PMA v Republic (Criminal Appeal E057 of 2021)
[2023] KEHC 1320 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1320 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E057 OF 2021

FG MUGAMBI, J

FEBRUARY 15, 2023

BETWEEN

PMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon. R.M. Amwayi, SRM dated 30th June 2021 in Sexual Offence Case No. 115 of 2020 in the Chief Magistrates Court at Mombasa)

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to section 8(1) and (4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between August 10, 2019 and November 6, 2019 in Likoni sub county within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of CWW, a child aged 16 years old. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section11(1) of the *Sexual Offences Act* No 3 of 2006.

2. The Appellant was convicted and sentenced to 15 years' imprisonment. He filed the present appeal against the conviction and sentence. The appeal is set out in his Petition of Appeal filed on July 26, 2021. The Appellant also relies on his written submissions filed on September 16, 2022. The Prosecution opposed the appeal through the written submissions of its counsel filed on January 23, 2023.

3. Two issues arise for determination from the Appellant's case. First, is whether the Prosecution had established a prima facie case against him and secondly whether the sentence imposed by the trial court was excessive and harsh.

4. The Respondentss have drawn the courts attention to its role as the first appellate court as stated in *Kiilu & Another v R (2005) KLR 174*. It is the duty of this court to analyze and re-evaluate the evidence

which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See also Okeno v Republic [1972] EA 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic (1987) KLR, 19* & Okeno v Republic (1972) EA, 32.

5. I have perused the court file and I note that from the proceedings, the Appellant appears to have pleaded guilty to the offence. It is not clear what transpired to have the matter proceed to full trial although the judgment confirms that the accused pleaded 'not guilty'. In the interests of justice and since there is no clear explanation for the discrepancy, I will address the issues raised in the appeal.

6. Arising from the law by dint of sections 8(1) and (3) of the *Sexual Offences Act*, the elements of the offence of defilement which the Prosecution must prove beyond reasonable doubt are:

   i. Age of the complainant;

   ii. Penetration; and

   iii. Positive identification of the assailant.

Age of the complainant

7. Regarding the age of the complainant, the Respondents invite this court to consider the case of *Edwin Nyambogo Onsongo vs Republic (2016) eKLR* where it was stated by the court of appeal that: -

> ' The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.' 'we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.'

8. The age of CWW was proved by the testimony of her mother, PW1 who stated that she was 16 years. A medical assessment by the doctor who was PW5 placed CWW at 17 years of age. The trial court relied on the evidence of PW1, who also testified on the actual birth date of CWW but took note that the medical assessment report had confirmed that the CWW was below 18 years of age. The Respondents did not rebut this evidence. I therefore find that the age of the complainant was proved to the required standards.

9. Penetration

10. Penetration is defined in Section 2(1) of the *Sexual Offences Act* to be:

    i.

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

11. It is the Appellants case that there are inconsistencies between the date when the alleged offence is said to have taken place that is between 5th October and November 7, 2019, when PW1 was away attending a funeral and the age of CWWs pregnancy which was placed at 15 weeks. It is his case that the medical examination report dated 18th November placed the pregnancy at 15 weeks yet PW1 was away for only 4 weeks, and if the offence had occurred anywhere in between that period CWW would at most be 4 weeks pregnant. It is his case therefore that the pregnancy and alleged penetration cannot be linked.

12. I am aware of the exception in section 124 of the *Evidence Act* to the requirement of corroboration in sexual offences, and that the court may convict on the evidence of the victim alone, if, for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. See Section 124 of the *Evidence Act* which provides as follows:

    i.

    > ' Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.

    ii.

    > 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.'

13. From the trial record, CWW was categorical that it was the Appellant who caused penetration of vagina with his penis. The complainant knew the Appellant well and explained in clear detail how, when and where the obnoxious act happened. I have equally perused the charge sheet and I note that the offence is said to have occurred on diverse dates between 10th August and November 6, 2019. It was also stated that the accused had defiled CWW on several occasions. The pregnancy may therefore have been as a result of earlier instances of intercourse. In any event, the testimony of the complainant was corroborated by the testimony of the medical doctor, PW5.

Positive identification of the assailant

14. The Appellant was positively identified first by CWW who was familiar with him as her father. She stated that the Appellant was living with them in their house. The trial court noted that the Appellant was therefore well known to the complainant. The same is corroborated by PW1, CWW's mother that in fact the accused was living with her, CWW and 2 grandchildren. I find that all the elements had been proven beyond a reasonable doubt and that the conviction was therefore safe. I now turn to the issue of sentence.

Of Sentence

15. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. In *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR* the court observed that:

    'To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences

16. In the same vein, sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or

patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo - vs - R*, and *Wilson Waitegei v Republic [2021] eKLR*).

17. Recent jurisprudence since Francis Karioko Muruatetu & Another vs Republic also points towards balancing more between retributivist and utilitarian theories of sentencing. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender's responsibility over third parties should affect the sentence. There is a sound argument also for first-time offenders, for instance, who are not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence is hefty enough to punish and deter others from the heinous crime. (See *BW v Republic KSM CA Criminal Appeal No 313 of 2010 [2019] eKLR*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR* and in *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No 93 of 2014)*.

18. The Appellant was provided an opportunity to mitigate in the trial court where he pleaded for the courts leniency and stated that he was the sole bread winner for his wife and 2 children and that he was an orphan. It is not true as alleged by the Appellant that the court disregarded his mitigation as is evident from p 43 of the court proceedings. The Appellant committed a heinous crime, and occasioned severe trauma to a child whom he ought to have been protecting given his relationship with her. It is unfortunate that the complainant will have live with the post traumatic consequences and constant reminder of the heinous act because of the pregnancy. I therefore find no reason to vary the sentence.

19. That said, it is the duty of this court to ensure that the sentence meted is lawful. I am guided by the Court of Appeal decision in the case of *Bethwel Wilson Kibor vs Republic [2009] eKLR* where the court reaffirmed the principle that where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody'. Similar guidance is contained in the Judiciary Sentencing Policy Guidelines (2014) in the following terms:

> ' The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.'

20. The learned trial magistrate who sentenced the Appellant did not specifically mention that they had taken into account the period that the Appellant had been in custody. I have perused the trial court record and found that the Appellant was arrested on November 13, 2019 and remained in pre-trial custody.

21. In conclusion, I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the Prosecution against the Appellant. I find no reason whatsoever to vary the sentence. I affirm the conviction and sentence save to add that the sentence will run from the date when the Appellant was arrested which is November 13, 2019.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI VIA VIRTUAL PLATFORM

THIS 15TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE