Kamau v Republic (Criminal Appeal E018 of 2021)
[2023] KEHC 3845 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E018 OF 2021

GL NZIOKA, J

MAY 3, 2023

BETWEEN

JOHN KARIUKI KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. On May 26, 2020, the appellant was arraigned in the Chief Magistrate's court at Naivasha charged vide criminal case number Sexual Offence 29 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the said Act. The particulars of each charge are as per the charge sheet.

2. He pleaded not guilty and the case proceeded to full hearing. The prosecution case was supported by evidence of six (6) witness. In a nutshell it was the prosecution case that, on diverse dates between May 13 and 15, 2020 the appellant defiled and/or committed an indecent act with "VW" "herein the complainant". The complainant told the court that, on May 15, 2020 she was in the house washing dishes in the company of her friend MM , when the appellant, who was their neighbour called them and told them that he wanted to send them. As MM stepped out of the house the appellant closed the door and then took her to his house, removed her clothes put her on the bed and defiled her. He then released her to go home and warned her not to tell anyone what had happened or he would kill her. As a result she did not inform anyone of the incident.

3. That, on May 19, 2020, the appellant called her again to his house, removed her clothes and defiled her. Later her mother called her and inquired as to why she was not walking properly and inspected her private parts. Her mother then called Mama F and Mama M and upon inquiry the complainant told them that the appellant had defiled her. The matter was then reported to the police station. The complainant was taken for treatment, while the appellant was arrested and charged.

4. At the close of the prosecution case, the appellant was placed on his defence. He told the court that, he was arrested over an offence he did not commit because he has broken up a love affair with the complainant's mother and she was not happy and also because she wanted money to circumcise her child and when the appellant did not give her, she was not happy.

5. At the conclusion of the trial, the learned trial magistrate delivered judgment dated August 17, 2021, wherein the appellant was convicted on the main charge and sentence to serve life imprisonment.

6. However, the appellant is aggrieved by both the conviction and sentence and has filed an appeal herein on the grounds as herebelow reproduced

    a. That, the learned appellate judge erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were NOT conclusively proved.

    b. That, the learned appellate judge erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.

    c. That, the learned appellate judge erred in law and fact by sentencing the appellant yet failed to find consider his mitigating circumstances.

    d. That, I pray to be supplied with a copy of the appellate court's proceedings and its judgment.

    e. That, further grounds shall be adduced at the hearing of this appeal.

    f. That, I wish to be present during the hearing and determination of this appeal.

7. It is also noteworthy that the appellant filed amended grounds of appeal alongside his submissions, though without the leave of the court, which are as reproduced here below: -

    a. That, learned trial magistrate erred in law and facts by failing to arraign the appellant within 24 hours as required by the law.

    b. That, the medical evidence was adduced by another doctor who did not see PW1, also the medical was not conclusive since the accused was not diagnosed of any disease, so the maker of medical evidence needed to be cross-examined.

    c. That, this particular case was founded through grudge of rejection, mother of PW1 was my friend (appellant) hence this was manifest of anger.

    d. That, the case to reduce to indecent act since PW1 was neighbour so it was difficult for the two to shake as they meet.

    e. That, the sentencing was unfair, since the need to mitigate was disregarded as useless by honourable magistrate that he has no discretion to pass any sentence.

8. The appeal was disposed of vide filing of submissions wherein the appellant vide submissions filed on July 19, 2022 submitted that he was detained in police custody for eight (8) days before he was arraigned in court without any explanation being offered, which is a clear violation of Article 49 (1) (f) of the *Constitution* and therefore should lead to his acquittal. He relied on the case of *Republic vs Amos Karuga Karatu* where the court held that prosecution mounted in breach of the law was a violation of the right of the accused. That it did not matter the weight of the evidence against the accused, the prosecution was a nullity.

9. He argued that the prosecution failed to call the maker of the medical evidence denying him an opportunity to fully cross-examine PW4 as his evidence was hearsay and therefore inadmissible.

Further, that the medical evidence did not establish that the complainant was defiled and cited the case of *Arthur Mshila Manga vs Rep* (2016) eKLR where the Court of Appeal held that the medical evidence failed to confirm that the complainant was defiled.

10. Furthermore, that the evidence of the complainant was not consistent and therefore the trial court erred in relying on section 124 of the *Evidence Act* to convict him.

11. The appellant submitted that the court watered down his defence that he was framed by the complainant's mother after he rejected her advances. He also argued that the life sentence meted out by the trial court violated his right to lodge an appeal under Article 50 (2) (q) and his right to access justice under Article 48 of the *Constitution* as the sentence cannot be reviewed. That, sentencing was judicial process that should not be left to the legislature

12. He argued that he did not give his mitigation yet it is an important part of the trial process as provided for in paragraph 4.1 of the Judiciary *Sentencing Policy Guidelines*. He offered mitigation that he was a young man and that he needed to be rehabilitated and reintegrated back into society which is not possible with a life sentence.

13. He urged the court to review his sentence and imposing a sentence that gives him an opportunity to reintegrated into society and prayed that his appeal be allowed, conviction and sentence quashed and he be set at liberty.

14. The respondent on its part filed submissions dated September 7, 2022 and submitted that, the ingredients to be established are identification, penetration and age as stated in *George Opondo Olunga v Republic* (2016) eKLR.

15. It was argued that the prosecution had proved the its case to the required standard. That identification was proper and strengthened by the fact that the complainant knew the appellant for a long period of time.

16. That penetration was proved as the complainant gave several accounts of when the appellant defiled her and which was corroborated by the medical evidence adduced by PW4, Benjamin Kuria the clinical officer.

17. Further, that the age of the complainant was proved by production of her birth certificate that showed she was born on January 16, 2010 and was therefore ten (10) years old at the time of the offence. Reliance was placed on Criminal Appeal No 118 of 2013 *Evans Wamalwa Simiyu* (2016) eKLR where the Court of Appeal held that in establishing the offence of defilement proof of age was relevant in showing that the complainant was under the age of eighteen years and therefore a child as defined in the Children's Act.

18. It was submitted that the sentence of life imprisonment was in accordance with the law and that it was meted out after the trial magistrate considered the circumstance of the case and mitigation.

19. Having considered the materials placed before the court and the arguments in support thereof I find that, the role of the first appellate court as well articulated in the case of *Okeno vs Republic* (1972) EA 32, 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. 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".

20. Be that, as it may, the appellant was charged and convicted of the offence of defilement. The subject offence is provided for under section 8(1) as read with section 8(2) of the *Sexual Offences Act* as follows:

> 1 A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"
>
> 2 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.

21. Pursuant to the aforesaid, the ingredients of the offence were considered in the case of; *Agaya Roberts vs Uganda*, Criminal no 18 of 2002, and *Bassita Hussein vs Uganda* Criminal Appeal No 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age is below 18 years (iii) the accused is the culprit. (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.

22. In the instant matter the age of the child was proved by the birth certificate produced as prosecution exhibit No. 1 The certificate No xxxx, indicates that, the complainant was born on January 16, 2010. The offence is alleged to have been committed between May 13 and 15, 2020. Therefore, the child was ten (10) years and about four (4) months. The age is adequately proved.

23. As regards, penetration I find that the same is defined under section 2 of the Sexual Offence Act No 3 of 2006 as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The courts have also settled when defilement occurs in the Court of Appeal in *Erick Onyango Ondeng' v Republic* [2014] eKLR where it quoted with approval the decision of the Ugandan Court of Appeal in *Twehangane Alfred Vs Uganda*, Crim App No 139 of 2001, [2003] UGCA, 6 and held that:

> "...We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In Twehangane Alfred Vs Uganda (supra) the Uganda Court of Appeal expressed the same view as follows: "In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

24. In the instant matter the medical documents produced included a P3 form (Produced as prosecution exhibit 2). It indicates that, the hyperaemic vaginal walls with no hymenal membrane tissue was noted. Thus the hymen was missing which meant as stated in evidence, the complainant had lost her virginity. The PRC also indicated, the same finding of hyperaemic with torn membrane which was stated to be consistent with the history of defilement given. The afore finding is corroborative of the evidence of the complainant that she had been defiled. She was also noted to be unable to walk properly. Therefore, the element of defilement was proved.

25. The last issue to determine is whether it is the appellant who defiled her. An analysis of the evidence adduced reveals that, the complainant testified that, on two occasions the appellant defiled her. Apparently the incidents were taking place during the day and more so the appellant was known

to the complainant as they were neighbours staying in the same plot. The complainant referred to the appellant by name as one "Kariuki". Furthermore, from the evidence of PW2 MMN and PW3 MWG when they asked the complainant what happened. She told them that, it was the appellant who was their neighbour who had defiled her. That is the same evidence she gave in court and positively identified the appellant in the dock. The appellant's cross-examination of the complainant did not shake her evidence. He admitted that, there was no grudge with the child. In fact, the issue of a love affair came during the cross-examination of the complainant's mother. He did not even cross examine her on the alleged issue of money. Even then, the alleged love affair between PW2 and the appellant and what might have transpired between them does not negate the evidence that the complainant was defiled. In fact on the flip chart the appellant might have defiled the complainant due to that break up with the mother, an revenge, if such relationship existed at all.

26. Be that as it were, the provisions of section 124 of the *Evidence Act* states:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 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.

27. Contrary to the finding of the trial court, that the section does not apply where the child gives an unsworn statement I find that, it does apply and in any case the child's evidence was corroborated by PW2 and PW3 as to whom she said committed the offence and the medical document.

28. I have considered the defence by the appellant and I find that, it did not rebut the prosecution case as to what happened to the complainant on the material dates. He simply addresses what he perceived to be the reason for his arrest, a grudge between him and PW2 over a love relation gone sour. I am therefore satisfied that, the learned trial magistrate arrived at the correct decision on conviction. I only note the dates when the offence allegedly occurred are at variance with the evidence in that, the charge sheet indicates the dates as between May 13 and 15, 2020, but the complainant evidence was that she was defiled on May 15 and 19, 2020. However, I don't find the variance to be fatal to the prosecution case, as the date of May 15, 2020 is covered and defilement on that date per se is sufficient to prove the charge.

29. Finally, as regard, the sentence meted out, I find that the law provides for a sentence of life imprisonment and that is the sentence meted out. I therefore find no merit in this appeal and I accordingly dismiss it in its entirety.

DATED, DELIVERED AND SIGNED ON THIS 3RD DAY OF MAY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Appellant present in court virtually

Mr Atika for the state

Ms Ogutu- Court assistant