GOO v Republic (Criminal Appeal 15 of 2020)
[2023] KEHC 2156 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL 15 OF 2020

TA ODERA, J

MARCH 8, 2023

BETWEEN

GOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence of Hon E. M. Onzere S.R.M in original Tamu PMC Sexual Offence No. 37 of 2018 delivered on 10/12/2018)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars being that on 23/8/2018 in Kipkelion West Sub County within Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of MAO a child aged 11 years. He faced an alternative count of committing an indecent ac with a child contrary to section 11(1) of the *sexual offences act*. The particulars were that on the aforesaid date in the stated place intentionally and unlawfully touched the vagina of MAO with his penis. A child aged 11 years.

2. The appellant pleaded not guilty to the charges and the matter proceeded to hearing. PW-1, the minor stated that the accused being his father came home on 24/8/2018 at night and found her sleeping with his brother sharing a bed. The accused came to the bed where they were sleeping and defiled her. The appellant took a panga and threatened to her and her siblings for they shouted. When their mother came home the following morning, they reported the incident whereafter, she was taken to Fort Tenan Hospital for examination.

3. PW-2 DO. stated that she related to the minor by virtue of being her brother. That on the material day, the appellant came home alone after attending a burial with their mother. The appellant first sat

on a chair before moving to the bed he was sharing with his sister, the complainant herein and did bad manners to her. The appellant slapped and threatened to cut them with a panga if they screamed.

4. PW-3, AAO the minor's mother stated that she had attended a burial with the appellant, her husband. Later in the night, the appellant left the burial home and she didn't know where he had gone. When she reached home the following morning, he found the appellant sleeping on the chair while the children were sleeping on the one bed. The minor reported what had transpired the night before and she therefore examined her noticing some discharge on her thighs. She took her to hospital for examination.

5. PW-4, Kibet Langat a Clinical Officer based at Fort Tenan Sub-County Hospital received the minor in the company of her mother on 25/8/2018 with complaints of pain on the thighs after being defiled. On examining her, he did not note spermatozoa on the vagina. There were no vaginal lacerations or discharge either.

6. PW-5 Felistus Anyango, the investigating officer stated that she received the minor and her mother on 15/9/2018 complaining of defilement of the minor by her father. She recorded their statements and took the minor to hospital for examination. She produced the age assessment report showing the minor was 13 years and subsequently charged the appellant.

7. The appellant was put on his defence an opted for an unsworn testimony which was to the effect that he did nothing wrong and therefore had no defence to make.

8. The trial magistrate subsequently convicted him for the offence of defilement and sentenced him to serve life imprisonment. The appellant was aggrieved thus the instant appeal which is premised on the following grounds;

    a. That the trial court failed to realize nothing linked him with the offence.

    b. The sentence imposed against him was against the weight of evidence adduced.

    c. The court failed to appreciate the sentence imposed was unconstitutional due to its mandatory nature.

    d. The prosecution's case was full of contradictions.

9. The parties later filed their written submissions which have been considered. The appellant's are dated December 23, 2022 while the respondent's are dated January 13, 2023.

Analysis and determination.

10. This being a first appeal, I am guided by the sentiments expressed by the Court of Appeal in *Kiilu & another vs. Republic* (2005)1 KLR 174, where it was stated;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions."

11. This being a defilement charge, the prosecution is required to establish the complainant's age, the act of penetration and positive identity of the perpetrator.

12. On the aspect of age, the charge sheet indicates her age as 11 years. The baptism card shows she was born on 3/8/2008 and therefore around 10 years at the time. PW-3, her mother stated the minor was born on 3/8/2008. I find that the minor was subjected to age assessment and her age was determined as 13 years.

13. In the circumstances, the court is to determine whether the minor's age was satisfactorily proved. There have been numerous judicial pronouncements on the issue of age especially when there is a light variance such as in the instant case as illustrated below.

14. In *Hilary Nyongesa vs Republic* Eldoret Criminal Appeal No 123 of 2009 the court stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

15. In *Kaingu Elias Kasomo -v- R* Malindi Cr. App. No. 504 of 2010 the Court of Appeal stated that:-

> " The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence....Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the *Sexual Offences Act*, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."

16. In *Musyoki Mwakavi –vs- Republic* Machakos High Court Criminal Appeal No. 172 of 2012, the court stated:-

> " ...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...."

17. In the current case, clearly there is a discrepancy as captured above. What is the effect of such variance? Can it be said that the element has not been proved?

18. I note the variance is about 2 years. Giving due allowance to the fact of recollection of exact dates varies, I find that the age is proved. Nonetheless, I find the correct age of the minor was shown through the age assessment report and baptismal card (pexh 3 and 4 respectively) and the account of PW-1 and PW-3.

19. The slight variation did not in any event cause any miscarriage on the appellant's part as the victim is still a minor.

20. In the circumstances, I find this limb to have been proved satisfactorily.

21. On the element of penetration, the definition thereto is given under Section 2 of the *Sexual Offences Act*, to include partial or complete insertion of the genital organ of a person into the genital organs of another person.

22. PW-1 in her evidence before the court gave a cogent account of what transpired on the day. The record captures her testimony thus.

> " ...the accused also removed his inner wear. The accused then took his 'thing'. The thing that I am referring to is the thing the accused uses to urinate. He put it in my thing which I use to urinate."

23. It is now settled law that penetration need not be proved only by medical evidence. Cogent evidence by the victim of sexual abuse suffices. This was the position in *JOO Vs Republic* [2015] eKLR where

the court quoted a paragraph of the judgment in the case of *Mark Oururi Mose versus Republic* [2013]eKLR to the effect that:-

> "...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis mine).
>
> This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated."

24. The clinical officer did not indicate the status of the hymen in the p3 form and the treatment notes also do not talk of the same. The trial magistrate stated in the judgment that she believed the evidence of PW1 and PW2 who though minors were able to recollect the events of the day. I had no advantage of seeing the witnesses. The proviso to Section 124 of the law of *Evidence Act* provides that '' ;

> ''Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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.''

25. Considering the said sentiments of the trial court and the evidence firm and consistent evidence of the victim notwithstanding the clinical officer's finding. There is overwhelming evidence of penetration on the vagina o the minor .I therefore find the limb was proved accordingly.

26. On the identity of the perpetrator, the minor clearly stated that the culprit was her father. This is not denied. PW1 testified that the appellant who is her father is the one who defiled her on the material day and warned them not to reveal what he had done. On cross- examination of pw1, the appellant admitted having sexual intercourse with Pw1 but said she did not cry. The appellant in his defence admitted that he went back home on the material night and that he sat on the chair in the house. This cannot be a case of mistaken identity or fabrication as there is no evidence that appellant had differed with PW1 or Pw3 at the material time. The narration by PW-3 that the appellant disappeared from a funeral they were attending taken together with the minor's evidence and that of PW2 that appellant had sexual intercourse with PW1 clearly pointed out that the child recognized him on the material night as her assailant. I find that appellant was properly placed at the scene.

27. I have evaluated the entire evidence on record and I find that the conviction was sound. I uphold it.

28. The sentence meted out has also been challenged as being unconditional due to its mandatory nature. The sentence is also challenged as not being supported by evidence.

29. The sentences for defilement under Section 8 of the *Sexual Offences Act* are pegged on the age of the victim, section 8(2) under which the appellant was charged applies where the victim is aged 11 years old and below. In this case it was proved that the victim was aged 13 years old at the material time and so the applicable sentencing section is 8 (3) of the *Sexual Offences Act* which provides for a sentence of not less than 20 years imprisonment where the victim was aged between 12 years old and 15 years old .

30. I have had the occasion to read the judgement of Odunga J in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC wherein the learned judge stated as follows;

> " 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 Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

31. The learned judge did not in way invalidate any sentence prescribed by the Act, what the court is required to do is to consider the mitigation tendered by the party.

32. Having said that, the record shows that in his mitigation, the appellant simply stated that he wants to be released to go home. The court having considered the mitigation handed down the sentence.

33. It is similarly trite law that sentencing is a discretion resting with the trial court as has been observed in a plethora of authorities. In *Bernard Kimani Gacheru vs. Republic* (2002) eKLR where it was stated-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

34. In the circumstances of the matter before me, I find that the Trial Magistrate erred in sentencing the appellant to life imprisonment as it was in excess of the 20 years imprisonment provides for. The circumstances of this case were aggravated by the age of the victim. The fact that appellant is her father who breached his duty of care and protection of the child and also that appellant slapped pw1 and pw2 and threatened them with a panga before committing the offence. I find that this is a case where minimum sentence should be imposed.

35. For the foregoing reasons, the appeal partially succeeds on sentencing. I proceed to substitute the sentence of life imprisonment with 20 years imprisonment. The sentence to run from September 15, 2018 when he was arrested and placed in custody till completion.

36. It is so ordered.

T.A. ODERA - JUDGE

MARCH 8, 2023

Delivered virtually via teams platform in presence of;

Appellant,

Okoth for prosecution

Court Assistant Oyando.

T.A. ODERA - JUDGE

MARCH 8, 2023