Maroro v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 9744 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E024 OF 2023

F GIKONYO, J

JULY 24, 2024

BETWEEN

ISHMAEL MARORO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. M.I.G Moranga (S.P.M) in Kilgoris SOA No. E048 of 2021 on 20.09.2023)

JUDGMENT

1. This appeal is challenging the appellant's conviction and sentenced of 20 years imprisonment for the defilement of a 12-year-old girl.
2. The undated petition of appeal filed on 09.10.2023 sets out the following grounds of appeal;
    i. That, the trial magistrate erred in both law and facts by failing to realize that the main ingredients of the present offence were not proved to the required lawful standards.
    ii. That, the prosecution case was not proved beyond reasonable doubt and relied on uncorroborated evidence.
    iii. That, the learned trial magistrate erred in both law and facts by basing conviction on the prosecution witness, evidence was marred, manufactured with contradictions, inconsistencies, discrepancies, and glaring gaps.
    iv. That, the learned trial magistrate erred in both law and facts by rejecting my plausible defense without any further explanation of it.

Directions of the court.

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

Appellant's submissions.

4. The appellant submitted that the testimonies of the prosecution witnesses were contradictory, inconsistent, and uncorroborated. The appellant relied on Ramkrishana Denkerai Pandya Vs Rep App No. 06 Of 1990 Eaca 93, John Mutual Musyoka V Republic [2017] eKLR Ca 11/2016

5. The appellant submitted that the minimum mandatory sentence is harsh and excessive.

The respondent's submissions.

6. The respondent submitted that there're no significant contradictions in the prosecution evidence as alleged. The complainant is the sole identifying witness and she singularly identified the appellant as the perpetrator of the offense. The medical documents were merely of corroborating value and the indication from the ultrasound that the complainant's infant may have been conceived earlier than the alleged date of the offence does not negate the complainant's assertion that the appellant had sexual intercourse with the complainant in the month of August.

7. The respondent submitted that there is no necessity for a DNA test. the complainant has narrated in her testimony through direct evidence that she was defiled by the appellant. This evidence suffices to sustain the charges. The respondent relied on AML v Republic (2012) eKLR, Kassim Ali v Republic (2006)eKLR, and Benjamin Gitau v Republic (2011) eKLR

8. The respondent submitted the sentence is within the legal limits.

Analysis And Determination.

Court's duty

9. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

10. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

11. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) "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.."

12. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) The complainant was a child- age;

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see Mark Oiruri Mose v R [2013] eKLR; and

    3) The accused caused the penetration of the child.

13. See the case of Charles Wamukoya Karani Vs: Republic, Criminal Appeal No. 72 of 2013.

14. PW1 stated that she was 12 years old and was in class 6. She was born on 21.12.2009.

15. PW2, the complainant's mother testified that the complainant was 6 years old.

16. PW4, the complainant's aunt testified that the complainant was 13 years old and she was in class 6.

17. The investigating officer produced the complainant's birth certificate which indicated that she was born on 21.12.2009.

18. Based on the evidence adduced, the complainant was 12 years old at the time of the commission of the offence, and therefore, a child.

19. PW1's evidence during the trial was that sometime in August 2021 after schools closed, she was at home as her mother left for work. She went to the shop to buy vegetables at 7 p.m. when she met the appellant, who invited her to his house so that he could tell her something. She dropped the items at home and went back to meet the appellant. She entered the inner room of the accused's house and he forced her to have sexual intercourse. She went back home but did not tell anyone.

20. A month or so later she felt ill and on examination, she found she was pregnant. Her mother reported the matter to the police station and recorded her statement. She identified the appellant as the person who had impregnated her after 2 months of knowing him as a bicycle repairer. She denied having any other.

21. PW2 LA a mother to the complainant testified that sometime in December 2021 she noted her daughter appeared sick. After prodding her further she confessed to having had sexual intercourse with the appellant who lived nearby.

22. PW3 Purity Kisaka of Nkararo Health Centre and the clinical officer confirmed that the complainant visited the institution and was found to be pregnant. She produced the P3 form P. Exhibit 3. Post Rape Care as P. Exhibit 2 and ultrasound as P. Exhibit 4 dated 01.12.2021.

23. The medical evidence supports the claim that there was a penetration of the child.

24. The evidence yields the conclusion that the prosecution proved to the required standard that penetration did occur of C.A.

25. But by whom?

26. The complainant states that prior to the defilement incident, she had known the appellant for two months. On the date of the incident, she had met him on her way to buy vegetables at around 7:00

pm. They spoke and the appellant told the complainant that there was something he needed to tell her. They parted ways as the complainant returned home but soon upon arrival, the complainant went to the appellant's house to inquire on what the appellant had said he wanted to tell her. That was when the appellant ushered the complainant to her inner room and defiled her.

27. The complainant and the appellant were well-known to each other. The complainant knew and went to the appellant's house by herself and alone. The offence occurred in the appellant's house. She described the inner room where the predator devoured her. The complainant was not under any illusion of the identity of the appellant. She positively recognized the appellant on the material day. The appellant and complainant spent significant time together from the time they met on the road to the time of the defilement. It is unlikely that the complainant would have failed to recognize him in all those instances.

28. The appellant gave unsworn testimony. He stated that he was at work on 27/11/2021 when he was summoned to the police station at Nkararo. He denied knowing the complainant. He claimed that PW2 often brought boyfriends to the house and would leave them as her children were at home too. According to him, he was framed to avoid embarrassment, to spoil his reputation and business. He claimed he was detained so he could pay money.

29. The appellant did not cross-examine the prosecution witnesses on this aspect of his defense materially detracting the potency of the defense. Leaving it an afterthought which did not dislodge the prosecution's case. This court does not find any credibility in the alibi defense as the issue never came up during the prosecution's case.

30. Notably, the issue that the appellant was framed did not arise during the cross-examination of PW2.

31. The court does not find anything that shows that there was a grudge between the complainant's mother and the appellant.

32. Nor, anything which shows any collision between CA, and PW2 to frame the appellant for the offence herein.

33. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled CA. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW2. The defense was a red herring and an afterthought. It is dismissed.

34. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.

35. In the upshot, the appeal on conviction is dismissed.

On sentence.

36. The relevant penalty clause under which the appellant was sentenced is Section 8 (3) of the *Sexual Offences Act* which section provides that:

    8(3) "A person who commits am 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.."

37. The prosecution submitted that the sentence was within the law.

38. The appellant simply stated that the minimum sentence was harsh and excessive but did not forcefully argue the matter. It may not be proper to determine the issue of minimum sentence in section 8(2) of SOA. Nevertheless, it hurts not some observations.

New jurisprudential hints

39. Jurisprudential hints coming through are that; minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See. the Supreme Court in Republic vs Joshua Gichuki Meangi And Intiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.

40. But, the Supreme court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in 'a proper case', or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards 'the ceiling'; whilst limiting exercise of discretion below 'the floor' in sentencing; as well as what 'it is Parliament...that sets the parameters of sentencing for each crime in statute' means or entails, which sets the stage for proper situating of the legislative function to prescribe penalties in a contest between judicial sentencing, and 'legislative sentencing'.

Relevant Factors

41. The trial magistrate considered all the necessary factors and the sentencing policy guidelines. The trial court, therefore, exercised its discretion in sentencing the appellant.

42. This court has considered the fact that the accused is a repeat offender having been convicted of stealing, and was not remorseful as was noted by the trial court.

43. The court has also considered that the offence is serious. The victim was a child of tender age- she was 12 years old. The manner the offence was committed was brutality leaving her pregnant with a child, yet, she is a child. Her life has been ruined completely and will certainly suffers post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. In addition, prevalence of the offence is sickening, and justifies a 20 years sentence or longer period. Therefore, a deterrent sentence is necessary.

44. The sentence imposed will punish for the offence as well as deterring others from committing similar serious offences. It is also giving him an opportunity to be reintegrated back into society and eke a living as a free man at some point

45. The trial court did not commit any error in principle, and the sentence is not illegal. In the circumstances, the 20 years of imprisonment is upheld.

Section 333(2) CPC.

46. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 01.12.2021. He was released on bond on 06.12.2021.

Conclusion and orders

47. The appeal on conviction and sentence is dismissed.

48. The appellant's 20 years imprisonment is upheld.

49. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS .....24TH .....DAY OF .....JULY....., 2024.

.....

HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for ODPP - Present

The Appellant - Present