Langat v Republic (Criminal Appeal E006 of 2024)
[2024] KEHC 12647 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E006 OF 2024

F GIKONYO, J

OCTOBER 22, 2024

BETWEEN

DOMINIC LANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. H.M. Nyaberi (C.M) in Narok CM SOA No. E036 of 2021 on 25.03.2024.)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 15 years imprisonment for the defilement of a 16-year-old girl and 7 years for procuring an abortion.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide a petition of appeal dated 05/04/2024 and filed on 08/04/2024. The appellant filed grounds of appeal as follows;
    i. The learned magistrate erred in law and in fact in convicting the appellant on evidence not proved beyond reasonable doubt.
    ii. The learned magistrate erred in law and in fact in holding that the fact of penetration had been proved beyond reasonable doubt or at all.
    iii. The learned magistrate erred in law and in fact in holding that the age of the complainant had been proved beyond reasonable doubt. The learned trial magistrate relied solely on a birth certificate which was disputed.
    iv. The learned magistrate erred in findings against the appellant, that the charge of obtaining abortion had been proved beyond reasonable doubt. The learned magistrate did not make a finding of whether or not the complainant had been pregnant or the age of the fetus. The finding was made without reliance on any medical evidence.

v. The learned magistrate erred in convicting the appellant on the contradictory evidence of the complaint and did not make an attempt to analyze the credibility of the evidence in accordance with the law.

vi. The learned magistrate erred in fact and in law in ignoring the submissions of the defense.

vii. The learned magistrate erred in law and in shifting the burden of proof to the appellant.

viii. The learned magistrate erred in law and in fact in not requiring corroboration of the evidence of the complainant.

ix. The learned magistrate imposed a drastic and draconian sentence on the appellant with no justification at all.

x. The conviction was unwarranted and the sentence is illegal not based on adequate evidence. The dame is a miscarriage of justice.

Brief facts

3. The appellant was charged with 2 counts, one of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. No. 3 of 2006 and an alternative charge of indecent act with a child contrary to section 11(1) of the same act.

4. The particulars were that on 23/05/2020 at Olchoro Trading Centre in Narok West sub county within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of N.C.T. a child aged 16 years.

5. On the alternative charge of indecent act with a child, the particulars were that on 23/05/2020 at Olchoro Trading Centre in narok west sub county within narok county intentionally and unlawfully touched the vagina of N.C.T. a child aged 16 years.

6. On count II., the appellant was charged with the offence of procuring an abortion contrary to section 158 of the penal code. The particulars were that on 03/03/2021 at Olchoro Trading Centre in narok west sub-county within narok county with intent to procure an abortion to N.C.T. unlawfully administered drugs to the said N.C.T. which caused the abortion to her unborn child.

7. The appellant was tried and convicted on the charges on Count I and Count II. In Count I, the appellant was sentenced to 15 years imprisonment and in Count II he was sentenced to 7 years imprisonment. The sentence is to run consecutively.

Directions of the court.

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

The Appellant's submissions.

9. The appellant submitted that the age of the complainant was not ascertained. They challenged the authenticity of the birth certificate produced in court.

10. The appellant submitted that the prosecution did not provide evidence to prove that the appellant was the perpetrator. The appellant contends that the complainant's testimony was full of contradiction and her evidence was not corroborated. The appellant relied on section 124 of the *Evidence Act* and JMN V Republic (Criminal Appeal E017 of2021)

11. The appellant submitted that the mere existence of a procured abortion should not automatically link it to the appellant. The appellant contends that there was no link between the alleged pregnancy that occurred in June of 2020 and the 03/05/2021 abortion. No DNA evidence was presented to specify whether the appellant was connected with the alleged pregnancy of the complaint.

12. The appellant submitted that the complaint was not a credible witness. The appellant contends that the complaint was inconsistent, contradictory, and with huge gaps as to exactly when the incident occurred, the time when she found out, and the time the abortion was procured. The appellant relied on section 163(1)© of the *Evidence Act*, Kyiaf V Wono [1967] GLR 463.

13. The appellant submitted that the trial magistrate shifted the burden of proof to the defence. The appellant relied on Article 50(2)(a) of *the constitution*, section 107(1) *Evidence Act*, Miller V Minister of Pensions [1947] 2 all er 372-373.

14. The appellant submitted that the trial magistrate disregarded the defence submissions on the credibility of the complainant's testimony.

15. The appellant urged this court to examine the evidence presented and if need be re-hear the case as per principles laid down in Ruwala V R [1957] EA 370

The respondent's submissions.

16. The respondent submitted that the age of the child was conclusively proven. The respondent relied on a certificate of birth (P Exh1), evidence of PW1 and PW4, and section 2 of the *Sexual Offences Act*.

17. The respondent submitted that the evidence produced during the trial proved the element of penetration beyond reasonable doubt. The prosecution relied on the evidence of PW1, PW3, and PW5, a summary from the newborn unit and the discharge summary of PW1 produced as P Exh3A and 3B respectively

18. The respondent submitted that the appellant was well known to PW1 and as such the prosecution proved its case that there was no mistake of identity as to who defiled the complainant. From the evidence that was adduced during the trial, it is clear that the appellant is a person who defiled the victim and there was no possibility of mistaken identity, the appellant was well known to the victim. The respondent relied on evidence of PW1.

19. The respondent submitted that the sentence meted out to the appellant was within the provisions of the law. The appellant relied on Abdala; Republic (Respondent) (Criminal Appeal 44 Of 2018) [2022] KECA 1054(KLR) (7 October 2022) (Judgment), and Section 8(3) of the Sexual Offenses Act.

20. In the end, the respondent submitted that grounds of appeal on evidentiary issues have no merit. All evidentiary issues on the offence of defilement were well proved beyond reasonable doubt by the prosecution. The case was proven beyond reasonable doubt. The trial magistrate did not error in conviction and sentence as the evidence adduced was solid. The respondent prayed that the appeal be dismissed in its entirety and the conviction and sentence be upheld as it is within the law.

Analysis And Determination.

Court's duty

21. 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

22. 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

23. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) 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(4) "A person who commits an offence of defilement with a child aged Sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years."

24. 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) Age of the complainant;

    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 was the assailant.

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

26. PW1 testified that she was 17 years old at the time of trial. She stated that she was born on 02/04/2004.

27. PW4, the investigating officer stated that the complainant was 17 years old at the time of the investigations. He produced a birth certificate as P Exh1.

28. Based on the evidence adduced, the age of the victim was 16 years at the time of the defilement.

29. PW1 in her evidence during the trial was that on 23/05/2020 at around 1900hrs she went to the shop. On her way, she met the appellant whom she knew as a medical doctor. The appellant requested her for a relationship which she accepted. On the same day, the appellant took her to his house, removed her clothes, and removed his clothes. He then laid on top of her and inserted his penis in her vagina without using a condom. They continued having unprotected sex on several occasions between May 2020 and November 2020. They further had unprotected sex on 27/11/2020 and in December 2020. She missed her periods and upon testing, the results were positive. She informed the appellant of her pregnancy.

30. On 03/03/2021 the appellant gave her two tablets and instructed her to put one tablet below her tongue and the other to insert in her vagina. Pw1 did as instructed. She then proceeded home. She started bleeding after some time she informed her mother PW2. PW2 took her to Longisa Hospital where she was admitted for one day and underwent a procedure to remove the retained part of the fetus in her uterus as the drugs she was given by the appellant were drugs for procuring an abortion.

31. The medical officer PW5 testified that PW1 was admitted to their hospital on 3/03/2021 with a diagnosis of incomplete abortion. PW5 stated that PW1 received treatment and a procedure was done

on her to remove the retained part of conception in her uterus. PW1 was discharged on 04/03/2021 and given drugs. PW5 produced the summary from the newborn unit and the discharge summary of PW1 as exhibit 3A and 3B respectively.

32. PW3 stated that she examined PW1 on 08/03/2021 after being managed at Longisa hospital for vaginal bleeding. Upon examination, PW3 established that PW1'S hymen was longstanding broken, and there was inflammation around her vagina. PW5 concluded that PW1 had engaged in sexual intercourse before the examination.

33. The analysis of the evidence yields the inescapable conclusion that the prosecution proved to the required standard that penetration did occur of N.C.T.

34. Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom?

35. PW1 testified that she knew the appellant since she used to see him at Olchorro Hospital where he worked as a doctor. The appellant and PW1 met on several occasions when they had unprotected sex.

36. The appellant denied the charge as untrue and blamed it on the threats by the father of the complainant which were unsubstantiated.

37. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled N.C.T. The girl knew the appellant well and gave such succinct account of the times and manner they had unprotected sex. This is a person she knew and trusted until she informed him when she missed her periods. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex. Thus, who defiled her.

38. Based on the evidence adduced, the appellant caused the penetration of NCT

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

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

41. On the charge of procuring an abortion, section 158 of the penal code provides that, ' any person who with intent to procure miscarriage of a woman, whether she is or she is not with the child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years".

42. From the testimony of PW1 and PW5, there was sufficient evidence that PW1 was pregnant and that the appellant had procured her abortion by giving her the tablets that induced the abortion. The appellant has medical grounding; prescribed drugs and gave specific instructions on how to use the drugs.

43. The appeal on the conviction under this charge is dismissed.

On sentence.

44. The relevant penalty clause under which the appellant was sentenced is Section 8 (4) of the *Sexual Offences Act* which section provides that:

    8(4) "A person who commits an offence of defilement with a child aged Sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years".

45. And section 158 of the penal code provides that,

'any person who with intent to procure miscarriage of a woman, whether she is or she is not with the child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years".

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

47. This appeal relates to section 8(4) of SOA and section 158 of the penal code. And, as was expressed by the Court of Appeal in Dismas Wafula Kilwake vs. Republic [2018] eKLR that: -

> " We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

48. The trial magistrate considered the gravity and the nature of the offence committed and the judiciary sentencing policy guidelines.

49. The court has also considered that the offence is serious. The victim was a child- she was 16 years old. The manner the offence was committed was by taking advantage of a child. The offense was highly aggravated by the fact that the appellant misused his medical background and administered abortion or miscarriage upon her, causing her extreme injury and bleeding which prompted a procedure to remove the retained fetus. The manner he did it was also most cruel; left her to take the dosage and at home where there is no medical assistance or monitoring. Scarring! And, Most inconsiderate and unprofessional. These constitute grave psychological and emotional injury as well as injury to her worth and dignity as a person. The child is likely to also suffers post-traumatic effects; from agonizing memories of the incident. In addition, the fact that the prevalence of the offence justifies a 15 years' imprisonment in this case. Therefore, a deterrent sentence is necessary.

50. There is new jurisprudence; 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.

51. 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; whether such approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, 'it is Parliament...that sets the parameters of sentencing for each crime in statute'; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and 'legislative sentencing'.

52. The ‘proper case’ should not also be taken to mean that, there is no work which has been done on the subject of minimum or mandatory minimum sentences by courts, lawyers and other multi-disciplinary eminent scholars and practitioners in Kenya. And, the wisdom in tapping into such body of work as we craft the final touches on the dress.

53. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences are important objects of punishment, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life

54. In the circumstances, the 15-year and 7-year imprisonment sentence is upheld. Except, fairness and the need to avoid excessive punishment call for the sentences of 15 years and 7 years to run concurrently. The order that they will run consecutively is set aside.

Conclusion and orders

55. The appeal on conviction and sentence is dismissed. Except, the sentences of 15 years and 7 years shall run concurrently. The order that they will run consecutively is set aside.

56. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 22ND DAY OF OCTOBER, 2024.

Hon. F. Gikonyo M.

Judge

In the Presence of: -

C/A: Mr. Otolo

Ms. King’ayi for Appellant – Present

Appellant – Present

Ms. Rakama for DPP – Present