SMK v Republic (Criminal Appeal E037 of 2021)
[2023] KEHC 548 (KLR) (Crim) (1 February 2023) (Judgment)

Neutral citation: [2023] KEHC 548 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E037 OF 2021

CW GITHUA, J

FEBRUARY 1, 2023

BETWEEN

SMK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the conviction and sentence in Kibera CMS Court Sexual Offence No. 33 of 2014 (Hon. R.M. Kitagwa (RM)) dated 16th May 2019)

JUDGMENT

1. The appellant, SMK, was tried and convicted of the offence of defilement Contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No 3 of 2006 (SOA).

2. The particulars of the offence were that on diverse dates between December 2013 and March 2014 at [Particulars Withheld] within Nairobi County, he unlawfully and intentionally committed a sexual offence by inserting his male genital organ (penis) into the female genital organ (vagina) of JW (name withheld) a child aged 9 years.

3. Upon conviction, he was sentenced to serve life imprisonment. He was dissatisfied with his conviction and sentence hence this appeal. He filed his petition of appeal on May 12, 2021 and with leave of the court, he filed supplementary grounds of appeal together with his written submissions on April 20, 2022.

4. In both his initial and supplementary grounds of appeal, the appellant in essence complained that the learned trial magistrate erred in law and in fact by: convicting him on the basis of a defective charge sheet; convicting him on evidence which was inconsistent and uncorroborated which was not sufficient to prove the charges preferred against him beyond any reasonable doubt; failing to accord him a fair

trial as required by the *Constitution*; breaching the law on the burden and standard of proof and; failing to consider his defence in making her determination.

5. The appellant prosecuted his appeal in person. During the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions which both parties duly filed. The appellant in his submissions expounded on his grounds of appeal. He reiterated that several of his constitutional rights were violated during the trial and that besides the fact that his conviction was based on a defective charge sheet, the evidence relied on by the prosecution was contradictory and did not meet the threshold of proof beyond reasonable doubt.

   In a nutshell, the appellant claimed that he was wrongly convicted as the prosecution did not prove his guilt as charged beyond reasonable doubt. He urged the court to allow his appeal as prayed.

6. The appeal is contested by the respondent. Learned Prosecution Counsel, Ms Odhiambo, in her written submissions supported the appellant's conviction and sentence. She submitted that the prosecution proved all the essential ingredients of the offence of defilement beyond any reasonable doubt. Further, she averred that the appellant was accorded a fair trial by the trial court and urged this court to dismiss the appeal in its entirety for lack of merit.

7. The brief facts of the prosecution case are that the appellant is the complainant's father and he used to live in a two roomed house together with the complainant (PW1) and her elder brother DK (PW2). Both the complainant and her brother testified that one of the rooms was used as a living room while the other room was their joint bedroom. The bedroom had two beds; they shared one bed while the appellant used the other bed. The appellant had at the time separated from their biological mother and step mother.

8. PW1 recalled that when they were sleeping, the appellant would carry her from their bed and place her on his bed. He would then undress her and insert his penis into her vagina. She stated that this happened on several occasions. After such incidents, she would wake up and find herself naked. Upon looking for her clothes, she would find them on the appellant's bed. She reported the matter to her grandmother, PW3 who lived in the same compound. PW3 told her to scream the next time the appellant defiled her.

9. A week later, the appellant defiled her again and this time round, she told PW2 about it. PW2 advised her to report to her teachers and acting on this advice, she narrated her ordeal to one of her teachers one Mrs I, who alerted the headmaster of the school (PW5). PW5 took up the matter and escorted PW1 to Kabete Police Station where they reported what had been happening to PW1 and she was thereafter taken to Nairobi Women Hospital on March 20, 2014 for medical examination.

10. According to the PRC form which was produced as P Exhibit 1 by PW4 on behalf of Dr Lin, upon examination, Dr Lin noted that PW1's genitalia was normal but her hymen was broken. The PRC form also showed that PW1 gave a history of having been defiled severally by her father, the latest incident being on the previous day.

11. The trial court's record also reveals that PW1 was also examined on March 27, 2014 by PW6, Dr Kizzi Shako, a Government Pathologist. According to Dr Shako, on examining PW1, she found that her genitalia had a laceration on the left labia minora, multiple bruising and tenderness. The hymen was normal but had a healing tear at 6 o'clock meaning that the hymen was not intact. She concluded that there was penetration of PW1's vagina but she could not tell by what object. She completed a P3 form which she produced as P Exhibit 3.

12. When put on his defence, the appellant initially elected to give a sworn statement and to call one witness. He however informed the court later through his learned counsel Mr Lokorito that he had changed his mind and he had opted to remain silent.

13. This being a first appeal to the High Court, it is my duty to re-evaluate and subject the evidence tendered before the trial court to a fresh and exhaustive analysis to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. See: *Okeno v Republic, [1972] EA 32*; *Kiilu & Another v Republic, [2005] 1 KLR 174* among many other authorities.

14. I have considered the grounds of appeal, the evidence on record and the submissions filed by both parties and all the authorities cited. I have also read the judgment of the trial court. Having done so, I find that the issues emerging for my determination are the following:

    i. Whether the charge sheet was fatally defective.

    ii. Whether the appellant's right to a fair trial was violated by the trial court as alleged.

    iii. Whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

15. On the first issue, the appellant submitted, inter alia, that Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* does not provide for an alternative charge. He averred that the inclusion of the offence of committing an indecent act with a child contrary to Section 11(1) of the SOA as an alternative charge in the charge sheet was improper; that the same ought to have been drafted as a second count.

16. As a general rule, alternative charges are usually included in the charge sheet where the criminal acts attributed to an accused person constitute more than one offence and one of them is more serious than the other. In such a case, the prosecution has the option of charging an accused person with either of the two offences or with the serious offence as the main count and the less serious offence as an alternative count.

17. In the instant case, the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the SOA arose from the same facts as the charge of defilement preferred against the appellant in the main count. The offence charged in the alternative count was obviously less serious than the offence of defilement given the punishments prescribed by the law for the two offences. I therefore find no merit in the appellant's argument that the inclusion of the alternative charge of committing an indecent act with a child made the charge sheet defective. The prosecution had both a constitutional and statutory mandate as well as discretion to decide what charges to prefer against the appellant.

18. In addition, the appellant contended that the charge sheet was defective because the charges therein were at variance with the evidence adduced by the prosecution. He submitted that the OB number indicated on the charge sheet was OB No xxxx yet the evidence on record indicated that the first report made to the police by the school principal (PW5) was made on March 20, 2014. Further, the appellant averred that the OB No xxxx indicated in the P3 and PRC forms did not match the OB number xxxx contained in the charge sheet.

19. The contents of a charge are clearly spelt out in Section 134 of the *Criminal Procedure Code* which provides that:

    > ' Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'

20. From the above provision, it is clear that an OB number is not one of the essential requirements of a charge. A discrepancy regarding the OB number appearing on the charge sheet and the one indicated in medical reports cannot render a charge sheet fatally defective. The variance is not one which would materially affect the prosecution case and in my view, it would at best amount to an irregularity which is curable under Section 382 of the Criminal Procedure Code.

21. Although the appellant did not raise it in his submissions, my perusal of the court record reveals that there was a variance between the charge of defilement and the evidence that was adduced by the prosecution in support thereof. The evidence disclosed that PW1 was allegedly sexually assaulted by the appellant who was her biological father and therefore, the appellant ought to have been charged with the offence of incest under Section 20 (1) of the SOA instead of general defilement.

22. While the prosecution ought to have substituted the charge of defilement with that of incest, failure to do so did not in my view make the charge fatally defective since the essential ingredients of the two offences are similar except for the additional requirement that for the offence of incest, there must be blood relationship between the perpetrator and the victim.

23. Even if the evidence on record proved the offence of incest, it is my finding that the appellant did not suffer any prejudice because of the prosecution's failure to substitute the charges. He understood the charges as can be demonstrated by the way he cross examined the witnesses before he engaged an advocate to represent him.

24. Having found as I have above, I now proceed to address the second issue I have distilled above for my determination. The appellant complained that he was not accorded a fair trial since during the trial, an advocate was not appointed for him at the State's expense. Under Article 50 (2) (h) of the *Constitution*, an accused person has a right to have an advocate assigned to him by the State and at the State's expense if substantial injustice would otherwise result.

25. The Court of Appeal in the case of *Karisa Chengo & 2 Others v Republic, [2015] eKLR*, addressed the circumstances under which an accused person would be entitled to legal representation at the state's expense and stated as follows:

> ' It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The *Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at the state expense in cases where substantial injustice might otherwise result. And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.'

26. From the trial court's record, the appellant appeared in person at the beginning of his trial. He later engaged counsel to represent him when the trial was ongoing. Granted, the appellant was charged with a serious offence but it was not one that attracted the death penalty on conviction and besides, he was able to afford the services of an advocate who ably represented him during the trial and had some witnesses recalled for cross examination. These two factors removed him from the category of accused persons who would be entitled to legal representation at the state's expense.

27. My perusal of the trial court's record does not show or suggest that the learned trial magistrate conducted the trial in a manner that prejudiced the appellant or violated any of his fair trial rights guaranteed under the *Constitution*.

28. The next issue for my determination is whether the charge against the appellant was proved beyond reasonable doubt. It is settled law that for the prosecution to secure a conviction for a charge of defilement, it must prove the three key ingredients of the offence which are: age of the victim; penetration; and positive identification of the accused as the assailant.

29. Regarding the age of the victim, the appellant submitted that the evidence relating to the complainant's age was contradictory. He averred that the charge sheet indicated the complainant's age as 9 years while PW4 testified that the complainant's date of birth was November 14, 1995 which would mean that she was 19 years old at the time the offence was allegedly committed.

30. My reading of the court record shows that the PRC form which the appellant was alluding to in his submissions clearly indicated that the complainant was born on November 14, 2005. The date of November 14, 1995 indicated in the typed proceedings at page 22 must have been a typographical error. I make this conclusion because the handwritten proceedings at page 42 indicates that in his testimony, PW4 testified that the complainant was born on November 14, 2005 and not November 14, 1995.

31. On her part, PW1 told the court that she was 10 years old at the time of giving evidence in September 2015 which means that she was 9 years old when the offence is said to have been committed in 2014. Both the PRC and P3 form indicate that PW1 was 9 years old when the offence was allegedly committed.

32. Further, the head teacher (PW5) testified that PW1 was in class three at the time the abuse by her father was brought to his attention. The age of the complainant as stated in the charge sheet remained uncontroverted by any evidence to the contrary. Consequently, I am satisfied that the trial court correctly found that the age of the victim as stated in the charge sheet was proved beyond any reasonable doubt.

33. On penetration, it was the complainant's testimony that the appellant, on several occasions, used to carry her from her bed to his bed while she was sleeping and he would thereafter undress and defile her. PW1's evidence was corroborated by the evidence of PW2 who testified that on several occasions, he would wake up and find the complainant on the appellant's bed. PW3 also confirmed in her evidence that PW1 had reported to her that the appellant had been sexually assaulting her but she did not believe her.

34. Moreover, PW1's evidence on penetration was also corroborated by the medical evidence produced by PW4 and PW6.

    Although the appellant complained in his submissions that the PRC form was illegally produced in evidence as he was not given a chance to cross-examine its author, it is my view that this submission lacks merit for the following reasons:

First, the court record clearly shows that the prosecution laid a proper basis under Section 33 of the *Evidence Act* for the production of the form as an exhibit by PW4 on behalf of Dr Lin who could not be traced. The record shows that the appellant thereafter cross-examined PW4.

Secondly, documents from a medical practitioner are among the documents that can be produced in evidence by persons other than their makers under Section 77 of the *Evidence Act*.

See: *Joseph Kakei Kaswili v Republic, [2017] eKLR*.

35. In my opinion, it is in fact illogical for the appellant to argue that he was not given an opportunity to cross-examine a witness who was not availed to testify in the first place. In the circumstances, am unable to fault the trial court's finding that the prosecution proved the element of penetration to the required legal standard.

36. Regarding identification, it was not disputed that the appellant was PW1 and PW2's father. They all lived in the same house. The complainant was categorical that the appellant defiled her on several occasions in their home. This evidence was not controverted as the appellant chose to remain silent when put on his defence. Being her father, PW1 could not have mistaken him for anybody else.

37. Having re-appraised the evidence on record, I agree with the finding by the trial court that the complainant was a truthful witness given that her evidence was materially corroborated by the evidence of the other prosecution witnesses. As pointed out by the learned trial magistrate, the complainant was only nine years old at the material time and had no reason to implicate her father with the offence.

38. From my analysis of the evidence on record, am convinced that the prosecution proved the offence preferred against the appellant in the main count beyond any reasonable doubt. It is therefore my finding that the appellant was properly convicted.

39. Turning to the appeal against sentence, the appellant was sentenced to life imprisonment which is the punishment prescribed by Section 8(2) of the SOA for persons found guilty of defiling minors aged 11 years and below.

40. The Court of Appeal in a recent decision in the case of *Joshua Gichuki Mwangi V Republic, CRA No 84 of 2015* held that the minimum mandatory sentences prescribed under the SOA were unconstitutional to the extent that they denied the trial court discretion to determine the appropriate sentence to impose on a convict given the circumstances of a particular case. In that case, the appellant was charged and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the SOA. Though Section 8 (3) prescribed a minimum mandatory sentence of 20 years, the Court of Appeal considered the circumstances of the case and in the exercise of its judicial discretion reduced the appellant's sentence to 15 years.

41. Guided by the aforesaid decision, I have considered the appellant's mitigation including the fact that he was a first offender. I have also considered the nature of the offence he committed and the circumstances in which it was committed. From the record, the appellant was in remand custody for approximately five years and two months prior to his conviction.

42. The above mitigating factors must not however shroud the fact that the appellant committed a heinous crime against his own daughter which will no doubt traumatize her for the rest of her life. He had a duty to protect her but he instead chose to abuse his position of trust by sexually abusing her several times.

Taking all relevant factors into account, I hereby set aside the sentence of life imprisonment imposed by the trial court and substitute it with an order of this court sentencing the appellant to serve thirty

five (35) years imprisonment. In compliance with Section 333 (2) of the Criminal Procedure Code, the sentence shall commence from the date of his arrest, namely, March 24, 2014.

43. The upshot of this judgment is that the appellant's appeal against conviction is dismissed but his appeal against sentence succeeds to the extent that his sentence is reduced from life to thirty five (35) years imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2023.

C. W. GITHUA

JUDGE

In the presence of

The appellant

Ms. Ntabo for the Respondent

Ms. Karwitha Court Assistant