Karimbo v Republic (Criminal Appeal E030 of 2022)
[2023] KEHC 3405 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E030 OF 2022

LW GITARI, J

APRIL 20, 2023

BETWEEN

BONIFACE MURIUNGI KARIMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to ten (10) years imprisonment. The particulars of the charge were that on October 3, 2017 within Tharaka Nithi County, the appellant unlawfully and intentionally caused penetration of his penis to the vagina of one NMK, a girl aged fifteen (15) years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. Aggrieved by the conviction and sentence, the appellant has filed the instant appeal citing the following grounds:

    a. That the learned trial magistrate erred in matters of law and facts by failing to consider that the prosecution evidence was insufficient and contradictory to sustain a conviction.

    b. That The pundit trial magistrate erred in matters of law and fact when he failed to record reasons for believing a single witness contrary tosection 124 of the *Evidence Act*.

    c. Thatthe learned trial magistrate erred in both matters of law and facts by rejecting the Appellant's defense without giving cogent reasons.

d. That the pundit trial magistrate erred in both matters of law and fact by failing to note that theappellant was not medically examined to ascertain whether he had actually committed the alleged offence undersection 36(1) of the *Sexual Offences Act*.

4. The appeal was canvassed by way of written submissions which have summarized hereunder.

The Appellant's Submissions

5. It was the appellant's submission that the complainant voluntarily went to his home as they were in a boyfriend-girlfriend relationship. Further, that he did not know that the complainant was a school girl and that he thought that they were having a consensual relationship and sex. The appellant thus prays to be committed to community service or in the alternative, to be set at liberty.

The Respondent's Submissions

6. On the other hand, it was the Respondent's submission that the prosecution proved beyond reasonable doubt the three elements of the offence of defilement, that is, penetration, the age of the victim, and the identity of the perpetrator. Therespondent thus urged this court to uphold the trial court's decision on conviction and sentence of theappellant.

Issues for Determination

7. Having considered the appellant's Amended Grounds of Appeal and the written submission of the parties herein, it is my view that the main issues for determination are:

a. Whether the prosecution proved its case beyond any reasonable doubt;

b. Whether the sentence given was irregular.

Analysis

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

I proceed to consider the evidence tendered by the prosecution in support of their case.

9. PW1 was the complainant, NMK. She stated that she was 16 years old. It was her testimony that on September 8, 2017, she was sent home from school because of lack of school fees. That her mother sent her the school fees and together with her friend, the travelled to Chuka township. She stated that on the material day, she was in Chuka where she met the appellant and they had sex at a around 10.00 p.m. According to her, the police came at around 2.00 p.m. together with his father and a bodaboda rider and took her to Chuka police station before going to hospital for a checkup. On cross examination, she stated that she neither agreed to accompany theappellant to his home nor consent to have sex with him.

10. PW2, NKK, the complainant's father. He stated that the complainant was sent home from school on September 8, 2017 and that she sent her Kshs. 2,000/= for school fees but she did not go back. That

on the material day, the complainant disappeared from home only to be later found sleeping at the Appellant's house. They then went and reported the matter to the police.

11. PW3 was Dr. Moses Maina attached at Consolata Hospital Kyeni. He stated that the complainant was brought to the hospital on October 4, 2017 with an allegation of having been defiled by her boyfriend. On examining her, PW3 found that there were no lacerations. That there was also no hymen, blood, or spermatozoa. Finally, that there were pus cells. He produced the P3 Form as P.Exhibit 1.

12. PW4 was Ephantus Mutugi, a boda boda operator residing at Kithinji village. It was his testimony that on the material day at around 2.00 p.m., he carried the complainant to the appellant's home. That the appellant paid him Kshs. 100 as fare. Subsequently, PW4 went back and reported to the complainant's mother that her daughter was with the Appellant. PW4 and PW2 then went and made a report to Chuka Police Station.

13. PW5 was CPC Miriana Ongae. It was his testimony that the complainant and the appellant were in a relationship and that the complainant had disappeared from home since September 8, 2017. Further, that the police were led to the Appellant's home on the material day were they found him sleeping with the complainant and he was arrested.

14. Theappellant testified as the only witness in his defence. He admitted to having sex with the complainant but stated that he did not know her age. According to him, he thought that the complainant was an adult.

15. Having considered the evidence placed before the trial, I shall now move to analyse the main issues raised in the present appeal.

    a. Whether the prosecution proved its case beyond any reasonable doubt

        1. In defilement cases, the ingredients that need to be proved are identification or recognition of the offender, penetration and the age of the victim. This was so held in the case of *Moses Mwarimbo Dau v Republic*[2018] eKLR cited by the respondent.

17. In this case, the age of the complainant is not in dispute as her birth certificate was produced in evidence which indicated that she was born on August 30, 2002. This means that she was slightly above 15 years on the material day.

18. The next ingredient is penetration. It was PW1's testimony that she had sex with theappellant on the material day. PW4 stated that he was the one who took the complainant to the appellant's home before going to inform the complainant's mother. On the other hand, it was the testimony of PW2, PW4, and PW5 that they found the complainant sleeping with the appellant. In his defence, the appellant did not deny sleeping with the complainant. It was his evidence that he thought that the complainant was an adult and that they were having a consensual relationship. This evidence proves e that there was penetration and that theappellant was positively identified as the perpetrator of the offence.

19. Section 8(1) of the *Sexual Offences Act* provides that:

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

20. In the case of *Mark Oiruri Mose v Republic* [2013] eKLR the court held that -

> " All that was required is proof of penetration in the victim's vagina by the appellant. Penetration may be partial or complete under the Act."

21. The Appellant did not deny having sex with the complainant. It was however his defence that he was in a relationship with the complainant and that he believed she was an adult

22. Section 8 (5) & (6) of the *Sexual Offences Act* provides as follows:-

> " It is a defence to a charge under this section if - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

23. Where this defense is raised, the court has to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. In this case, the trial court considered this defence and opined that the since the appellant had been in a relationship with the complainant for a period of time, he ought to have asked or inquired about her background information or found out where she stays. Further, that relying on the complainant's physical appearance was not sufficient to determine their age. I agree with this reasoning. The appellant ought to have taken further steps to determine whether the complainant was of age.

The appellant on the 1st ground states that the evidence was insufficient and contradictory to sustain a conviction. The burden was on the prosecution to prove the charge against the appellant beyond any reasonable doubts. The prosecution had the duty to adduce evidence was sufficient to support the charge. I find that the prosecution discharged this burden by calling adequate witnesses to prove the charge. There were no material contradictions. The contradictions alleged are minor and the court ignores minor contradiction which are not intentional and which do not prejudice the appellant in anyway. This ground must therefore fail.

On the 2nd ground, section 124 of the *Evidence Act* (cap 80) Laws of Kenya is cited by the applicant. The trial magistrate is required to give reasons where the complainant who is the victim of the crime is the only witness. In this case, although the complainant was the only witness to the fact of defilement, failure by the trial magistrate to give reasons for believing the complainant is in my view immaterial as the appellant admitted in his defence on oath that he had sexual intercourse with the victim. This ground must fail.

Finally the appellant has raised the round that he was not medically examined to determine whether he committed the offence. Under section 8 of the *Sexual Offences Act* three ingredients are supposed to be proved in order to sustain the charge.

I have analyzed this ingredients above. The appellant was identified as the perpetrator and I repeat once again that he admitted that he penetrated the victim. Penetration, is proved by the testimony of the victim. The Court of Appeal at Malindi in the case of *Kenga v Republic* Criminal Appeal No.4 of 2020, noted that;

> " the argument that a D.N.A test under Section 36 of the *Sexual Offences Act* was required was not well founded. As this court stated in *Robert Mutungi Mumbi v Republic* (2015) eKLR section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples, including D.N.A testing to establish the linkage between the accused person and the offence. The provision is not couched in

mandatory terms and D.N.A evidence is not the only evidence by which commission of a sexual offence may be proved."

Failure to comply with Section 36 was not a fatal omission. It was not mandatory that such examination be done. There was sufficient evidence to prove that the appellant committed the offence. The ground fails.

24. In view of the above analysis, it is my view that theappellant's conviction was safe. The prosecution did establish its case against the appellant to the required standard of beyond any reasonable doubt.

25. On the issue raised of the trial court relying on the evidence of a single witness, the provision of section 124 of the *Evidence Act* stipulates as follows:

> "...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."

26. This being a case involving a sexual offence, it follows that the evidence of the complainant was sufficient to warrant a conviction. That notwithstanding, the testimonies of PW2, PW3, PW4, and PW5 were well corroborated and pointed to the Appellant's guilt.

Whether the sentence was irregular

27. The Appellant has urged this Court to reduce his sentence or commit him to community service or set him at liberty.

28. The case of *Wanjema v. Republic* (1971) EA 493 dealt with principles upon which a first appellate court may act on in dealing with an appeal on sentence. An appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

29. In this case, theappellant was sentenced to serve ten (10) years' imprisonment.

30. Section 8(3)of the *Sexual Offences Act* provide that:

> "(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

31. The complainant was slightly above fifteen years at the material time of the offence having been born on 30th August, 2002. The prescribed sentence for defiling a 15 years old child is imprisonment of not less than twenty years. It thus follows that the Appellant was lucky to have been given a very lenient sentence. I will not interfere with the sentence.

Conclusion

32. From the foregoing, it is my view that this appeal lacks merits.

I therefore order that:-

1. The appeal is without merits.

2. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF APRIL 2023.

L.W. GITARI

JUDGE