Kurui v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 6726 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E008 OF 2023

RB NGETICH, J

JUNE 6, 2024

BETWEEN

FESTUS KURUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of the Honourable Resident Magistrate V.O Amboko in Sexual offence criminal case No. E047 of 2021)

JUDGMENT

1. The Appellant had been charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual offences Act*. The particulars of the charge was that the appellant on the 28th day of February, 2020 at 2100Hours at (Particulars withheld) Day and Boarding primary school in (Particulars withheld) Sub-county within Baringo County willingly and unlawfully caused his penis to penetrate into the vagina of FJ a girl aged 14 years in contravention to the said Act.

2. The alternative charge was the offence of Indecent Act with a girl Contrary to Section 11 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the Appellant on 28th day of February, 2020 at 2100hrs time at (Particulars withheld) Day and Boarding Primary School in (Particulars withheld) Sub County within Baringo County willingly and unlawfully caused his penis to touch the vagina F.J a girl aged 14 Years in contravention to the said Act.

3. The appellant denied committing the offence hence the matter was set down for full trial. The prosecution availed 4 witnesses in support of their case and at the close of the prosecution's case, the trial court found that the appellant had a case to answer and he gave sworn statement in his defence and availed 3 witnesses.

4. By judgment delivered on 23rd August 2022, the trial court found the Appellant guilty of the main charge, convicted him and sentenced him to 20 years imprisonment; the period was to run from 23rd August, 2022 when the Appellant was placed in remand pending sentencing.

5. Dissatisfied with the decision of the trial court, the Appellant has now appealed to this court against conviction on the following grounds:-

    i. The Honourable Magistrate erred in law and fact by failing to find that the evidence tendered by the prosecution was not enough to prove its case beyond reasonable doubt.

    ii. The Honourable Magistrate erred in law and fact by failing to find that the evidence tendered by the prosecution was full of fabricated lies and uncorroborated.

    iii. The Honourable Magistrate erred in law and fact by shifting the burden of proof to the accused.

    iv. The Honourable Magistrate erred in law and fact by meting conviction and sentence which is harsh and excessive without considering the appellant's mitigation.

    v. The Honourable Magistrate erred in law and fact by failing to consider the appellant's defence and merely dismissing it.

    vi. The Honourable Magistrate erred in law and fact by failing to find that the birth certificate tendered in court was not authentic.

    vii. The appeal has high chances of success.

6. The appellant prays to this court;-

    a. That the appeal be allowed.

    b. That the sentence be set aside.

    c. That the Honourable Court be pleased to order a re trial.

    d. That the judgment be quashed and the appellant be set at liberty.

7. The Appeal proceeded by way of written submissions.

Appellant's Submissions

8. The Appellant filed submissions dated 6th February, 2024 and submitted that this appeal is premised on the following grounds: -

    i. That the Honourable Magistrate failed to find that the evidence tendered by the prosecution was not enough to prove the case of defilement beyond reasonable doubt.

    ii. That the Honourable Magistrate failed to find that the evidence tendered by the prosecution was full of fabricated lies.

    iii. That the Honourable Magistrate shifted the burden of proof to the accused and not considering the appellant's defence by merely dismissing it.

9. They submit that for the charge of defilement to stand, the Prosecution must prove three main ingredients as provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 being the age of the victim (must be a minor), that there must be penetration and proper identification of the perpetrator.

10. The Appellant submit that in respect to penetration, the prosecution witnesses stated that the complaint of defilement which occurred on 28th February,2020 at 9:00pm at (Particulars withheld) Boarding Primary was reported on 13th March,2020 at the police station which led to the arrest of the Appellant and investigations commenced; and the complainant was taken to Baringo County Referral Hospital for examination and treatment.

11. He submits that the complainant's testimony is that she had sex with the Appellant two weeks before she sat for her examinations and due to her drop in her performance, she was questioned by Mr. Chepyegon and she informed him what had happened. That the complainant alleged that the incident occurred when she was in Standard 7 which dates back to the year 2019.The doctor formed an opinion that from the allegations given, the absence of hymen and the presence of few epithelial cells made him conclude that there was a defilement.

12. The appellant submit that the absence of hymen is not a proof of defilement and the hymen can be broken in many ways and the presence of epithelial cells in human body is normal and is medically and scientifically proved. He questioned the doctor's basis on finding of penetration and submit that the complainant's evidence is not medically supported and the testimony itself is flawless, cooked and doubtful.

13. In respect to age of the injurie, it is indicated days in the P3; that the complainant stated that it occurred 2 weeks before she sat for her examinations but she did not say when she sat and finished for her examinations. That when the incident allegedly happened, she did not report it to anyone and submit that the clinical officer assumed and indicated that there was evidence of penetration which he did not explain how he arrived at proving penetration; that the alleged offence took long and penetration could not be proved medically though the trial Magistrate relied on the medical evidence to arrive at her judgement.

14. Further that PW2's testimony does not corroborate the complainant's testimony at all. That the term "had sex" does not connote that the Appellant inserted his penis into the vagina of the complainant and the trial magistrate failed to get it well; that the complainant did not tell the court how penetration happened and that she only stated that the Appellant asked her to have sex with him which she agreed but is not proof penetration at all and the court erred in finding that PW2 corroborated the complainant's testimony.

15. Further, the court also misled itself in finding that there was defilement since the urinalysis showed traces of blood and epithelial cells and penetration was not therefore proved

16. On whether evidence tendered by the prosecution was full of fabricated lies and contradictions, the appellant submit that the complainant's testimony and evidence flow from 2019. That she did not state that the Appellant defiled her on 28th February,2020 thus casting doubt on the testimonies of both the clinical officer and PW2.

17. That PW 2's testimony raises questions as to how PW2 suspected that the issue which the complainant's parent wanted to come and inform him touched on the performance of the complainant and the alleged sexual relationship with the Appellant. That PW2 was not informed on phone of the issue and why he called the complainant and interrogated her is questionable.

18. The appellant further argue that the complainant's testimony is different from PW2's. That PW1 stated that she was taken to the hospital by her parents, head teacher and Mr. Chepyegon while PW2 states that the complainant and her friend were escorted to the hospital by the chief and the 2 police

officers; further, the watchman who was also arrested under unclear circumstances was later released and the motive behind his arrest was sinister.

19. That PW1 in her evidence did not mention Mercy Tarus but PW2 gives a totally different testimony from that of PW 1. They submit that care should be exercised and ought to have been exercised by the trial court, to see the discrepancies in the witness testimonies. That it should be noted that mercy Tarus who was a crucial witness was not called to testify and thus the two counts the Appellant was convicted for were not sufficiently proved; and the complainant's parents were not also called to testify.

20. That PW2 recalls of an incident which took place in the year 2021, PW1 talks of 2019 and the Clinical Officer states that the incident occurred on 28th February, 2020 and the complainant was treated on 13th March, 2020; that PW 1 did not give a date of the alleged offence and how the medical officer came up with the date is unknown.

21. On whether the Honourable Magistrate shifted the burden of proof and failed to consider the appellant's defence, the appellant submits that from the glaring inconsistencies, contradictions and fabrication of the testimony, it was unsafe to convict and sentence the appellant in both counts of the charges. That the Appellant's defence was thrown under the carpet. That due to the complaints from a section of parents over loss of school items, the Appellant had written a resignation letter on 17th June,2016 which was declined. That he blames the complainant's parents for instituting these charges due to his request to the BOM to withdraw the posho mill tender and award another person which led to his fallout with the complainant's parents and they could no longer greet him though he held no grudge against them.

22. The appellant pray that conviction and sentence meted against him be set aside, quashed and the Appellant be set at liberty in all the counts.

23. In response the Respondent submitted on the following issues:-

    i. Whether the prosecution discharged its burden of proof.

    ii. Age of the victim.

    iii. Whether penetration was proved.

    iv. Whether the appellant/accused was positively identified.

    v. Whether the learned magistrate considered the evidence of the appellant/accused

    vi. Whether the sentence is harsh and illegal.

24. That it is trite law that the burden of proof in criminal cases lies with the prosecution but the prosecution did proof the elements of defilement before the trial court.

25. In respect to proof of victim's age, the Respondent submit that the age of the complainant was sufficiently proven. That the prosecution produced a certificate of birth of the complainant as exhibit 1 indicating that she was born on the 4th of June, 2007. The incident occurred on the 28th of February. 2020. The minor was therefore 12 years at the time of the incident.

26. On whether penetration was proved, the Respondent submit that the act of penetration in a sexual offence case was explained to great extent in the case of *Alex Chemwotei Sakong v Republic* [2018] eKLR.

27. That in any event, penetration can be proved circumstantially considering circumstances under which the act was committed and relied on the case of *Kassim Ali v Republic* (2005) eKLR to support this position.

28. The Respondent submit that PWI described how the appellant found her wearing a night dress and touched her breasts and asked her to have sex with him to which she agreed. That the whole ordeal happened within 30 minutes. That she also went on to state that the appellant wore a condom.

29. The Respondent submit that the doctor PW3 gave evidence that he examined the child aged 14 years old and filled the P3 form on the 16th of March, 2020. That the child had been treated on various dates prior to his examination being 13th of March, 2020. That the hymen was broken and there was presence of red blood cells which proved that the child was indeed defiled. He produced P3 form and treatment notes and laboratory test results as exhibits 2, 3 and 4 respectively which he submits was sufficient to prove the act of penetration.

30. On identification of the appellant, the Respondent submit that PW1 properly described the appellant herein as a person who worked at the school where she was going, being (Particulars withheld) Primary school, a boarding school at Ainamoi. She described him as a cook which was not disputed and was confirmed by the appellant during his defence.

31. They submit that by the description of what happened, it goes without saying that by virtue of the fact that there was a discussion of the perpetrator trying to convince the victim to engage in sexual activity and engaging in sexual activity for about 30 minutes, was sufficient for the victim to identify her perpetrator. That the victim (PW1) described the appellant as Festus who defiled her and pointed him in the dock.

32. On whether the appellant's evidence was considered by the trial court, the Respondent submits that the trial court clearly made a reference to the appellant's evidence and found that the same did not shake the prosecution's case. That on the claim that the child's mother fabricated the case, the accused did not show that there were any differences between the two of them. Further that the appellant indicated that he was asked for a bribe at the police station but did not indicate who asked him for the said bribe. That it is imperative to state that the complainant narrated to both her teacher and parents who confirmed the same and the appellant did not rebut the evidence of the child Pw1 and that of the doctor who confirmed the child was indeed defiled.

33. That the witnesses confirmed that the appellant was at the school on the date of the incident thereby confirming that he had the opportunity to commit the offence.

34. On whether the sentence meted out by the trial court was harsh or illegal, the Respondent argue that the *Sexual Offences Act* prescribes the mandatory minimum sentence of 20 years imprisonment where the victim is 15 years and below and submit that the sentence meted out by the trial court was the minimum sentence provided and was not harsh nor excessive.

35. In conclusion the Respondent submit that the prosecution's case was well proven during trial and there were no inconsistencies in the evidence and urged this court to find that the appeal herein is unmeritorious and proceed to dismiss the same accordingly.

Analysis And Determination

36. This is the first appellate court and our duty as such was well set out in the case *Okeno v Republic* [1972] EA 32 as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala 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."

37. In view of the above, I have considered evidence adduced before the trial court together with submissions filed. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR).

(a) Penetration

38. The first ingredient in proving the offence of defilement is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

39. 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.

40. The complainant who testified as Pw1 FCC stated that the accused Festus Kurui used to wink at her while she was studying at (Particulars withheld) primary school which is a boarding school in Ainamoi where the accused was a cook. She stated that he used to tell her to go for additional food portions and that they used to clean the kitchen with other students.

41. She testified that she was going alone to unhung her clothes outside the dormitory at 9:00P.M when she met the accused outside the dormitory who asked her to go to where he was and she complied. She stated that the accused started touching her breasts and asked her to have sex with him and at that time she was not in school uniform and had a night dress on. She said she agreed since the accused convinced her that he will not tell anyone and the accused then removed her nightdress and they had sex. She said the accused wore a condom before they had sex and they had sex for almost 30 minutes and she later went to the dormitory.

42. Pw3 the doctor who testified in court stated that on examination of the complainant, the hymen was absent, pregnancy test was negative, HIV test was negative, VDRL was negative, urinalysis showed traces of blood and epithelial cells. He said that the absence of the hymen and the presence of epithelial cells concludes that there was defilement, I have no reason to doubt the complainant who narrated vividly how the Appellant defiled her. Her evidence was corroborated by the doctor PW3 who

confirmed that there was penetration. From the foregoing penetration was proved beyond reasonable doubt.

(b) Proof of age

43. In respect to proof of age, the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated 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 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."

44. The complainant herein in her testimony in court stated that she was born on 27th June, 2006; she stated that the birth certificate indicates that she was born on 4th June,2007. PW4 one number 247957 P.C Caroline Toroitich produced birth certificate which confirmed that the complainant was born on 4th June,2007. In my view, the birth certificate was sufficient proof of the age of the victim that she was 14 years at the time of the offence.

(c) Identification of Assailant

45. In respect to identity of the assailant, the complainant testified that she was defiled by Festus who was a cook in her boarding school (Particulars withheld). She stated accused's name and identified him in court. She said she joined the school in class 7 and has known accused as their cook. She further state that the accused used to wink his eyes whenever he saw her. From the foregoing, it is clear that the Appellant was not a stranger to the victim having interacted with him at school severally. There is no doubt that she properly recognized him.

(ii) Whether there was contradiction in evidence adduced by prosecution witness

46. In the case of *Philip Nzaka Watu v. Republic* [2016] eKLR, the Court of Appeal held:-

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.
>
> Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

47. In the above cited cases, it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. The appellant's attempt to discredit the complainant's

evidence citing inconsistencies does not pass the tests in the above cases. The issues raised are trivial and, in a way, misguided. It did not call for rejection of evidence adduced.

(iii) Whether appellant's defence was considered

48. The Appellant has complained that his defence was not considered by the trial court. I note from the judgment that the learned magistrate considered the accused defence in paragraph 26- 31 of the judgement. The learned trial magistrate in paragraph 30 of the judgement indicated that in light of the contradiction noted in the defence witnesses' testimony, the accused person's alibi defence had not dislodged the prosecution's evidence that placed the accused person at the scene before and after the incident. It is therefore not true that his defence was not taken into consideration. I agree with the trial magistrate that the defence is a mere denial and the prosecution case was proved beyond reasonable doubt.

(vi) Whether the sentence imposed was harsh and excessive

49. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this the issue of interference of sentence as follows: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

50. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR 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, anyone of the matters already states is shown to exist."

51. The appellant seeks the sentence of 20 years imprisonment to be reduced. In this case, the complainant was of the age of 14 years at the time of the offence. Section 8(3) of the *Sexual Offences Act* prescribes the mandatory minimum sentence of 20 years imprisonment where the victim is 15 years and below.

52. The fact that the appellant was an employee at the school where the complainant studied placed a duty of care to the child but instead, the appellant took advantage of the innocent girl aged 14 years old and defiled her. In my view the appellant deserved deterrent sentence and sentence of 20 years imprisonment imposed by the trial court against him was appropriate in the circumstances. I will not therefore interfere with the sentence imposed by the trial court.

53. Final Orders: -

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

2. The period appellant served in remand during trial that's from the dated of arrest to be computed in the sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 6TH DAY OF JUNE 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state.

Appellant present.