Kevogo v Republic (Criminal Appeal E002 of 2021)
[2024] KEHC 8756 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8756 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E002 OF 2021

JN KAMAU, J

JULY 23, 2024

BETWEEN

WASHINGTON KEVOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court in Sexual Offence Case No 39 of 2020 on 24th August 2021)

JUDGMENT

Introduction

1. 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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon M. Ochieng (PM), on the charge of defilement and sentenced to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgment, on 7th September 2021, he lodged the Appeal herein. His Petition of Appeal was dated 1st September 2021. He set out eight (8) grounds of appeal. On 22nd November 2023, he filed Supplementary Grounds of Appeal dated 10th August 2022. He detailed three (3) Supplementary Grounds of Appeal.

4. On 4th April 2024, the court noted that the parties herein had filed their Written Submissions before the admission of this Appeal. It therefore directed that the Appellant's and Respondent's Written Submissions filed on 27th February 2024 and 15th March 2024 respectively be expunged from the court records. It then directed the parties to file fresh submissions by 19th April 2024.

5. The Appellant's Written Submissions were dated 22nd February 2024 and filed on 27th February 2024 while those of the Respondent were dated 13th March 2024 and filed on 15th March 2024. The Judgment herein is therefore based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

8. Having looked at the Appellant's Grounds of Appeal and Supplementary Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court dealt with the said issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

10. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were dealt with under this head as they were all related.

11. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

12. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

13. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

14. The Appellant did not submit on this issue. On its part, the Respondent pointed out that the Complainant (hereinafter referred to as "PW 1") testified that she was fourteen (14) years old at the material time of the incident. They relied on the Birth Certificate that her mother, NM (hereinafter referred to as "PW 2") produced.

15. The aforementioned Birth Certificate showed that PW 1 was born on 6th August 2006. The offence herein was committed on 26th August 2020. She was therefore about fourteen (14) years old at the material time of the incident herein.

16. The Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about fourteen (14) years old and was therefore a child at the material time.

B. Identification

17. The Appellant argued that recognition alone could not prove that he was the one who defiled PW 1 resulting in her becoming pregnant. He was emphatic that no one saw him defile her and that PW 1's brother, DM (hereinafter referred to as "PW 3") did not tell the court that he gave him Kshs 20/=.

18. On the other hand, the Respondent submitted that the Appellant was known to PW 1 as his aunt lived in the same plot as PW 2. It added that he gave PW 3 Kshs 20/= when he found him and PW 1 at the "pool". It pointed out that the Appellant admitted that he knew PW 1 but did not rebut her evidence. It was therefore its submission that he was positively identified as the perpetrator of the offence herein.

19. PW 1 testified that on the material day, at around 5pm, she was in their house when the Appellant came and called her three (3) times. When she went to inquire why he was calling her, he held her by hand and took her to a shop where people played pool. He removed her inner wear and defiled her while standing next to the pool table. She stated that PW 3 passed near the pool and he gave him Kshs 20/=. She later informed PW 2 of the incident. Both PW 2 and PW 3 corroborated her evidence.

20. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

21. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

1. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

23. The incident took place at day time. PW 1 and the Appellant knew each other as his aunt was her neighbour. PW 1 positively identified him by pointing at him in the dock during trial. In his sworn evidence, he also confirmed that he knew her. His testimony was that PW 2 was a friend to his aunt

who he was not in good terms with. There could not therefore have been any possibility of a mistaken identity because they were not strangers.

24. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. PEnetration

25. The Appellant submitted that the fact that PW 1 reported the incident almost two (2) months after it happened cast doubt on the veracity of her evidence. He asserted that although PW 1 claimed that he defiled her on 26th August 2020, Douglas Obare (hereinafter referred to as "PW 4") testified that he examined her on 5th October 2020 and that the Ultrasound showed that she was eight (8) weeks and three (3) days pregnant, giving a difference of three (3) weeks and two (2) days. He was emphatic that the age of PW 1's pregnancy did not tally with the date of defilement. He argued that in the circumstances a DNA test ought to have been done to link him as the perpetrator of the offence.

26. He referred this court to the case of R.V. Manda 1951 (3) S.A. 158 at 163 at Par C to F where Schreuiner JA stated that there was need to scrutinise the evidence of children due to their imaginative and suggestibility. He added that the court ought also to appreciate the inherent dangers of accepting such evidence.

27. On the other hand, the Respondent contended that PW 1 told PW 2 that she was dizzy and that on 5th October 2020 she took her to hospital where PW 4 confirmed that PW 1 was pregnant.

28. It submitted that under normal circumstances, victims of sexual offences were the only witnesses and the offence occurred in secrecy. It therefore submitted that the Trial Court arrived at the correct conclusion that the Appellant penetrated PW 1's vagina.

29. According to PW 1, sometime in September (sic), her mother took her to Sabatia Hospital Clinic after she vomited. She was then found to have been pregnant. It was then that she informed her mother that the Appellant had defiled her on the material date.

30. PW 4 confirmed that PW 1 had a normal genitalia with no injuries but that her hymen was absent. She had whitish discharge with pus cells. He concluded that there was penetration as she tested positive for a pregnancy. He produced the Ultra Sound Report, Post Rape Care (PRC) Form and P3 Form as exhibits in support of the Prosecution's case.

31. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2, PW 3 and the Investigating Officer, No 92118 Corporal Lucy Chanzu (hereinafter referred to as "PW 5") and by the scientific evidence that was tendered by PW 4 which confirmed recent penetration. It was not mandatory for the Trial Court to have ordered for a DNA test. In any event, by the time PW 1 was testifying, she was about five (5) months pregnant when the test could not have been done. The fact that PW 3 saw the Appellant and PW 1 together which PW 1 confirmed and PW 1 was later found to have been pregnant pointed to the credibility of both PW 1 and PW 3.

32. The Appellant was obligated to have called a witness to corroborate his alibi defence that he was at the Stage and not at the pool at the time of the incident, the burden of proof having shifted to him. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.

33. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were not merited and the same be and are hereby dismissed.

II. Sentencing

34. Supplementary Ground of Appeal No (3) was dealt with under this head.

35. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

36. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.

37. This court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.

38. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

39. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.

40. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

41. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

42. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

43. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against him undisturbed.

Disposition

44. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 1st September 2021 and lodged on 7th September 2021 was not merited. His conviction and sentence be and are hereby upheld.

45. It is so ordered.

DATED and DELIVERED at VIHIGA this 23rd day of July 2024

J. KAMAU

JUDGE