Kariuki v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 10807 (KLR) (7 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10807 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E022 OF 2023

DO CHEPKWONY, J

AUGUST 7, 2024

BETWEEN

FRANCIS GATU KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence arising in Ruiru Law Courts Sexual Offences case number 46 of 2020 delivered on 15th May, 2023 by Hon. C. A. Otieno-Omondi)

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 5th September, 2020 at [Particulars Withheld], Kiambu County, the accused caused his penis to penetrate the vagina of JNG, a child aged 15 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 15th May 2023, the Appellant was convicted and sentenced to 20 years' imprisonment. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 23rd May, 2024 in which he raised 15 grounds of appeal;

> "(a) The learned trial Magistrate erred in fact and law by not considering that the prosecution did not prove the ingredients of defilement beyond any reasonable doubt.
>
> (b) The learned trial Magistrate erred in fact and law by failing to appreciate the evidence noted on the post-rape care (PRC) form, undermining the

rule of discovery and inspection of documents, thus reaching an erroneous conviction.

(c) The learned trial Magistrate erred in law and fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution, which doubts ought to have been resolved in favour of the appellant.

(d) The learned trial Magistrate erred in fact and law in not putting the prosecution to task, noting that evidence adduced by the prosecution to prove its case must be sufficient to prove the case beyond reasonable doubt. For evidence to be capable of being corroborated it must be relevant and admissible, credible, independent and emanating from a source other than the witness requiring to be corroborated and must be implicating the accused, these thresholds were not met.

(e) The learned trial magistrate erred in fact and law by failing to consider and appreciate the issue of mandatory minimum sentences in the Sexual Offence Act that have been outlawed by various decisions by the superior courts following the Supreme Court decision in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR. (See Christopher Ochieng vs. R [2018] eKLR and Jared Koita Injiri vs. R [2019] eKLR. The Appellant was sentenced to serve a custodial sentence of twenty (20) years, which sentence is harsh and inconsiderate in the circumstances.

(f) The learned trial Magistrate erred in law on the face of the doubt cast, the conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive.

(g) The learned trial Magistrate erred in fact and in law by ignoring the tenets of proving sexual intercourse, which is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. The victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse and penetration this was not appreciated.

(h) The learned trial Magistrate erred in fact and in law in not following the post rape care form as a documentary evidence, there was no laceration of the upper part of the vagina, both labia and majora and minora had no blood stained and the skin intact concluding that there was no penetration. It is also noteworthy that there were no traces of spermatozoa. Although the absence of spermatozoa cannot discount defilement, it adds to speculations in this case.

(i) The learned trial Magistrate erred in fact and in law by failing to accord the Appellant a fair trial by failing to conduct a voire dire examination in accordance with Section 9 of the Oaths and Statutory Declaration Act (Cap.15). The trial court failed to establish whether the minor understood the nature of an oath before taking down their sworn evidence, therefore, failed to adhere to the provisions of Section 9 of the *Oaths and Statutory Declarations Act* before taking down the evidence of the minor.

(j) The learned trial Magistrate erred in fact and in law by failing to properly evaluate the Appellant's defence before arriving at its decision.

(k) The learned trial Magistrate erred in law and fact by improperly shifting the burden of proof from the prosecution to the defence.

(l) The learned trial Magistrate erred in fact and law by shifting the burden of proof to the Appellant, thus reaching a judgment that was speculative, misconceived, misplaced or misinformed and unfounded in law as it purported or implied that the accused ought to have explained the evidence on the innerwear adduced in blatant and total disregard of the clear provisions of Section 107 of the *Evidence Act*. Cap. 80 of the Laws of Kenya and Article 157(11) of *the Constitution* of Kenya.

(m) The learned trial Magistrate erred in fact and law when, in the realm of conjecture, it is trite that the benefit of the doubt should always go to the accused person. Therefore, in the circumstances the second element of the offence which is penetration was not proved beyond reasonable doubt.

(n) The learned trial Magistrate erred in fact and in law by failing to appreciate the Appellant's defence and the totality of the circumstances of this case, thus rendering the conviction unsafe.

(o) The learned trial Magistrate erred in fact and law in reaching a conviction and sentencing that was unjust in the circumstances, against the weight of the evidence adduced and based on misguided points of fact and wrong principles of law, thus occasioning a miscarriage of justice."

3. In summary, the grounds of appeal raise three issues: first, that the prosecution's evidence did not prove the charge to the required standard of proof; secondly, that the learned trial magistrate disregarded the appellant's defence; and lastly, that the sentence was inconsiderate.

4. PW1 was the complainant. She testified that she met the Appellant on 30th August, 2020 at her mother's shop, which sells juice, and exchanged numbers. She told the court that she met the Appellant on 2nd September 2020 upon his request, and they went to Naivas along the Eastern Bypass and thereafter dropped her home. PW1 further stated that on the 5th of September 2020, the date material to this case, she met the appellant at Vision Park, who then drove to Naivas supermarket and gave her yoghurt and chocolate. She testified that she started feeling sick when she took the yoghurt and that she was dizzy when they got to a guest house. According to PW1, she passed out, and when she woke up later, she found her trousers and pant had been removed, and she lay on the bed, which had white sheets. She testified that she inquired about what had transpired from the appellant, who told her that nothing had happened. She narrated that she woke up with pain in her abdomen and vagina and that she took a bath at the guest house, during which time she noticed blood on her pant. It was her evidence that the appellant gave her a tablet to take in the car and drove her home. In cross-examination, she acknowledged that she did not tell the appellant her age and that they had exchanged romantic messages with the appellant on the phone. She also admitted that she did not tell her mother (PW2) about the 5th September, 2020 incident until the 7th September, 2020.

5. PW2 was the complainant's mother. Her evidence was that she became alarmed and inquired from PW1 when, on 7th September 2020, she saw a romantic message from the appellant sent to the phone her daughter used (PW1). She narrated the information relayed by PW1 that the appellant had defiled her and also told the court about her involvement in the report at the police station and subsequent hospital visit. PW2 stated that the appellant was a loyal customer at the juice shop and well-known to her family.

6. The investigating officer told the court about the interrogation upon the report of the matter at the police station and the subsequent arrest after a message was sent to the appellant using the complainant's phone, asking to meet him. PW4, a medical doctor at Ruiru Sub County Hospital, produced the P3 form, which had been prepared by her colleague who had since transferred from the facility. Her testimony was that the complainant had fresh bruises around the labia majora, and the hymen was missing. She told the court that the medical examiner made an assessment that there was penetration, and the degree of injury was assessed as grievous harm.

7. PW5 was a digital forensics examiner attached to the DCI cybercrime and digital forensics laboratory. He produced a report relating to the case on the phones that were analyzed. He testified that text messages retrieved from PEx7 showed communication between numbers 07xxxxxx66 and 07xxxxxx56. (particulars withheld).

8. When placed on defence, the appellant gave unsworn testimony and denied the charges. He acknowledged that the complainant was known to him through her mother, PW2, who came from the same home area. He further said that he had been in touch with the complainant and that he was picking her up on the date he was arrested. The appellant stated that he did not know that the complainant was a minor, and he maintained that the charges were framed up because he declined advances made by PW2.

9. The appeal proceeded through written submissions. The appellant submitted that the trial court erred in shifting the burden of proof to him and that the conviction was against the weight of the evidence adduced. He also submitted that the subsequent sentence was inappropriate and excessive.

10. 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".

11. As an appellate court, I must reconsider and evaluate the evidence before the trial court and arrive at an independent conclusion, bearing in mind that I did not hear or see the witnesses. I have considered and analyzed the evidence that 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. The issues for determination are two pronged;

    i. Whether the prosecution proved their case to the required threshold;

    ii. Whether the sentence was appropriate.

12. 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:

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

Analysis and determination:

13. In Hadson Ali Mwachongo v Republic [2016] eKLR, the Court of Appeal held that:-

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009* (Kisumu). This Court stated as follows; In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

14. The complainant testified that she was born on 18th August 2005. This was corroborated by the testimony of PW2. The prosecution produced a copy of the complainant's birth certificate (Pexh1), which showed that she was born on 18th August 2005. A birth certificate is an official document, and the entry of the date of birth is admissible proof of age. The incident complained of is stated to have occurred on 5th September, 2020. With this evidence, the complainant was 15 years old at the time.

15. The complainant was 15 years old and was thus not a child of tender years as to require mandatory voire dire examination. Court decisions have supported the definition of a child of tender years as being 14 years old. See John Muturia v Republic [2021] eKLR. The complainant's evidence was properly taken and received by the court.

16. From the evidence in this case, the appellant and the complainant were known to and communicated with each other. The Appellant was a regular customer at a juice shop owned by PW2, and the complainant occasionally served at the shop on behalf of her mother (PW2). The complainant told the court how they related as friends, a fact acknowledged by the appellant in his defence. Facts exist that they met at the juice shop owned by PW2 around the dates under reference and that they would plan to meet away from the shop. The appellant was arrested after a text message was sent to him disguised as the complainant being the sender and wanting to meet him.

17. The complainant was very elaborate in her testimony about the meet-up and drive with the Appellant on 5th September 2020, which was not displaced in cross-examination. They met that day, and she returned home that evening, as confirmed by PW2, but she didn't return the same. Was she defiled, and if so, who defiled her?

18. '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'.

Penetration, as an essential ingredient of the offence, must be proven beyond reasonable doubt. Penetration can be evidenced 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)

19. The prosecution produced treatment notes and the P3 form as medical evidence supporting the case. The examination, as earlier outlined, showed that the complainant had fresh bruises on the labia majora, vaginal discharge, and the hymen was broken; these findings correlate with the complainant's

testimony about her partly naked state when she woke up and the pain in her vagina and abdomen. She told the court that she noticed that her panty was blood-stained when she went to the bathroom; this, too, is probative evidence of penetration. The absence of spermatozoa does not rule out penetration. The complainant was sexually assaulted, and there is proof of penetration.

20. The trial court weighed the accuracy concerns regarding the perpetrator's identity. I have evaluated the evidence and the findings thereto; the appellant was well-known to the complainant; the complainant was alert when she was in his car and could tell they drove along Mijikenda Road, Kamakis. She testified that she started feeling sick when she consumed the yoghurt the Appellant gave her. The use of stupefying substances can be deduced from the complainant's testimony of how she fell ill and lost consciousness thereafter. Whereas she was dizzy, she could see they stopped at a place with the word guesthouse where they got to a room, and she requested the Appellant to allow her to lie down as she was feeling sick. She was not alert when the sexual assault occurred. Her evidence was that when she regained consciousness, she was alone before the Appellant joined her. Her trousers and panty had been removed, and she had pain in her abdomen and vagina. The Appellant told her nothing had happened and went on to give her a tablet and dropped her home. There is no evidence that anybody else joined them that afternoon when the sexual assault occurred.

21. Where a victim is unconscious, the court must look at whether there are loose ends that create the impression that the fact complained of may not have occurred and, if it happened, if it may have been committed by someone else other than the accused. In the authority relied on by the Appellant, JNN v Republic (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR), the court held that an accused person should be given the benefit of doubt when reasonable grounds exist for creating doubts about the guilt of the accused person.

22. The issue of circumstantial evidence was addressed by Njuguna J. in *Njue & another v Republic (Criminal Appeal E020 of 2022)* [2023] KEHC 256 (KLR)

> " It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests, namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

23. In her judgment, the trial court summarized this case's sequence of events and facts. The prosecution evidence was conclusive, leaving no room for speculation. The evidence created a solid sequence with no way out, indicating that the complainant was sexually assaulted by the appellant and not by any other person.

24. The defence that the charges were fabricated and the allegation of malice due to rejected advances was refuted by the weight of evidence presented; there was no ill will on the part of PW2 or her family.

25. In his defence, the Appellant also raised the issue of the complainant's age. He stated that he was unaware that the complainant was a minor and maintained that the complainant had not informed him about her age.

    Section 8 of the *Sexual Offences Act* provides as follows;

(5) "It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

26. The trial court correctly interpreted this section, holding that if the Appellant relied on the defence of age under Section 8(5), then the evidential burden of proof shifts to him to prove that there was deception and that he took necessary steps to ascertain the complainant's age. There was no evidence of deceit, and the appellant did not take any steps to ascertain PW1's age. I am persuaded that the trial court correctly addressed the issue of the standard and burden of proof in this case.

27. The Appellant was afforded a fair trial. The ingredients of the offence of defilement contrary to Section 8(1), as read with Section 8(3) of the *Sexual Offences Act*, were proved to the required standards beyond a reasonable doubt, and the conviction was safe. Accordingly, the appeal against conviction is dismissed.

28. I will now turn to the sentence. The Appellant submitted that the sentence of 20 years imprisonment was without regard to his mitigation.

29. 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."

30. The Appellant was convicted under Section 8 (3) of the *Sexual Offences Act*. Under that section, a person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years.

31. The Supreme Court has given guidance on minimum sentences under the *Sexual Offences Act* in Republic V Joshua Gichuki Mwangi Petition *No. E018 of 2023*. The court held that where a sentence is set in statute, the legislature has already determined the course unless it's declared unconstitutional. The trial court exercised its discretion in sentencing and, in doing so, meted an appropriate, lawful sentence.

32. The Appellant was convicted on 15th May, 2023 and was in custody until 15th August 2023, when he was released on bail pending appeal. The prison authorities shall take into account this period spent in custody in computing the sentence imposed on the Appellant.

33. The upshot of the above is that the appeal is without merit, and the conviction and sentence are upheld.

It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 2ND DAY OF AUGUST, 2024.

C. KENDAGOR

JUDGE

JUDGMENT DELIVERED AT KIAMBU ON THIS 7TH DAY OF AUGUST, 2024.

D. CHEPKWONY

JUDGE

In the presence of:

Court Assistant: Martin

ODPP: Ms. Ndeda

Appellant: Francis Gatu Kariuki