DNW v Republic (Criminal Appeal E015 of 2021) [2023] KEHC 17656 (KLR) (17 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17656 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E015 OF 2021

GL NZIOKA, J

APRIL 17, 2023

BETWEEN

DNW .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence by Hon. E. Mburu, Senior Resident Magistrate, delivered on, 30th June, 2021, vide Criminal Case Sexual Offence No. 67 of 2018, at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate Court on 20th August 2018, charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") in the main count and an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing wherein the prosecution called a total of five (5) witnesses to prove its case. The prosecution case in brief is that, (PW3) PW (herein "the complainant") aged five (5) years and the appellant are cousins as their mothers are sisters and at the material time of the offence they were residing in the same house as the appellant had gone visiting the aunt.
3. That, while the complainant was in the company of the appellant alone at home, the appellant inserted his penis into her mouth and on another occasion while in the farm, he inserted it in her vagina. That, he warned her not to tell anyone threatening to beat her if she did. Consequently, she did not disclose to anyone what had happened to her.
4. In the meantime, (PW1) JGK the complainant's elder brother had gone to fetch water from the river, leaving the complainant with the appellant at the farm where the appellant was assisting in planting

potatoes. That, at around 11 am to 12 noon while returning home, he saw the appellant had removed his clothes and holding the complainant facing him. That, he had put his penis into the complainant's mouth while strangling her.

5. That, he was afraid of confronting the appellant fearing that he would beat him and instead inquired from one; LW whether the complainant had reported anything to her but W was not aware of what had happened to the complainant. PW1 JGK told her what he saw and when the complainant's mother (PW2) MWK returned home, LW told her what happened. The complainant's mother sent the appellant back to his home, while the complainant was taken to hospital.

6. That, the medical report revealed the complainant had been defiled. Thereafter the appellant was traced and arrested. As he had been assaulted by the members of the public, he was taken for treatment and later charged accordingly.

7. At the close of the prosecution case, the learned trial magistrate ruled the appellant had a case to answer and placed him on his defence. He elected to give a sworn statement and merely stated that he could not tell what happened but that it happened and that he was sorry for. That he was desirous of pursuing his education.

8. At the conclusion of the case the learned trial Magistrate delivered a judgment and held that the prosecution had proved its case beyond reasonable, convicted the appellant and sentenced him to serve life imprisonment.

9. However, the appellant is aggrieved by the decision of the trial court and has appealed against it on the grounds as here below reproduced verbatim that: -

    a. The trial court erred in fact and law when it relied on contradictory evidence adduced by the prosecution.

    b. The trial court erred in law and fact by finding that the prosecution had satisfied the ingredients of the offence of defilement.

    c. The trial court erred in fact and in law when it failed to consider that the appellant was a minor at the time of the alleged commission of the offence as well as during trial.

    d. The trial was not fair as the appellant despite being a minor was not provided with legal counsel during trial.

    e. The trial court did not consider the appellant's mitigation that he was remorseful, 1st time offender and his extreme youthfulness before handing him the mandatory life sentence.

    f. The prosecution did not discharge the burden of proof beyond reasonable doubt.

10. However, the appeal was opposed by the respondent vide grounds of opposition dated; 21st October 2022 which states that: -

    a. That, in response to ground 1, duty of disclosure was fulfilled and the appellant fully understood the case against him.

    b. That, in response to ground 2, the appellant, an adult, did not ask for legal representation nor seek to appoint counsel during trial. He understood the charges facing him and participated in the trial.

    c. That, in response to ground 3 and 4, the charge sheet was proper and there are no inconsistencies in the prosecution's case.

d. That, in response to ground 5, the appellant was given a chance to cross-examine all prosecution witnesses.

e. That, in response to ground 6, the sentence is appropriate and legal.

f. That, the petition is devoid of merit and ought to be dismissed forthwith and conviction and sentence upheld.

11. The appeal was disposed of by filing of submissions. The appellant in undated submissions argued that, when the first witness testified he had not been provided with the witness statements and other documentary evidence which the prosecution intended to rely on thus contravening his right under Article 50 (2) (j) of the *Constitution* of Kenya. He relied on the cases of; *Joseph Ndungu Kagiri v Republic* (2016) eKLR and *Joseph Kiema Philip v Republic* (2019) eKLR.

12. Further, that he was 18 years old when he was arraigned in court and in Form 2, and had the mental capacity of a secondary school child and therefore required legal assistance. Further the charge sheet was defective as there was a variance between the charge and the evidence tendered in court, in that the witnesses did not gave the date of commission of the offence.

13. Further, the evidence given was that the penetration to the anus was by a pen. Furthermore, the evidence given did not amount to defilement as defined in the *Sexual Offence Act.* He relied on the case of; *Peter Ngure Mwangi* (2014) eKLR.

14. That, the evidence of the complainant was unsworn and therefore lacked any probative value. He cited the Court of Appeal decision in *Paul Kinyanjui Kimauku v Republic* (2016) eKLR.

15. He further argues that, the trial court failed to treat him as a first offender and did not consider his mitigation as required under section 329 of the *Criminal Procedure Code* as was held in decisions in Machakos Petition No. E017 of 2021 *Philip Mueke Maingi & 5 Others v DPP* and Mombasa Petition No. 97 of 2021.

16. He urged the court to consider the time he spent in custody as provided for in section 333 (2) of the *Criminal Procedure Code* and the Sentencing Policy Guidelines and allow his appeal, quash the conviction and sentence and set him at liberty.

17. However, the Respondent in their submissions dated 21st October 2022, reiterated that the appellant understood the charges he was charged with and participated fully in the trial. That, at no one time did he raise an issue that he was not supplied with the witness statements nor that he was not ready to proceed.

18. Further, he did not raise any issue with regard to legal representation or requested under the *Legal Aid Act*, neither has he demonstrated that the suffered substantial injustice as provided for under Article 50 (2) (h) of the *Constitution*. Reliance was placed on the case of *David Gitonga Pialo v Republic* [2021] eKLR where the court held that the appellant therein had failed to raise the issue of being given legal representation at the court's cost and had participated in the proceedings.

19. That the charge sheet was not defective as the date of the offence Is clearly stated therein. Further, there is no inconsistences in the prosecution case, as medical evidence produced by PW4 Dr David Karia Samson corroborated the complainant's evidence that she had been defiled.

20. That the complainant was a minor who was too young to understand the meaning of an oath and the court directed that she gives an unsworn statement and the appellant was allowed to cross-examine her but he opted not to ask any questions.

21. On the sentence, it was argued that the sentence is proper in the circumstances of the case, as the complainant was a child of very tender years. That, appellant beat her and he also threatened her and so she kept silent. That, the appellant does not deserve a lenient sentence and the court should uphold both conviction and sentence.

22. Having considered the appeal, I note that, as held by the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

23. The court thus observed: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A. 336 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 (*Shantilal M. Ruwala v. R* [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

24. Be that as it were, the appellant was convicted of the offence of; defilement, created under section 8(1) of the Act, as follows: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

25. In deed the ingredients of the offence are settled. These ingredients were considered in the case of; *Agaya Roberts v. Uganda*, Criminal no. 18 of 2002, where the Court of Appeal stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

26. Similarly, in *Bassita Hussein v. Uganda* Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

27. I shall first deal with issue of the age. In that regard, it is settled law that, primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. The secondary evidence would be; the evidence of a parent or guardian, or physical observation of the child and/or common sense (see *Hilary Nyongesa v Republic* (Uganda) HCCRA No. 123 0f 2009).

28. In this matter the charge sheet indicates the complainant was five (5) years old. PW2 the mother of the complainant informed the court that the complainant was born on 1st January 2013 and was five (5) years old and produced the "child health card" (P. exhibit 1) in support thereof. The child was examined by the court in voire dire examination and found to be of tender age and unable to even appreciate the purpose and import of an oath, indicating her very tender years. It is the court's finding that the element of age was proved.

29. As regards penetration, the section 2 of the Act states that; “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person. In this matter, the medical evidence was produced by Dr. David Karia Samson from Gilgil Sub-County Hospital. He stated that he examined the complainant who was unstable and not calm. That, she had injuries on her face and cheeks and parietal region with burns of hot water. That she had lost one incisor and her buttocks had bruises.

30. Further, that he examined her private parts and noted that she had bruising on her vaginal wall and anus, and that her hymen had been broken. He concluded that the complainant was defiled and physically assaulted.

31. It is noteworthy that when the complainant testified she stated that the appellant, inserted his penis in her mouth and vagina and used to beat her with sticks on her buttocks for no apparent reason. Therefore, the afore medical evidence corroborates the complainant’s evidence of both sexual and physical assault.

32. As regards identity of the appellant and his involvement in the offence. It is not disputed that the appellant was residing in the same house with the complainant. They are cousins. The relationship was confirmed by the evidence of PW1 and PW2.

33. Indeed, PW1 testified that he saw the appellant indecently assault the complainant by putting his penis in her mouth. The issue of mistaken identity does not arise. Apparently all this was happening in broad daylight. The appellant did not rebut the prosecution case.

34. Having considered all the aforesaid, I find that all the ingredients of the offence of defilement were proved and the prosecution adduced adequate evidence to sustain a conviction and I decline to quash the conviction.

35. The issue of the appellant’s age, defective charge sheet and legal representation were not raised at the trial of the case and even then when the appellant was sentenced he was 18 years and therefore and adult.

36. Finally, on sentence section 8(2) of the Act states that; a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. Therefore, the sentence meted out is lawful and legal. Furthermore, by the appellant inserting his penis in both the mouth and private parts of the minor and physically assaulting her, behaved in an extreme inhuman and heinous manner. The sentence is appropriate. He can pursue his education in Prison.

    As such the appeal is dismissed in its entirety due to lack of merit.

37. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF APRIL, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr. Atika for the Respondent

Ms Ogutu; Court Assistant