Rono v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 7522 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7522 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E036 OF 2023

SM MOHOCHI, J

JUNE 12, 2024

BETWEEN

EMANUEL RONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement in Nakuru CMCC No 280 of 2017 dated and delivered by Honourable R. Kefa PM on 29th June, 2023)

JUDGMENT

1. The Appellant was charged in Nakuru CMCC No. 280 of 2017 for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, 2006. The particulars are that on diverse dates between 3rd January, 2016 and 11th February, 2016 in Njoro Sub-County, unlawfully and intentionally caused his penis to penetrate the vagina of PC a child aged 14 years.

2. He also faced an alternative charge of Indecent Act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006, the particulars were that on diverse dates between 3rd day of January, 2016 and the 11th day of February, 2016 in Njoro Sub-County, unlawfully and intentionally committed an indecent act to PC a child aged 14 years by touching her genital organ namely vagina with his genital organ namely penis.

3. He pleaded not guilty on both counts and the matter proceeded to trial. The prosecution availed four (4) witness in support of its case.

4. PW1, one Wihita Bomet the mother to the victim, she suspected the child of being pregnant and when she took to hospital and it was confirmed that she was indeed pregnant. That by the time she noticed, the child was already four months pregnant. She testified that she learned that the child had wanted to procure an abortion and that she had been given Kshs. 1,800 by the Appellant. She went to the

headmaster who wrote a letter which she took to the police station and the child was examined by a doctor and statements were recorded. The Appellant was also arrested. The child gave birth to a baby girl. In cross-examination she stated that the Appellant's wife and brother, Wesley took the child from school without her permission and took her to Wesley's place. Then the Appellant then ran away.

5. PW2 PC testified that the Appellant was her boyfriend and had impregnated her. She would go to his tailoring shop and engage in intercourse which they did several times. He gave her Kshs. 1,800 to terminate the pregnancy. She did not. Her mother found out when she was taken to hospital. Her mother reported to the police station, they recorded their statements. The Police told her to go home and give birth first. She gave birth to a baby girl on 11th October, 2016. She went to the hospital and the PRC forms together with the P3 forms were filled. The Appellant's wife first took her to live with a lady named Mercy then with Wesley the Appellant's brother. In cross examination she stated that the child was the Appellant's and that the Appellant's wife talked to third parties to claim they fathered the child. She stated she did not have an objection to carrying out of a DNA test.

6. PW3 No 79518 Cpl Leah Mbanyha attached to Njoro Police Station testified that on 24th March 2016 a report was made by PW1 that her child PW2 who was 14 as per the birth Certificate produced as P-Ex5 had been defiled by a person known to her and was expectant. The girl then escaped the police station through the assistance of the Appellant's sister as she later found out from the Appellant's family and only saw her again on 3rd May, 2017 after she had given birth and the child was 6 months old.

7. She was taken to hospital and examined. She leant that the Appellant fled and returned on 9th December, 2017 when they arrested and charged him. On cross examination, she stated that PW2 identified him as the father of the child and on learning that PW2 had gone back to the police station he disappeared. That there had been a family meeting where he suggested the case be withdrawn so that he could take care of the child.

8. PW4 was Dr. Mutai Kiplasor Matindany a clinical officer attached to Njoro Sub County Hospital. He testified that PW2 was examined on 23rd May, 2017, he observed the she was abused. Her hymen was broken and had already given birth by the time she visited the hospital. One Gillian Rono who was on transfer filled the P3 form P-Ex1 and the PRC form P-Ex2. He had worked with her for 4 years an knew her handwriting.

9. At the close of the prosecution's case the Court found that the Appellant had a case to answer and was put on his Defence.

10. DW1 Emanuel Rono gave unsworn evidence that he was arrested in December of 2017. He never defiled PW2 as alleged. That PW2 fled after the Court ordered DNA test to be carried out.

11. By judgment delivered on 29th June, 2023, the Appellant was convicted on the main count and sentenced to serve twenty (20) years imprisonment.

12. Being dissatisfied with the decision of the trial Court, the Appellant instituted this appeal against the conviction and sentence on three grounds as follows: -

    a. That Learned Trial Magistrate erred in law and fact in failing to consider that the prosecutions' case was not proved beyond reasonable doubt;

    b. That the Learned Trial Magistrate erred in law and fact by failing to note that the Appellant was not subjected to any medical examination; and

c. That the Learned Trial Magistrate erred in law and fact by imposing an excessive sentence.

13. The Appeal was canvassed through written submissions pursuant to the direction of 28th February, 2024. The Appellants' submissions were filed on 21st March 2024 while the Respondent filed 20th May, 2024.

Appellant's Submissions

14. The Appellant submitted and combined the first two grounds of Appeal. He contended that the medical evidence did not link him to the offence as there was no discharge on or seminal fluid detected after or during the exam and further that the Appellant was not subjected to any medical examination. That penetration was not proved beyond reasonable doubt. He relied on counsel's arguments in the case of R. v Kipkering as Koske & Another [1949] 16 EACA 135. According to the Appellant penetration was not proved by the doctor and failure to subject him to a medical examination was prejudicial on him.

15. On the third ground, he submitted that the sentence was excessive and harsh and invited the Court to consider the decisions in Fappyton Mutuku Ngui v Republic [2020], Dismus Wafula Kilwake v Republic [2019], Phillip Mueke Maingi & 5 Others v DPP & AG [2021] and Samuel Achieng Alego v Republic [2015] where the Courts discussed the impact of mandatory sentences. The Appellant opined that the sentence was excessive and harsh and therefore ought to be reduced.

Respondent's Submissions.

16. On the first ground, it was submitted that the ingredients of defilement as were highlighted in the case of Wamukoya Karani vs Republic CA No. 17 of 2013 were adequately proved. The age was proved by the birth certificate that she was 14 years at the time of the offence, the medical records indicated that there was penetration by the hymen being broken and PW1 having given birth. On identification PW2 and PW1 recognized the Appellant thereby meeting those ingredients.

17. Anent the issue of the Appellant not being subjected to a medical examination, it was submitted that the Court directed that a DNA test be conducted but it was not done. It was the Respondent's argument that proof of paternity is not an ingredient for proving a defilement case. That failure to do the test appeared to be an oversight but it was incumbent on the Appellant to insist that a DNA test be conducted. That further the Trial Court believed PW2 was telling the truth and thus the basis for conviction. Counsel concluded that not conducting the DNA test was not fatal to the case.

18. On whether the Appellant's sentence was excessive, it was submitted that the sentence was awarded on mandatory terms and although the Respondent, recognized the jurisprudence in the Philip Mueke case, it was of the view that the sentence was adequate and proportionate in the circumstances.

Duty of the Court

19. The duty of the first Appellate Court is to carefully and critically examine and analyze afresh the evidence presented in the trial Court and draw its own individual conclusion on the evidence. (See Pandya vs. Republic (1957) EA 336).

20. This Court is equally alive to the fact that it has not heard or seen the witnesses who testified in the subordinate court.

Analysis and Determination.

21. I have refined the issues into three issues,

    i. Firstly, whether the trial court erred in law and fact by failing to note that the Appellant was not subjected to any medical examination and if the same omission was fatal to the conviction to warrant reversal on appeal?

    ii. Secondly whether the case was proved beyond reasonable doubt? and,

    iii. Finally, whether there is any basis to disturb the exercise of discretion by the trial magistrate in imposing the sentence?

22. On the 1st issue, the provisions of Section 36 of Sexual Offence Act No. 3 of 2006 states as follows: - In regard to the "Evidence of medical forensic and scientific nature:

    "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

23. The Court directed the DNA test owing to the fact that the victim had been impregnated and the paternity finding would absolve the Appellant.

24. The operative words within the law is the "court may" and that the test was not strictly in proof of a defilement charge but rather a DNA Paternity test.

25. I note that the prosecution did apply on the 25th January 2019, to subject the Appellant to DNA analysis and the Court allowed the same on the 25th April 2019 the DNA was yet to be undertaken, the Appellant alleged not to have had money and the prosecution abandoned the quest requesting that the matter proceeds. This Court finds that the Court was fully aware and did not the defence case that failure to examine the accused and obtain DNA analysis is no defence and that the case had been proven otherwise leading to the conviction.

26. On the Second issue the Court's scrutiny and examination of the Record of Appeal reveals that the evidence as adduced and documentary evidence presented proved the ingredients of the charge leading to conviction. The court relied on the provisions of Section 124 of the *Evidence Act* being satisfied that the victim was truthful that the Appellant had defiled the victim on multiple occasions leading to a pregnancy that the Appellant attempted to terminate by giving the victim 1,800/- to procure an abortion I thus find no fault.

27. On the last issue as regards sentence, it is clear that the Court cannot hear an appeal on the severity of sentence. However, the Court can hear an appeal on sentence if it is erroneous in law. An error of law can arise, inter alia, from the manner in which a trial court exercises its discretionary jurisdiction on sentencing. If in imposing the sentence the Court acted on the wrong principle of law or committed some errors of law or misdirected itself in some respect, or the exercise of discretion is plainly wrong in the sense, inter alia, that no reasonable Court could exercise its discretion in such a way an Appellate Court can interfere with the exercise of judicial discretion on the principles stated in Mbogo v Shah [1968] EA 93.)

28. In Evans v Bartlam [1937] AC 473, a decision of the House of Lords cited by Sir Clement De Lestang V.P. in Mbogo v. Shah, (supra) Lord Atkin said in part at p. 480-481:

> " ..and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it."

29. Lord Atkin's dictum to the effect that the power of an appellate court to interfere with the exercise of discretion by a trial court is not limited to only consideration of the ground of error of law and can interfere on other grounds to avoid injustice, has often been cited as representing the modern thinking.

30. Faulting a trial magistrate for imposing a mandatory minimum sentence is a strange argument that cannot hold water, the sentences remain valid unless declared unconstitutional in this instance the sentence as imposed was a valid sentence for imposition and that the learned trial magistrate exercised his/her discretion and had an option to enhance which the Court avoided.

31. The severity of imposition of sentence must be argued with clarity showing how excessive the sentence is as is imposed by the Trial Court is, the same was lacking in this instance.

32. This Court accordingly finds the Appeal to be without merit and the same is accordingly dismissed. The Conviction is confirmed and sentence of imprisonment for twenty (20) years is upheld.

33. The Sentence shall run from the 11th December 2017.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU

THIS 12TH DAY OF JUNE 2024.

MOHOCHI S.M.

JUDGE