Kanya v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 18596 (KLR) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18596 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E022 OF 2022

RE ABURILI, J

JUNE 12, 2023

BETWEEN

EVANS KANYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. F. Rashid on the 23.6.2022 in the Senior Principal Magistrate's Court at Winam in Sexual Offence Case No. 13 of 2020)

JUDGMENT

Introduction

1. The appellant herein Evans Kanya was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual Offences Act* No 3 of 2006.The particulars of the charge were that on the January 26, 2020 in Kisumu Central sub-county within Kisumu County, he intentionally caused his penis to penetrate the vagina of SNA, a child aged 12 years. The appellant also faced the alternative charge 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 charge and the matter proceeded to trial where the prosecution called five (5) witnesses. Paced on his defence, the appellant gave sworn testimony denying the charges against him.

3. In her impugned judgement, the trial magistrate found that the prosecution had proved its case against the appellant herein beyond reasonable doubt and after considering the appellant's mitigation plus the fact that the appellant was a first time offender, she sentenced the appellant to serve 10 years' imprisonment.

4. Aggrieved by the conviction and sentence, the appellant filed his petition of appeal dated June 27, 2022 on the June 30, 2022 raising the following grounds of appeal:

    i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

    ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.

    iii. That the court be pleased to consider that the investigation tendered was shoddy.

    iv. That the court be pleased to consider any aspect or condition that shall not occasion prejudice.

    v. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in article 50 (2) (p) of the *Constitution*.

    vi. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. In his brief submissions, the appellant urged the court to apply the provisions of section 333 (2) of the *Criminal Procedure Code* and have his sentence run from the time that he was in custody. In other words, the appellant did not submit on the appeal regarding conviction

The Respondent's Submissions

7. The respondent submitted that all the ingredients of the offence of defilement were proven beyond reasonable doubt. On the age of the complainant, it was submitted that the age of the complainant at the time of defilement was 12 years as estimated in the charge sheet, PRC Form and P3 form although no birth certificate or documentary evidence was produced to support the same. Reliance was placed on the case of *Joseph Kieti Seet v Republic* [2014] eKLR where it was held interalia that age of a victim can be determined by medical evidence and other cogent evidence.

8. On the identity of the appellant as the perpetrator, it was submitted that the appellant and the victim were well known to each other going by the testimonies of PW3, PW5, PW4 and the complainant PW1.

9. The respondent submitted that penetration was proved beyond reasonable doubt and corroborated by the medical evidence contained in the PRC form and the P3 form.

10. The respondent further submitted that the appellant's defence was a mere denial that failed to shake the solid evidence tendered against him and that the defence was rightly dismissed by the trial magistrate.

11. On the sentence imposed on the appellant, it was submitted that the 10-year imprisonment was in line with the sentence prescribed by the act and further that the appellant had failed to demonstrate how the same was harsh and excessive considering the circumstances of the case.

Role of the first appellate Court

12. This being the first appeal, this court has the duty to re-evaluate and analyze the evidence adduced before the trial court in detail and reach its own independent conclusions bearing in mind that it

neither saw nor heard the witnesses as they testified and as to see their demeanour. The said duty was espoused by the Court of Appeal in the case of *Mark Oiruri Mose v Republic* [2013] eKLR, in the following words: -

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Evidence at the Trial Court

13. PW1 Joram Ochieng Orwa, a teacher at [Particlars Withheld] school testified that on the January 26, 2020 one of the children named RA approached him and informed him that she had found one of her friends being defiled. It was his testimony that R was in class 6 and the victim in class 1.

14. PW1 testified that he went with R and met the gate keeper and complainant coming from the toilet. He further testified that he assessed the complainant and found dust on her head and on speaking with her, she said that 'nani' had defiled her. He testified that the complainant did not mention the appellant as she did not know his name.

15. PW1 testified that he informed the chaplain, his wife and the matron then they reported the incidence to Kondele Police Station and then took the complainant to hospital at JOOTRH where the complainant was assessed and said to have been defiled. It was his testimony that the appellant was found defiling the complainant by RA. He further testified that he knew the appellant as he used to bring him milk and was his friend before the incident.

16. In cross-examination PW1 reiterated that the appellant was seen by RA and that he did not witness it as he was in the hall when the incident happened.

17. PW2 No 76767 PC Martin Godfrey Mwinyi testified that on the January 26, 2020 he was in his office when a teacher from [Particulars Withheld reported that the complainant had been defiled by the appellant herein in a toilet in the school. He testified that he gave them a P3 form. He further testified that the complainant was 12 years at the time of defilement.

18. In cross-examination PW2 stated that the complainant was taken to hospital. He further stated that the appellant was brought to the station by a crowd and that he was identified by the minor and later arrested. He further stated that the appellant was taken to hospital for examination at JOOTRH.

19. The complainant was taken through a *voire doire* and testified as PW3. She testified that on the January 26, 2020 she was in church at 7pm when she went to a toilet within the church compound. She testified that the appellant followed her, locked the door and slept on top of her in the toilet. It was her testimony that the appellant touched her breasts, removed her pant and inserted his penis in her private parts.

20. The complainant stated that the appellant ran away when he saw someone. She testified that the appellant used to stay at the school compound. It was her testimony that the teacher took her to hospital where she was examined by a doctor. PW3 identified the appellant as the person who defiled her. She further testified that they were found in the toilet by A who found the appellant defiling her.

21. In cross-examination PW3 reiterated her testimony and stated that the toilet was a distance from the church.

22. PW4 RA was also taken through a *voire doire* and gave sworn testimony that on the January 26, 2020 at 9am, they were in the church with the chaplain and teacher Mr Orwa. She testified that she went to the toilet where she found the appellant and PW3 in the toilet with the appellant on top of the complainant defiling her.

23. It was her testimony that she ran to inform Mr Orwa. She testified that the complainant did not have a pant whereas the appellant had removed his clothes up to the knees. She testified that the appellant used to stay in school as a gardener and that the appellant ran away after the incident but threatened her before running away. She testified that she assisted the complainant who was still on the floor to wake up.

24. PW4 reiterated her testimony in cross-examination. In re-examination she testified that she used the next toilet and that she saw the legs of the appellant and complainant next to the door and on opening the door found them.

25. PW5 Dr Lucy Ombok testified that she filled the P3 form for the complainant who went to hospital after changing clothes and reported that she was going to the toilet when she met with one 'mtu wa ng'ombe' who pinned her down, undressed her and defiled her using his penis.

26. PW5 testified that the complainant was mentally challenged and withdrawn and that she had sustained injuries on the right ear, an injury that was approximately 2 days and which she had sustained when she was forced to lie down. She testified that the complainant was given PEP and STI emergency contraceptives.

27. It was her testimony that on genital exam, she found the same was normal with a bruise that was healing on the vagina and a broken hymen. She also produced the PRC form filled by her colleague Belinda that had the same history as the P3 form. She produced the PRC as PEx1 and the P3 as PEx2.

28. In cross-examination PW5 stated that the she examined the complainant and found that she had bruises on her vagina. She stated that the appellant was not examined.

29. Paced on his defence, the appellant gave a sworn testimony that on the January 26, 2020 a lady employed at the school called him and said that she wanted to employ him and gave him work. It was his testimony that on the March 3, 2019, a lady came and took him to the school, [Particulars Withheld], where he was to work taking care of animals.

30. The appellant denied committing the offence and stated that he was arrested at 6pm and taken to Kondele Police Station. He stated that he was a family man with 7 children. It was his testimony that he knew the complainant but did not know her.

31. In cross-examination the appellant stated that on the day of the alleged incident, he was working at [Particulars Withheld].

Analysis and Determination

32. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. The issues for determination emanating therein are as follows;

    a. Whether the prosecution's case was proved beyond reasonable doubt and

    b. Whether the sentence imposed on the appellant was excessive and harsh.

Whether The Prosecution Proved Its Case Beyond Reasonable Doubt

33. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act* and an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

34. This being a case of defilement, it is trite law that the ingredients of an offence of defilement be proved, which are; identification or recognition of the offender, penetration and the age of the victim.

35. The age of the minor was not in doubt. Though she testified while under voire doire examination that she was eleven years old, her estimated age as recorded in the charge sheet, P3 form and PRC form was stated as 12 years old.

36. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR it was held:

> " ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

37. Further, the appellant did not dispute the age of the victim. In the case of *Joseph Kieti Seet v Republic* [2014] eKLR, HC at Machakos, criminal appeal No 91 of 2011, the learned Mutende, J., held as follows:

38. "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal criminal appeal No 2 of 2000. It was held thus:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

The foregoing holdings are applicable in the instant case in various ways. At the trial, PW 2, the complainant herein stated that she was 12 years old. Both PW 3 and PW 4 who were the complainant's biological parents stated that the complainant was aged 12. On the other hand, the charge sheet indicated that the complainant was aged 12 as well the P3 form that was produced in court as P Exhibit 1.

Furthermore, the trial court which had the opportunity of seeing PW2 did not doubt her age. PW2's age was also not set on a borderline. I would have no reason to doubt that that was her age."

39. In this case the complainant's estimated age as recorded in the charge sheet, P3 form and PRC form was stated as 12 years old and further it was the testimony of PW2 and PW5, who examined the complainant that she was 12 years old.

40. I am thus satisfied that the age of the complainant was proved to be 12 years old as at the time of the incident.

41. On penetration, section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person." See *Mark Oiruri Mose v R* [2013] eKLR.

42. The complainant testified firmly how the appellant followed her to the toilet, locked the door, pushed her to the ground, fondled her breasts, removed her pants then inserted his penis inti her vagina.

43. Her testimony was corroborated by that of PW4 who saw the appellant on top of the complainant defiling her and further by the medical evidence adduced by PW5 Dr Ombok who testified that the complainant and bruises on her vagina as well as a torn hymen.

44. In his defence, the appellant denied committing the offence.

45. Section 124 of the *Evidence Act* Laws of Kenya provides that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where evidence of alleged victim 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, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

46. Despite the provisions of section 124 of the *Evidence Act*, the complainant's testimony remained unchallenged and was corroborated by PW4 and PW5 Dr Ombok who examined the minor at the hospital at JOOTRH.

47. I thus find that the prosecution proved penetration beyond reasonable doubt.

48. As to whether the appellant was the perpetrator, the appellant was well known to the complainant. She testified that the appellant used to stay at the school compound. PW4 also testified that the person she saw defiling the complainant used to stay at the school as a gardener. In her testimony, PW5 testified that the complainant informed her that she was defiled by 'mtu wa ng'ombe'. The appellant despite denying committing the offence testified that he was employed at the school where he used to take care of animals.

49. From the record it is evident that the appellant was well known to the complainant. The evidence further shows that it was the appellant who was identified as the one who was in the toilet when the complainant was being defiled.

50. Accordingly, I find that the prosecution proved the identity of the appellant beyond reasonable doubt.

51. The upshot of the above is that the prosecution proved their case beyond reasonable doubt.

Whether The Sentence Imposed On The Appellant Was Excessive

52. The punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a sentence of 20 years or more. The evidence in this case discloses that the victim was in that age bracket as can be seen from the charge sheet where the applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*.

53. In his mitigation the appellant pleaded for leniency on the grounds that he had a family and children and thus sought a non-custodial sentence. In considering the same, the trial magistrate sentenced the appellant to 10 years imprisonment.

54. It is trite that sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R* and *Wilson Waitegei v Republic* [2021] eKLR)

55. In this instance, the appellant obviously took advantage of a 12-year-old school going girl and perhaps put to rest all her ambition for further studies and career. The effect of the offence on the minor are long lasting and the psychological effect is even worse. I find the sentence of ten years' imprisonment that was meted herein as proper and lawful.

56. The appellant further submitted and urged the court to have his sentence comply with section 333 (2) of the *Criminal Procedure Code*. Section 333(2) of the *Criminal Procedure Code* provides: -

> " Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

57. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

58. In the instant case, the court record and specifically the charge sheet brought against the appellant show that he was arrested on the January 26, 2020 and on the January 28, 2020. two days later, the trial court granted him Bond of Kshs 200,000. The trial record reveals that the appellant stayed in custody till sometime on August 23, 2021 when the bond having been reviewed to a cash bail of Kshs 80,000, the appellant managed to secure his release.

59. According to the Judiciary Sentencing Policy Guidelines:

> " The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

60. The appellant was sentenced on the June 23, 2022 having been arrested on January 26, 2020 and released on cash bail on August 23, 2021 and thus spent 18 months and 27 days in custody.

61. Accordingly, this appeal is partially successful to the extent that the appellant's sentence is revised to take into account the 18 months and 27 days that the appellant served in custody.

62. The appeal against conviction and sentence is dismissed save that the sentence imposed shall take into account the 18 months that the appellant spent in custody upon his arrest on January 26, 2020 until his release on cash bail on August 23, 2021.

63. This file is closed. I so order.

Dated, Signed and Delivered at Kisumu this 12th Day of June, 2023

R.E. ABURILI

JUDGE