Chemiat v Republic (Criminal Appeal E053 of 2022)
[2023] KEHC 3855 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E053 OF 2022

REA OUGO, J

APRIL 19, 2023

BETWEEN

MOSES WETUNDE CHEMIAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon C.M Wattimah, SRM dated 17th May 2022 in Criminal Case (SO) No. 49 of 2019 at the Magistrate's Court at Sirisia)

JUDGMENT

1. The Appellant, Moses Wetunde Chemiat, was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on diverse dates between month of November 2019 and 4th December 2019 in Bungoma West Sub- county within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of RJK a child aged 8 years. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The Appellant pleaded not guilty to the main charge and the alternative charge before the trial court. A full hearing was conducted. The prosecution called five (5) witnesses.

3. It was the testimony of RJK (Pw1) that on the material day she was at her grandmother's home and that her grandmother had gone to cut trees. The appellant was also present fixing the door of the cow shed. The appellant spoke to her while she was in the kitchen. He carried her to the main house and put her on the bed. Pw1 testified as follows:

> " ...he told me to remove the inner pant, I removed. He removed the thing he uses to urinate; he put it into the place I use to urinate. He then did bad manners on me. He was in a hurry. (He was doing it in a hurry). He finished and went back to the cow shed."

4. Pw1 testified that the appellant had defiled her four times. In the main house and in the kitchen. He would then give her 10/- and ask her not to tell anyone. On the material day, when her grandmother came home, Pw1 told her that the appellant had defiled her. Thereafter the appellant caned and beat her up for telling her grandmother. On cross examination Pw1 testified that the appellant defiled her 3 times in the kitchen and the fourth time, he defiled her on the bed in the main house. She also testified that she went to the hospital.

5. JC (Pw2) testified that Pw1 is her grandchild and that on the material day she woke up and went to the farm. Once she finished working the farm she went home and found Pw1 seated in the kitchen. Pw1 asked for tea. She testified that Pw1 then told her that she was very tired as the appellant slept on her and did to her bad manners. Pw2 went to the appellant to ask if he had defiled the child and the appellant started beating the child. Pw2 went to her sister HCK (Pw3). Pw2 told Pw3 that the appellant had defiled Pw1. Pw2 and Pw3 took the complainant to Cheptais District Hospital. The doctor confirmed that Pw1 had been defiled and she was given medication for 21 days. They recorded their statements and the appellant was arrested. She testified that the appellant was 9 years old.

6. The clinical officer Rose Ngolor (Pw5) testified that on 4th December 2019 the complainant gave a history of being sexually assaulted by a person known to her on 3rd December 2019. She experience pain while urinating. Vaginal examination revealed that she was swollen. The labia majora and minora had lacerations and oedema. Pw1 also had a fowl smelling discharge. Pw5 sent her to the lab for HIV, urinalysis and syphilis test and the results were negative. She concluded that Pw1 had been defiled and gave her antibiotics and medication to prevent infection.

7. No. 111340 James Marwa (Pw4) testified that he was the investigating officer. He testified that the case was reported and the appellant was brought into the station by the villagers. The following day, the complainant was taken to the hospital and it was confirmed that she had been defiled. On cross examination he testified that the complainant was 8 years at the time of the offence.

8. When placed on his defence, the appellant testified that he has always had disagreements with Pw2 over 7 coffee bushes. Pw2 had warned him of the repercussions of not giving his son land. He testified that the dispute emanated from a land issue. He was arrested and charged but denies committing the offence.

9. The trial magistrate at the end of the trial found that the prosecution had proved its case and convicted the appellant of the offence of defilement sentencing him to 15 years imprisonment. The appellant dissatisfied with the finding of the trial lodged his petition of appeal before this court on grounds that the court should consider reducing the sentence as he is a first offender and is remorseful. He advanced that the sentence was harsh and excessive in view of the gravity of the offence. He also urged the court to consider that he is the sole breadwinner in his family.

10. The appeal was dispensed by way of written submissions and both parties have filed their respective submissions. The prosecution submits that the appeal is solely challenging sentence meted by the trial court. The appellant in his grounds of appeal has only challenged the sentence by the trial magistrate, however, in his submissions he questions the decision of the subordinate court on claims that it did not consider that the possibility of fabrication of evidence due to a family dispute between the parties. The appellant cross examined the prosecution witnesses and they denied the existence of a land disputes or any squabbles with the appellant. On the contrary, the prosecution evidence points out that they were on good terms as Pw2 had even employed the appellant to work for her.

11. The three essential ingredients, penetration, age of complainant and identity of the perpetrator were therefore met. The prosecution evidence was that the appellant was well known to Pw1 as he had been

working for Pw2. Pw2 confirmed this and testified that the appellant was a relative. The incident took place in broad day light and the prosecution proved that the appellant was positively identified as the assailant. According to Pw1's birth certificate, she was born on 1st February 2011. When the incident occurred between November and 4th December 2019, the minor was 8 years old. The evidence of Pw1 was clear that the appellant defiled her by putting his penis in her vagina and had sex with her. She further testified that the appellant had had sex with her four times. The evidence of Pw1 on penetration was corroborated by the testimony of the clinical officer, Pw5, who produced the P3 Form and testified that Pw1's labia majora and minora had lacerations and oedema. Therefore, I am constrained to agree with the submissions of the respondent that the prosecution case was proved beyond reasonable doubt. The appellant's claim that the evidence was falsified is without any basis.

12. Therefore the only issue for consideration in the appeal is whether the sentence meted by the trial magistrate was excessive. The principles that govern the appellate court's interference with sentencing were aptly stated in the case of *Bernard Kimani Gacheru vs. Republic [2002]* eKLR restated that:

> " 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."

13. The appellant in his appeal has urged the court to consider the sentence harsh and excessive; the respondent on the other hand submits that the court should enhance the sentence considering that the minor was 8 years old. Section 8 (2) of the *Sexual Offences Act* stipulates that where it is established that an act of defilement was perpetrated on child under the age of 11, the perpetrator who is found guilty of the offense is subject to a mandatory minimum sentence of life imprisonment. I note that the trial magistrate considered that the appellant was a first offender and had been in custody for 5 years. He also considered the appellant's mitigation before sentencing him to 15 years imprisonment. In the circumstances therefore, I find no reason to interfere with the sentence meted by the trial court.

14. In the end, the appeal is lacking in merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister C/A