Kipkoech v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 7056 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7056 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E029 OF 2022

PN GICHOHI, J

JUNE 13, 2024

BETWEEN

COLLINS KIPKOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. F. Munyi (Principal Magistrate) in Nakuru Chief Magistrate's Court Criminal Case No. 138 of 2019 delivered on 16th July, 2021)

JUDGMENT

1. Collins Kipkoech Bii (hereafter referred to as the Appellant), appeared before the trial magistrate in Nakuru on 22nd August, 2019 where he was charged with the offence of defilement contrary to Section (1) as read with Section 8 (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 12th day of August, 2019 at Njoro sub -county within Nakuru County, he unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of J.C a child aged 4 years which caused penetration.

2. In the alternative, he was charged with the offence 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 are that on the 12th day of August, 2019 at particulars withheld Njoro sub- county within Nakuru County, he unlawfully and intentionally committed an indecent act to a child namely J.C a child aged 4 years by touching her genital organ namely vagina with his genital organ namely penis.

3. He pleaded not guilty to both charges and the case proceeded for full hearing. The trial court found the Appellant guilty and convicted him on the main charge. He was sentenced to serve life imprisonment.

4. Aggrieved by both conviction and sentence, the Appellant preferred this appeal. In his amended grounds of appeal, the Appellant raised five grounds which can be summarised into four and as follows:-

    1. That the learned trial magistrate erred in law and fact when he failed to note that all the evidence adduced by the witnesses was total lies and contradictory.
    2. That the learned trial magistrate erred in law and fact when he failed to note that the appellant was not examined to prove this act at all.
    3. That the learned trial magistrate erred in law and fact when he failed to note that the investigation of this case was poorly done.
    4. That the learned trial magistrate erred in law and fact when he rejected the appellant's defence evidence without giving a cogent reason why the defence was unacceptable.

5. The Appellant therefore urged this Court to allow the appeal, quash the conviction, set aside the sentence imposed on him and set him at liberty.

6. By consent of parties, the Appeal was heard on the basis of written submissions filed on 18th July, 2023 and 10th February, 2024 by the Appellant and the Respondent respectively. On his part, the Appellant submitted that the evidence adduced before the court does not justify the sentence imposed on him. He submitted that no one was there during the act and that PW2's evidence was contradicted and therefore it should not be relied on.

7. He urged the court to evaluate the evidence herein and make its own decision by setting aside the evidence of PW2, PW3 and PW4. He also urged the court to set aside the evidence of the Investigating Officer as the investigation was poorly done. He further submitted that during his arrest, he was beaten by PW4 to force him to agree to the defilement charge. He submitted that due to fear, he agreed and was taken to the police station.

8. He further submitted that the prosecution did not prove their case to the required standard. He submitted though he was immediately arrested and taken to the police he was not taken to the hospital for examination to prove whether he was the one who committed the defilement. He further submitted that this is the reason the doctors stated that they did not find any spermatozoa at the female organ namely vagina.

9. Further, he submitted that the trial magistrate did not give enough reason why his evidence is unacceptable. He prayed that this Court puts more reliance on his evidence and make another decision which can change his life in the future.

10. Lastly asked the Court to acquit him or give him a lenient sentence as opposed to a life sentence. In support of that argument, he cited several cases including *Phillip Mweke Maingi & Others v Republic* Petition No E 017 of 2021 which allows resentencing. He submitted that the trial magistrate did not give enough reason why his evidence is unacceptable and he prayed that this court puts more reliance on his evidence and make another decision which can change his life in the future. He urged the Court to give a lenient sentence.

11. The Respondent opposed the appeal and submitted that for the offence of defilement , three ingredients that must be proved that is; the age of the victim, identity of the perpetrator and proof of penetration.

12. In regard to the age of the child, the Respondent submitted that in regard to the age of the victim, the clinic card produced as Exhibit 7 confirmed that the victim was born on 26th May, 2015.

13. On identity, the Appellant was a person known to her. He was her cousin and identified him Deno and their neighbour. The Respondent also submitted that the victim had visible injuries on her genitalia and blood could be seen on her garments which were produced as exhibits and due to the seriousness of the said injuries, the victim was admitted to Nairobi Women's Hospital after being referred there by Njoro Sub- County Hospital.

14. It was further submitted that the victim was interviewed by the doctor and gave an account of what had happened to her and there was no doubt that the Appellant was the perpetrator. That from the proceedings, there is nothing to indicate that the victim gave false testimony to the court and the Appellant cannot dislodge the facts and evidence adduced.

15. The Respondent further submitted that at no point did its witnesses contradict each other. That on his part, the Investigation Officer was able to piece the evidence professionally and no gaps were noted.

16. It was further submitted that the learned magistrate gave the Appellant time to defend himself and nothing on record shows that his defence was disregarded. That the Appellant's defence did not at all dislodge the Respondent's case

17. Lastly, and in regard to the issue of the unconstitutionality of the life sentence, the Respondent submitted that it has no objection to the court reviewing the sentence and handing a determinate sentence. The Respondent otherwise urged the Court to find the appeal unmerited and proceed to strike it out.

Analysis

18. After considering the amended grounds of appeal and the submissions filed by the parties, the only issues that for determination are:-

    1. Whether the Respondent had proved three ingredients of the offence of defilement as required by law.

    2. Whether the defence was ignored.

    3. Whether the sentence should be interfered with.

19. In dealing with the above issues, this Court has a duty to re- evaluate the evidence and come to its own conclusion making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See *Okeno v. Republic* [1972] EA 32 .

20. PW1 identified the Appellant herein as their cousin and confirmed that the Appellant picked the victim (JC) and left with her. They stayed away until 1: 00 pm and came back. JC was walking with legs trying to put her legs apart and she had a little blood on her clothes. She called her father who asked JC where she was bleeding from. She said it was Deno. On cross- examination by the Appellant, PW1 confirmed that he left with JC as he used to on daily basis.

21. PW2 was the victim . The trial court examined her to justify reception her evidence and having been satisfied of that examination, the trial court proceeded and took the unsworn evidence of the victim and that evidence was as follows:-

    " .....I know Denno. He is that one (points at the accused). I go to school I know how to read. Denno removed my pair of trousers and my pant. Then he lay on me. I was not

happy. There is nothing else. I was taken to the police. I was taken to hospital by my father. I went there so that I could be injected on my hand. A letter had been written by the hospital. I had been sick on the place where I use to urinate. Denno caused it to be sick. He lay on me that is why that place got sick. He touched it. He touched it with his finger. He did not touch it with anything else. He did not have clothes when he lay on me. He lay on me with the organ which he uses to urinate. I saw it. It is the one that he used to cause injury on me." [Emphasis added].

22. PW4's evidence was that he left the Appellant and the children including JC on the material day. He came back and found that the Appellant had left with JC. They came back shortly.

23. PW4's daughter (PW1) asked him to check on the child (PW2). He saw blood on the foot. The child told him that it was Deno. Upon lowering the child's clothes, he noted blood on her thighs. He questioned Deno (Appellant) but he first denied. PW4 hit Deno hard and he stated that he only touched the child using his finger. At that point he telephoned their neighbour (PW3) and she came to the house.

24. PW3 was EDN . She was a neighbour and received a call from the child's father (PW4). He was crying as he talked to her. She rushed there and found him holding the Appellant. She enquired why he was crying and he asked her to see what the Appellant had done to the child.

25. She checked the child and noted that her private parts were injured. She told PW4 that the child had been raped. He told her that it was the Appellant who had done it. She asked the Appellant why he had done yet he had a girlfriend. The Appellant replied that the devil had caused him to do so. Since the child was bleeding, PW3 advised PW4 to take child to hospital.

26. PW5 was Dr Njoroge Ruku of Nairobi Women Hospital. He examined the child at about 6.00 pm that day which was few hours after the incident. He noted that she was bleeding from her vagina and her hymen was freshly torn. It was a deep second-degree tear. The child was admitted and he took her to theatre where she was cleared and stitched to stop the bleeding. He asked the child what had happened and she replied in Kiswahili :- "Deno aliingisha susu yake kwa yangu nikaskia uchungu"

27. They took genital swab which showed that she had a lot of blood but there were no sperms. Her urine had a lot of blood. Her pink white pant was blood stained and so was her blue pair of trousers. He handed over the clothes to the police for further investigations.

28. He concluded that the child had blunt trauma penetration into the vagina. The injuries were a few hours old. The probable type of weapon/organ used was blunt. He filled the P3 Form capturing the said findings. The child was later discharged and a discharge summary prepared.

29. PW6 Mary Njoki Ndukano of Njoro Sub- County Hospital was at work on 12/08/2029 when she received the child on allegation that she had been defiled by a person known to her. She examined the child and noted that her hymen was broken. She had a tear extending the pelinum and was bleeding. She also had a lot of pain. Her clothes were blood stained.

30. She stated that since the hospital could not repair the tear, she referred the child to Nairobi Women's Hospital and gave them the referral letter which she produced as exhibit. On cross examination by the Appellant, she told the court that he was not brought to the hospital.

31. PW7 No. 90783 PC Jane Chepchumba of Njoro Polce Sation was the Investigations Officer in this case and was at the police Station when PW4 arrived with his four-year-old daughter and reported that she had been defiled by her cousin. She interrogated the child who told her that Deno had taken her to his house and removed her inner pant, laid her on a mattress on his bed and inserted his organ for

urinating into her organ she used for urinate and after he finished, he dressed her and took her home. He advised the child's father to take her to Njoro Sub County Hospital which he did and the chid was referred to Nairobi Women Hospital where she was admitted. She was latter discharged . The P3 Form and PRC Form filled.

32. PW7 obtained the blood-stained clothes from the doctor and produced them as exhibits. She established that Deno was the Appellant in this case. After investigations she charred him with this offence.

33. On cross examination by the Appellant, PW7 maintained her evidence and told the court that when he questioned the Appellant, he told her that the child was injured by a stick as while the Appellant was washing clothes. She maintained that the child was familiar to him and she identified him.

34. In his defence , the Appellant denied committing this offence and stated that on 12th August 2019, PW4 called him saying that he had woken up but he could not see his daughter named JC within his compound. The Appellant informed him that he was still asleep upon which PW4 disconnected the call. The Appellant went on with his work and at about 12:20 pm, he proceeded to the PW4's house where he found the child , PW4 and the entire family. He was offered a cup of tea.

35. Shortly, PW4 went outside leaving the Appellant in the house. The Appellant heard a commotion outside and PW4 came back to the house furious and asking the Appellant questions in the manner used by police.

36. The Appellant told him that he was alone and that he had gone to his home. PW4 beat up the child and then turned on the Appellant and beat him up. The Appellant did not know what was happening. PW4 told him would get to know what was happening.

Determination

37. To start with and even though it is not an issue in this appeal, the charge as drafted shows that the Appellant was charged with the offence of defilement contrary to Section (1) as read with Section 8 (2) of the *Sexual Offences Act* No 3 of 2006. While it escaped the trial courts attention during plea, the said court noted the error at the time of writing the judgment and stated thus:-

> " I noted that the accused was charged under Section (1) as read with Section 8 (2) of the *Sexual offences Act*. I noted that section 1 gives the name of the Act. I believe that the person who drafted the charge sheet meant section 8 (1) and not (1). In my opinion, this is an error that can be cured under section 382 of the *criminal procedure code*."

38. The issue of defective charge was dealt with by the Court of Appeal in the case of *Peter Ngure Mwangi v Republic* [2014] eKLR, where the Court stated:-

> " On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients necessary in a charge sheet necessary in a charge sheet and stated as follows in the case of IsaacOmambiavRepublic, [1995] eKLR:
>
> "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: 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....Turning to the second limb as to whether the defect in the charge sheet is curable under Section 382 of the *Criminal Procedure Code* or not, we have had occasion to revisit and construe this section on our own.

Section 382 of the *Criminal Procedure Code* provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."[Emphasis added]

39. In this case and in the circumstances herein, there was no objection raised by any of the parties and this was certainly an error that did not affect the charge and injustice was caused to the Appellant . The error could not have invalidated the judgement by the trial court.

40. From that evidence as analysed by this Court, there is no doubt that the Respondent's case was properly corroborated. There was no contradiction whatsoever in evidence adduced by the Respondent's witness. The Appellant's defence did not affect the Respondent's case in any way. Having looked at the judgement by the trial court, there is no doubt that the court did take into account all the material before it including the defence in arriving at the impugned conviction.

41. In regard to the identity of the Appellant, it is clear that the Appellant was a person well known to the child. She also knew his name Deno a name by which they all knew the Appellant. The child gave that name to all the Respondent's witness that it was the Appellant when asked who had done the act to her. He was a cousin to the victim and used to pick the child from home and that was a normal occurrence until this day when he picked her and turned against her. There was no chance of mistaken identity.

42. On issue of penetration, the Appellant brought her home after several hours. She was bleeding from her private parts. This was individually noted by all the witnesses. PW5 and PW6 noted on the same day that the child's hymen was torn. The injuries a few hours old.

43. Section 2 of the *Sexual Offences Act* defines "penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person." There is no doubt that the child was defiled and that it was the Appellant who defiled her on the material date. She was not injured by a stick as he alleged. As noted from the medical record ad evidence, the injuries on the child were caused by a blunt object. This court is satisfied that the object was the Appellant's male organ.

44. On issue of age of a victim, the Court of Appeal in *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR held as follows: -

"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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R Cr. Appeal No.19 of 2014 and

> Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

45. Contrary to submissions by the Respondent, Exhibit 7 which is the Mother & Child Health Booklet MOH 216, shows that the 26th May, 2015 was the date of first dose . The child was otherwise born on 08/05/2015.

46. That means that at the time she was defiled, the child was aged about 4 years and 2 months. The Respondent therefore proved age of the child. In the circumstances, the Appellant's appeal on conviction fails.

47. In regard to the sentence, section 8 (2) of the *sexual Offences Act* provides that:- " 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."

48. The Appellant was a first offender. In mitigation , he stated:-

> " I urge the court to consider both sides. I am a young man. I take care of my younger siblings who were left under my care. They depend no me . I urge the court to help me serve the State and my family."

49. In sentencing , the trial court stated:-

> " I have considered the mitigation of the offender, the nature of the offence and the circumstances of the offence. The accused's conduct is one that should be condemned in the strongest terms possible. He is a person who the child trusted deeply such that she used to follow him on daily basis. The child was too young to be exposed such beastly act. He is sentenced to life imprisonment."

50. Whereas this Court is in agreement with that reasoning, life imprisonment has since been declared unconstitutional. In *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) , the Appellant who was aged 18 years at the time he defiled the 4 ½ year old had been sentenced to serve life imprisonment. High Court dismissed his appeal and that prompted the Appellant to move to the Court of Appeal. In its judgment, the Court of Appeal upheld the appellant's conviction of defilement but substituted the life imprisonment with a sentence of 40 years imprisonment to run from the date of conviction.

51. In so doing the Court of Appeal held:-

> " We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence."

53. This Court finds the above reasoning squarely fitting in this matter and this Court can say no more. The Appellant destroyed the life of a child is such a tender age and she will live with that permanent violation of the very private part of her body. The Appellant is not one who can be trusted with such a child.

54. In conclusion, this Court makes the following order:-

1. The appeal on conviction is dismissed for lack of merit.
2. The life sentence be and is hereby set aside and substituted with a sentence of 40 years imprisonment.
3. The period spent in custody from the date of arrest being 14/08/2019 shall be taken into account while computing the sentence.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF JUNE , 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Collins Kipkoech Bii- Appellant

Mr. Kihara for Respondent

Saewa- Court Assistant