JEE v Republic (Criminal Appeal 22 of 2019)
[2023] KEHC 17219 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17219 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 22 OF 2019

FR OLEL, J

MAY 5, 2023

BETWEEN

JEE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the considered judgment of Hon Lucy Mutai (CM) dated October 6, 2019 delivered in Nanyuki Chief Magistrate CR (SOA) No 59 of 2018.)

JUDGMENT

1. This appeal arises from the considered judgment of Hon Lucy Mutai (CM) dated October 6, 2019 delivered in Nanyuki Chief Magistrate CR (SOA) No 59 of 2018, where she convicted the appellant and sentenced him to serve 10 years imprisonment for attempted defilement.
2. Being dissatisfied as against the said judgement, the appellant preferred this appeal against both conviction and sentence. His ground of appeal were that;
    a. The trial magistrate erred in matters of law and fact by failing to note that the prosecution did not prove their case beyond reasonable doubts.
    b. That the learned trial magistrate faulted in matters of law and fact for failing to not that there was an error in identification since it was dark and no light was used.
    c. That the learned trial magistrate erred in matters of law and fact by failing to note the evidence tendered by the prosecution was not sufficient to sustain a secure conviction.
    d. That the learned trial magistrate faulted I matters of law and fact by convicting the appellant relying on a single evidence witness without warning himself the danger surrounding her decision.

e. That the learned trial magistrate faulted in matters of law and fact by failing to note that the investigations were not properly conducted.

f. That the learned trial magistrate faulted in matters of law and fact by rejecting the appellants defence without any content.

The appellant prayed that this appeal be allowed the conviction be quashed and sentence laid upon him be set aside.

Brief Facts.

3. PW1 GM testified that she was born on September 21, 2001 (was 17 years old) and attended school at [Particulars withheld] Primary school. On 19/7/2018 she had visited an eye clinic in Nanyuki and was accompanied by her mother one MM. After visiting the clinic they went to visit their grandmother who lived with the appellant. He was her grandmother's immediate neighbour. Her grandmother house was made up of timber and it was one roomed. Her grandmother slept in the room, while she slept on the floor.

4. As she slept at night, she realized that somebody was all over her chest/breasts, and had started to remove the beddings. She decided to feel the person and realized it was a man. There was moonlight and lights penetrating through the gaps between the house timber. The person who was groping her wore a jumper. He further felt him and held his penis which was protruding from his trousers. She got up and tried to run away through the door, but the assailant held her back and threw her down. At that point she screamed and that alerted the accused wife and her grandmother, who asked what was going on, she told them that somebody was strangling her. At that point the accused ran out through the rear window.

5. PW1 stated that the appellant wanted to rape her because his manhood was out and ready/full. She had seen the appellant the night before and they had spoken, when asking her about the meals available at her grandmother's home. After the appellant had ran away, his wife called PW1 to her house. At that point the appellant was not there. PW1 asked the wife of the appellant where he had gone to and she said that he had gone out to vomit. They went out to look for him and when they spotted him, PW1 told the appellant's wife that her husband is the person who had attacked her. The following morning she reported that matter to a nearby AP post and explained that he appellant had attempted to defile her.

6. In cross examination PW1 reiterated that it was the appellant who had attempted to rape her at about 3.00am and she had refused to go back to her grandmother's house for fear that the appellant would come back and attack her. The presence of the appellant wife made her feel safe and secure, though she tried to influence her to drop the case. PW1 also confirmed that the appellant was drunk that night and that she had told the court the truth.

7. PW2 MM was the mother to PW1, she stated that on 18/7/2018, she was with her daughter at her mother's house. She left her daughter with her grandmother and the next day she learnt that somebody had attempted to rape her and had strangled her in the process as she had scratch marks on her neck. She learnt that it was the appellant who had committed the offence and he was later arrested. Her daughter PW1 was 17 years old, having been born in 2002, she identified the birth certificate and P3 form before court. In cross examination, she stated she was informed of the incident which occurred at PW1 grandmother's house, but later that night PW1 slept in the appellant's house under the care of his wife as she felt safer. She insisted she had tendered truthful evidence.

8. PW3 APC Ali Mohamed of Blue Gum AP camp testified that on 30/7/2018 at about 9.30pm they received information that a suspect in an attempted defilement case was in his house. Together with Cpl Ali, they proceeded to the appellant's house and arrested him, before escorting him to Nanyuki police station. His only duty was to arrest the appellant.

9. PW4 Hannah Mageto stated that she was a Clinical Officer at Nanyuki Teaching and Referral hospital and held a diploma in Clinical Medicine and Surgery. On 24/7/2018 PW1 has presented a case of attempted defilement which occurred on 18/7/2018 at about 3.00am. She had a bruise on the neck and vaginal examinations was normal save that the hymen was absent. There was no sign of bruises recent tear or bleeding. The scratch marks on the neck were healing. She produced P3 form as an exhibit.

10. PW5 PC Jeniffer Langale stated that she was the investigating officer. After recording statements she issued the complainant with a P3 form which was filled and returned on 29/7/2019. The complainant had reported that the appellant attempted to defile her while sleeping at her grandmother house and when she screamed he abandoned his mission and fled. She sustained injury on her neck due to scratch marks. The appellant was traced and later arrested. After investigations were complete she charged him with the offence before court. She produced PW1 birth certificate as an exhibit in court. In cross examination she stated that PW1 grandmother house was semi-permanent in nature and the appellant was a neighbour to the complainant grandmother.

11. The appellant was placed on his defence and opted to give sworn evidence. He stated that he was a casual worker. He denied committing the offence as charged. Further he testified that after the material day he proceeded to Isiolo. Upon considering the evidence tendered the trial court was satisfied that the appellant attempted to rape PW1 and sentenced him to 10 years imprisonment.

Appellant Submissions

12. The appellant submitted that it was wrong to convict him when he was not positively identified by the complainant. The complainant was not clear in her mind who attacked her especially because of poor illumination. There was no voice recognition because the assailant did not talk to the complainant. It was also evident form her testimony that he house was not properly lightened. Therefore in a nutshell her entire description of her assailant failed to meet the requirements needed to hold the appellants culpable.

13. The second issue raised was that PW1 proved to be a witness who was not truthful and/or consistent. She told PW4 that she was 14 years. She gave conflicting dates of her attack as 18/7/2018 and 19/7/2018 and that her testimony was at variance with the charge sheet. These inconsistency coupled with the fact that the matter was reported 4 days later goes a long way to show that the case was framed up. Further he submitted that he charge sheet was defective. It stated that PW1 was a minor aged 13 years while infact she was 17 years old having been born on 21st September 2001. The particulars of the charge sheet on the main charge were thus defective in material particulars which was fatal to the prosecution case.

14. The final point submitted on was that no investigation was carried out by an independent investigator, the appellant wife did not write her statement and there was no witness who corroborated the appellant's evidence. The medical report too did not provide any link between the accused and PW1. The scratch marks on PW1 neck could not be used to place the appellant at the scene of the crime. The prosecution thus failed to prove the charge facing the accused beyond reasonable doubt. The evidence presented was scanty made up of mere conjectures and unproved assumptions. He prayed that this appeal be allowed and both conviction and sentence be quashed.

Respondent's Submissions.

15. The prosecution submitted that they indeed proved their case beyond reasonable doubt and there was overwhelming evidence to secure a conviction against the appellant. PW1 evidence was adequate to secure a conviction as she saw the appellant who touched her and it was her scream that made him rum away. There was ample light form the moonlight and light sneaking in through the gaps on the wall and corner. During the day she had spoken to him and he was a person she had seen. His identity was thus sufficiently proved.

16. The age of the victim too was proved by admission into evidence of her birth certificate and it confirmed that PW1 was below 18 years old. PW1 evidence was further corroborated by PW2 – PW5 and the said evidence was consistent and reliable enough to secure a conviction. The final issue raised by the appellant that the trial court failed to consider his defence too could not hold any water as the same was considered as per paragraph 34 of the proceedings. The conviction was thus safe and this appeal ought to be dismissed.

Analysis & Determination

17. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion. The court also must take into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno vs. Republic* (1927)E.A 32 & *Pandya vs. Republic* (1975) EA 366.

18. Also in *Peter's vs Sunday Post(*1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

19. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:

    a. Whether the offence of attempted defilement was proven to the required standard thereby warranting a conviction.

    b. Whether the charge sheet was defective.

    c. Whether there were inconsistencies in the evidence of a single witness.

    d. Whether the trial Magistrate failed to consider the appellants defence

    e. Whether the sentence of the Appellant should be reviewed downwards.

20. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is

possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

a. Whether the offence of attempted defilement was proved to the required standard thereby warranting a conviction.

21. Section 9(1) of the *Sexual Offences Act* provides as follows:

> (1) A person who attempts to commits an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
>
> (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

22. The ingredients for the offence of attempted defilement and defilement are similar and can be summarized as follows. Age of complainant must be proved, evidence of attempted rape or penetration must be presented and proved and finally proper identification of the perpetrator must be established

A. Age of the minor

23. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (Emphasis added).

B. Attempted Penetration, Proper Identification of the Assailant & effect of the Court Relying on the Evidence of a Single Witness

24. PW1 testified that she was 17 years old having been born on 21st September 2001. PW2 who was her mother confirmed this fact and the investigating officer PW5 produced her birth certificate into evidence as Exhibit 1. The fact that she was a minor was thus sufficiently proved as she was less than 18 years old.

B. Attempted Penetration, Proper Identification of the Assailant & effect of the court relying on the evidence of a single witness.

25. Pw1 testified that on July 19, 2018, she had been taken to hospital by her mother and later passed by her grandmother place where she spent the night. The house was a timber house and it was a one bedroomed house. The Grandmother used the bedroom, while she slept on the floor, presumable in the sitting room. As she slept at night, she realized that somebody was groping her breasts and had started to remove her beddings. She decided to feel the person and realized that he was a man. The person wore a jumper and as she felt him further she held his penis which was protruding from his trouser. She got up and attempted to run towards the door but the assailant held her back and threw her down.

26. Further PW1 testified that there was light coming in from the creeks between the timber. The light was from the moon and other light system, though inside the house there was no light. At the point of being flung back as she attempted to run away, she recognised her assailant to be the appellant, she screamed

and the appellant squeezed her throat. Her screams attracted the attention of her grandmother who asked her what was going on and she told her somebody was strangling 'her. Her grandmother did not do anything as she was old, but after that she heard the voice of the appellant's wife who too, was inquiring what was happening. The appellant at that point ran out through the back window. The appellant's wife immediately called PW1 to her house and she did not find the appellant therein. She asked where the appellant had gone to and the appellant's wife replied that he had gone to vomit. They both went round the house to check on the suspect and she spotted the appellant. She immediately informed his wife that, he was the person who had attempted to rape her. Later the same morning she was escorted by her uncle and reported the incident at the local AP camp.

27. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> 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."

28. The victim vividly testified as to how she was attacked while sleeping by the assailant and was rudely awoken up by someone groping her breasts. The assailant was a man as she also held his penis, which was protruding from his trousers. Finally, when she attempted to run away from the said person, she was held back and push down on the floor. The assailant started to strangle her to stop her from screaming. Obviously, the intruder was no a petty thief and had clear intention of defiling PW1 judged by his aggressive action against her person. This was clearly a case of attempted rape and/or defilement and were it not for PW1 screams, the assailant would have continued with his heinous crime.

29. As to identification of the perpetrator. The PW1 positively identified the Appellant as the perpetrator. She confirmed that her grandmother's house was a timber house and there was light penetrating inside the house from the moon light and outside lights. She noticed that the assailant was wearing a jumper and when she stood and attempted to escape the assailant held her and threw her on the floor. It is at that point that she realized it was the appellant. She testified that;

> " The person wore a jumper. I felt him further and I held his penis which was protruding from the trousers. I got up and tried to run away through the door, when he held me back and threw me down. It was the accused person.....
>
> "The accused wanted to rape me because his manhood was out and ready/full. I had seen the accused before night and he had spoken to me asking me about meals available at ours."

30. Further as a result of her screams PW1 was rescued by their neighbor who happened to be the appellant's wife. PW1 felt safer in her company than being left alone with her elderly grandmother. Immediately she entered the appellant's house she asked where her husband was and was told he had gone outside to vomit. They went around the houses to check on the suspect and she spotted the appellant. She immediately told the wife that he is the one who has attacked her. The following morning, she made a report to the AP camp.

31. Evidence of recognition must be carefully tested as the converse may easily cause miscarriage of justice. Courts have clearly laid down applicable principles in such cases. The Court of Appeal in the case of *Wamunga vs Republic (*1989) KLR 426 stated;

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of errors before it can safely make it a basis of conviction."

32. It was also held in *Nzelo vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 and *Republic vs Tumbull and Others* (1973) 3 All ER 549 that evidence of identification/recognition at night must be absolute and water tight to justify conviction.

33. PW1 has seen the appellant a few hours before the appellant attacked her. During the attack she initially did not know who was attempting to defile her, but she immediately recognized him when he pulled her back and threw her down on the floor. He followed it up by attempting to strangle her and obviously that was within close quarters giving the complainant ample time to see him even though the light creeping through the timber in was not the best. The appellant was further clearly identified as PW1 went around the houses to check on the suspect who attacked. This was within minutes of the attack and lol and behold, the first person they met behind the house was the appellant. PW1 immediately and without hesitation told the appellants wife that he was the person who attacked her.

34. In his submissions the appellant submitted that the trial magistrate erred in law by relying on the evidence of a single witness who lacked integrity and credibility. These submissions have no basis for the reasons discussed above. Further section 143 of the *Evidence Act* Cap 80, allowed the trial magistrate to convict the appellant based on the evidence of a single witness so long he believed the witness and record reasons for the same. The trial magistrate recorded reasons for believing PW1 in his judgment and the same cannot be faulted.

35. Finally, even if the lighting within the house was not adequate, the appellant's identification was authenticated and confirmed when PW1 in company of the appellant's wife went around the houses to search for the appellant. This was within a few minutes of the attack and on seeing the appellant, she did not hesitate to confirm that he was the assailant. This corroborated her earlier identification and conclusively proved that indeed it was the appellant who attacked the complainant.

C. Whether the charge sheet was defective.

36. The appellant submitted that, the charge sheet was defective as PW1 was stated to be 13 years old, while she testified that she was 17 years old having been born on September 21, 2001. The date of the alleged defilement differed. In the charge sheet it was stated to be on 18.7.2018, while PW1 testified that it was on July 19, 2018. These two factors made the charge sheet defective.

37. Section 134 of the *Criminal Procedure Code* provides that;

> " Every charge or information shall contain and shall be sufficient if it contains a statement of specific offence or offences with which the accused person is charged together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged"

38. The charge sheet dated August 1, 2018, did contain all the relevant information and disclosed the offence and further gave out proper particulars as was necessary to give the appellant reasonable

information as to the nature of the offence charged. Such a charge sheet cannot be said to be defective. See *Isaac omambia vs Republic* (1995) eKLR.

39. Secondly even though the charge sheet initially filed stated that PW1 was 13 years, on February 7, 2019 the state counsel applied to amend the same to change the age of the complainant to read 17 years. This application was allowed and the amended charge sheet read over to the appellant. Further even if PW1 testified that the incident happened on 19.7.2018 as opposed to July 18, 2018, that does not make the charge sheet defective as that is a minor discrepancy in the evidence tendered, which evidence must be looked at in totality. This ground of appeal fails.

D. Whether the trial Magistrate failed to consider the appellants defence and whether No investigations were carried out

40. The appellant in his defence denied committing the offence and stated that after the material day he proceeded to Isiolo. The trial magistrate did review and considered the entire spectrum of evidence presented before convicting the appellant. In particular at page 34 of the record, page 8 of the judgment he did consider the appellants defence and found as a fact that it did not add up nor raised doubt in his mind. This ground of appeal to fails.

41. It is also obvious that investigations were carried out resulting to the appellant being charged in court and witnesses coming forward to testify. As regards the medical evidence, it proved that the complainant sustained injury on her neck when being strangled by the appellant and thus was relevant piece of evidence. It corroborated PW1 evidence of being attacked and the attempted rape.

E.Whether the sentence of the Appellant should be reviewed downwards.

42. As regards finally, the appellant submitted that the sentence of 10 years was manifestly excessive and ought to be reconsidered

43. In *Maingi & 5 others vs Director of Public Prosecution & another* (Petition E017 of 2021)(2022)KEHC 13118 (KLR) Justice GV Odunga in a well-considered judgment did find that there is need to align legislations that were in existence before the promulgation of the *Constitution of Kenya 2010* with the letter and spirit of the new constitution. He further made a declaration that;

> " To the extent that *Sexual Offences Act* prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentences to impose, such sentences run foul of Article 28 of the *Constitution*. However, the courts are at liberty to impose sentences presented thereunder as long as the same are not deemed to be the mandatory minimum prescribed sentences."

44. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira vs The state of Maharastra* at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive

for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

45. In *Francis Karioki Muruatetu & another Vs Republic* the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary *Sentencing Policy Guidelines* list the objective of Sentencing at.

Paragraph 4.1 they include the gravity of the offence, the threat, of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

46. What are the relevant circumstances herein? The Appellant did seek to take advantage of a young girl and violently attempted to defile her. PW2 also testified that on the following day the appellant threatened to harm PW1. It should at this stage be noted too that the appellant probably intoxicated on the said night. This was confirmed by PW1 who testified in cross examination and stated that, "Your wife requested me to abandon this case because you were drunk, but I declined"

47. The Court of Appeal in the case of *Benard Kimani Gacheru Vs Republic* (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

48. The Appellant's only complaint is that the sentence meted out was excessive as it was the minimum sentence provided for under Section 9(2) of the *Sexual Offences Act* No 3 of 2006 and this has been declared unlawful for not giving the trial magistrate the latitude in sentencing. While this complaint of sec 9(2) of the *sexual offences Act* No 3 of 2006 may be true, it by itself does not invalidate the sentence as the trial court had sentencing discretion having considered all factors and circumstances of the case.

49. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 9(2) of the *sexual offences Act* No 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was manifestly high given a reasonable proportionality between the sentence passed and the crime committed. In *Republic vs Scott* (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

Disposition

50. The appeal as against conviction fails and is dismissed

51. As regards the sentence passed, I hereby set aside the sentence imposed on the Appellant to serve ten (10) years imprisonment and substitute it therefrom with a sentence of six (6) years imprisonment to run from the date of sentence in the lower court. This sentence will however be inclusive of the period he was in custody from July 30, 2018 to October 6, 2019, when he was sentenced pursuant to provision of Section 333(2) of the *Criminal Procedure Code*.

52. Judgment accordingly.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 5TH DAY OF MAY, 2023.

In the presence of:-

Appellant

.....For O.D.P.P

.....Court Assistant