Nyambura v Republic (Criminal Appeal E007 of 2022)
[2024] KEHC 10602 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E007 OF 2022

CJ KENDAGOR, J

JULY 18, 2024

BETWEEN

FRANCIS WARUI NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on the 10th October 2020 at Murang'a County, the accused caused his penis to penetrate the vagina of MM, a child aged 16 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling 5 witnesses. Placed on his defence, the appellant gave unsworn testimony.

2. In a judgment delivered on 17th March 2022, the appellant was convicted and sentenced to 15 years imprisonment. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 6th April 2022 in which he raised 9 grounds of appeal which can be summarized as: firstly, that the charge sheet was defective; secondly, that some material witnesses were not called to the stand; thirdly, the evidence by the prosecution did not prove the charge to the required standard of proof; and, lastly, that the learned trial magistrate disregarded the defence proffered by the appellant.

3. The appellant relied wholly on his written submissions at the hearing of this appeal.

4. The respondent, on the other hand, orally submitted that the prosecution proved its case beyond any reasonable doubt, and as such, the trial court's determination was proper in the given circumstances.

5. This being the first appellate court, I am guided by the principles enunciated in the case of Okeno v Republic (1972) EA 32, where the court of appeal set out the duty of the first appellate court 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 R [1957] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

6. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution, the grounds of appeal and the written submissions by the parties herein. I find that the issue for determination is whether the prosecution proved its case beyond any reasonable doubt.

7. I will begin with the issue of a defective charge. The appellant submitted that his conviction was based on a defective charge.

8. It is clear that the accused was charged with the offence of defilement under Section 8 (1) read with Section 8 (2) of the *Sexual Offences Act*. This is the offence to which he pleaded and in respect of which he defended himself. However, at the time of conviction, the trial Magistrate in fact said:

> " ...I accordingly convict the accused herein one Francis Warui Nyambura under section 215 CPC for the offence of defilement C/S 8 (1) as read with section 8 (4) of the *Sexual Offences Act*."

9. As the first appellate court, this Court's role is to re-evaluate the evidence adduced at trial in light of Section 347 (2) of the Criminal Procedure Code, and reach its own conclusion (Okeno v Republic [1972] EA 32). I have no doubt that the offence charged was defilement and that trial was for defilement. The charge was under the wrong section of the law whilst the conviction was correctly meted under Section 8 (4) of the *Sexual Offences Act*.

10. This was a non-substantive error. The charge sheet was itself not defective.

11. Section 382 of the Criminal Procedure Code provides that unless an error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed. I hereby invoke the provisions of that section. The Section provides as follows:

> " 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."

12. Therefore, I find that the errors submitted by the appellant being non-substantive and curable under section 382 of the Criminal Procedure Code.

13. Turning now to the main charge. 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* No 3 of 2006. To prove the offence

charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore obliged to establish or prove all the above elements of defilement beyond reasonable doubt.

14. In the present case, I note that the victim testified that she was 17 years old at the time in question. She produced her birth certificate (Pexh1), which showed that she was born on 29 November 2003. The offence occurred on 1 October 2020. I find that the victim was a minor aged 16 at the time of her attack. I am satisfied that the first ingredient of the complainant's minority age was proved to the required standards.

15. On the appellant's identity, the appellant was well known to the complainant and in her testimony, she testified that she knew him and that he was from the same area as her mother's place of birth. In his defence, the appellant stated that PW3 had him arrested as they had a business dispute implying that he and the complainant's family were well acquainted. To this end, it is my finding that the appellant, who was well known to the complainant and her family, was positively identified. Furthermore, there was no claim of mistaken identity. The appellant was, therefore, identified beyond reasonable doubt.

16. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean:-

> 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

17. Penetration can be proved through the victim's sole testimony or the victim's testimony corroborated by medical evidence. (See Bassita Hussein vs. Uganda, Supreme Court Criminal Appeal No. 35 of 1995) In this case, the totality of the evidence of PW1, PW4, and the medical reports above leave no doubt in my mind that the appellant penetrated the complainant on the material day. His defense, which I outlined earlier, is a sham. In the end, I concur fully with the learned trial magistrate that all the ingredients of the offence were proved beyond reasonable doubt. I find that the conviction was safe. The appeal against conviction is accordingly dismissed.

18. I will now turn to the sentence. The appellant argued that he was sentenced to a minimum mandatory sentence of 15 years imprisonment which has been declared unconstitutional. He argues that the sentence is manifestly harsh and not in compliance with Article 50(2)(p) of *the Constitution*, which stipulates that an accused person should benefit from the least severe punishment.

19. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe and unless it was manifestly excessive. The Court of Appeal of East Africa stated in Wanjema v Republic [1971] EA 494 that:

> " An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"

20. The appellant was convicted under Section 8(4) of the *Sexual Offences Act*. Under that section, a person who commits an offence of defilement with a child between the ages of sixteen and eighteen is liable upon conviction to imprisonment for a term not less than fifteen years. The learned trial magistrate imposed a sentence of 15 years imprisonment. I hold the view that the trial court did not act on any wrong principle, overlooked any material factor, or took into account some wrong material in meting out the sentence herein. [See Dismas Wafula Kilwake v Republic [2018] eKLR].

21. It is thus clear that the court exercised its discretion in sentencing and, in doing so, meted an appropriate, lawful sentence. However, I note that during sentencing, the trial court did not factor in the period the appellant spent in custody during the trial.

22. Section 333(2) Criminal Procedure Code which provides that the period of detention before trial should be considered in the sentence

23. The appellant was arraigned in court on 13th October 2020, and although he was granted bail, he remained in custody until the case's conclusion, having failed to raise the surety.

24. In the circumstances, I find that in computing the sentence imposed on the appellant, the prison authorities shall consider the period spent in custody by the appellant from 13th October 2020 until the sentencing date

25. The upshot of the above is that the instant appeal is partially successful. The appeal against conviction is dismissed. The appeal against the sentence is allowed to the extent that the sentence shall take into account the period that the appellant spent in custody during the trial, as stipulated in Section 333(2) of the Criminal Procedure Code.

26. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JULY, 2024.

.....

C. KENDAGOR

JUDGE

JUDGMENT DELIVERED THROUGH THE MICROSOFT ONLINE PLATFORM.

In the presence of:

Court Assistant: Hellen

ODPP: Ms. Oduor

Appellant: Francis Warui Nyambura