that the appellant had done that to her on several occasions and daily. She informed PW1 of the same and she took her to PGH Nakuru where she was treated and issued with a P3 form together with a lab request form.

31. Dr Thomas Matara (PW4) produced as Exhibits 2a, 2b & 3 the P3 form, Post Rape Care Form (PRC), Lab request Form respectively. The P3 Form under section C indicates that there was tear and bruises in the vestibule and the hymen was torn but no discharge was noted.

32. The appellant in his sworn testimony denied having defiled the minor.

33. From the evidence of the minor (PW2), the medial evidence by (PW4) there is no doubt that the child (PW2) was defiled. This evidence was not shaken at all by the cross - examination.

34. As to the identity of the perpetrator, the minor testified that the appellant was her father and the incident took place on several occasions. The appellant was therefore a person well known to her. In addition, there was no evidence of a grudge between the PW1 (the minor's mother) and the appellant to make her coerce PW2 into implicating the appellant as alleged. The appellant confirmed that the minor was his daughter and PW1 his wife. To this end, I find that the appellant was positively identified

as the perpetrator. The prosecution proved its case to the required standard and the trial magistrate did not err in convicting the appellant. The conviction is therefore upheld.

35. However, on the sentence of life imprisonment, this court shall adopt the finding of the court of Appeal in the case of Dismas Wafula Kilwake v Republic [2019] Eklr As Follows;

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

36. The appellant being the minor's father was expected to love and protect the child. What he did was beastly and must be condemned in the strongest terms. This court is well guided by the Court of Appeal not only in the above decisions but several others. I hereby set aside the sentence of life imprisonment and substitute it with thirty (30) years imprisonment from the time the trial court imposed the sentence. The upshot is that the Appeal partially succeeds in terms of sentence only.

37. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE