Kipketer v Republic (Criminal Appeal E028 of 2021)
[2023] KEHC 18727 (KLR) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E028 OF 2021

RN NYAKUNDI, J

JUNE 12, 2023

BETWEEN

HOSEA KIPKETER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Coram: Before Justice R. Nyakundi

Cheruiyot Melly & Co. Advocates

1. The appellant was charged 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. The particulars of the offence were that on the 8th Day of January ,2019, at Kemelo Location within Nandi County intentionally and unlawfully caused his penis to penetrate the vagina of JBV, a child aged 13 years. Alternatively, he faced a charge of committing an indecent act with a child in violation of section 11 of the *Sexual Offences Act* No.3 of 2006 on the even date at the aforementioned locality.

2. The accused pleaded not guilty and the matter proceeded to full hearing. Upon considering the testimonies of the witnesses and the evidence before the court, the trial magistrate was satisfied that the prosecution had proved its case to the required standard for the main charge and convicted the accused. He was sentenced to serve 20 years imprisonment.

3. Being aggrieved by the sentence and conviction, the appellant instituted the present appeal vide a petition of appeal dated 6th October 2021 premised on the following grounds;

    1. That the Learned trial magistrate erred in law and facts by failing to properly evaluate the evidence before her thus reaching an erroneous decision.

2. That the trial magistrate erred in law and fact by failing to consider that the Appellant samples were not subjected to forensic testing to confirm that he was the one who committed the offence as required by section 36 of the *Sexual Offences Act*.

3. That the learned magistrate erred in law by convicting the Appellant on an incurably defective Charge with the resultant miscarriage of justice on his part.

4. That the learned magistrate erred in law and fact by arriving at a conviction after the Prosecution's failure to prove their case beyond reasonable doubt as its evidence was entirely contradictory, inconsistent and insufficient to warrant a conviction.

5. That the learned magistrate erred in law and fact by failing to consider the evidence of the Complainant with circumspection taking into account the discrepancy in the evidence by the Prosecution witnesses and the Defence but raking the same as gospel truth thereby reaching erroneous decision.

6. That the trial learned magistrate erred in law and fact in relying on extraneous issues in convicting the Appellant wherein ah the ingredients of the Offence were not proved.

7. That the learned magistrate erred ill law and fact in dismissing the Defence which was advanced by the Appellant which Defence was cogent in light of apparent discrepancy in the Evidence of Prosecution witnesses.

8. That the learned magistrate erred in law and fact in dismissing the Defence which was advanced by the Appellant which Defence was cogent in light of apparent discrepancy in the Evidence of Prosecution witnesses.

9. That the trial magistrate erred in law and in fact in convicting and sentencing the Accused Person without any basis.

10. That the trial magistrate erred in law by engaging into speculation as a basis of conviction and sentence against the Appellant.

3. The appeal was prosecuted by way of written submissions.

Appelant's Case

4. Learned counsel for the appellant filed submissions on 6th February 2023. Counsel submitted that the prosecution failed to prove its case to the required standard. He urged that when the Appellant was called upon to take plea, he denied the charges facing him before the trial Court. When again called upon to make his defence, the Appellant contested that he did not defile the Complainant. In his appeal he similarly submits that the allegations against him were not substantiated beyond reasonable doubt since the prosecution did not discharge its mandate requiring proof beyond reasonable doubt. Counsel urged that the trial Court shifted the burden of proof from the Prosecution to the Accused when it found that the Accused Person had defiled the Complainant when he was not subjected to medical examination to ascertain whether he was indeed the one who defiled the Complainant.

5. Counsel faulted the identification of the appellant by recognition. Further, while referring to the element of penetration, he urged that there was a doubt created by the Prosecution witnesses as to whether the Appellant was with the Complainant alone on the material day. The Appellant denied ever being with the Complainant in fact he explained his absence at the crime scene but the Trial Court disregarded this by blatantly. He submitted that the Court

relied on the testimony of the Complainant's grandmother who alleges to have woken up late in the night to answer a call of nature when she bumped into the Complainant sleeping on the sofa while her legs spread apart. That is the moment she allegedly noticed blood oozing from the Complainant's genitalia prompting her to question what had happened to her. That is when she allegedly revealed what had happened to her.

6. Learned counsel submitted that the discrepancies in the Prosecution case are of such a nature as would create a doubt as to whether there was in fact penetration, and, whether the same was by the accused. Further, that the Prosecution could then not have discharged the burden of proof to the required standard in view of these discrepancies. He cited the case of *John Nyaga Njuki & Others v Republic* Nakuru Criminal Appeal No. 160 of 2000 [2002] 1 KLR; [2002] eKLR in support of his submission.

7. It is the appellant's case that the clinical officer who examined the complainant did not comment on the contents in Laboratory Examination Report and whether samples were extracted from the Appellant for comparison purposes, in fact the Appellant was not subjected to any medical examination to ascertain the allegations of a penetrative act against him. Further, that the 1st investigating officer did not find the appellant with the complainant and that he acted through a complainant who pointed out the appellant's house for purposes of arrest. Counsel submitted that eventually, another Investigating Officer tendered evidence on behalf of the former for purposes of presenting a birth certificate only. He did not comment on why the Appellant was not accompanied to hospital in company of the Complainant and admitted that there was no specimen comparison done during the investigations. During trial it was not denied by the Investigating Officer and the Clinical Officer that the Appellant was not subjected to medical examination alongside the Complainant. It is the appellant's contention that he was prejudiced as a result of lack of a conclusive Medical Report.

8. Learned counsel for the appellant cited section 36 of the *Sexual Offences Act* and submitted that the Appellant was not medically examined to ascertain whether he was indeed the one who committed the offence in question as the credibility of the Prosecution witnesses especially the Complainant's and the Clinical Officer's was questionable and the trial Court could then have accorded him a benefit of doubt.

9. Learned counsel submitted that the evidence of PW1 contradicted the evidence of PW2 as she said that she conveyed the message about her being defiled by the Appellant whereas PW2 said on the material day she woke up at mid-night and that is the time she allegedly came to know about the incident. PW1 testified that the Appellant was not at her grandmother's place after the incident but PW2 contradicts this testimony by saying that the Appellant came at 7 pm and left at about 9 pm. He urged that in the face of the doubtful testimony of PW1 and the manifestly inconsistent and contradictory evidence that followed, the lack of forensic testing of the Appellant's samples affected the credibility of the evidence before the trial Court. He submitted that the Appellant ought to have been subjected to a forensic testing to establish and/or ascertain his involvement in the incident beyond reasonable doubt hence the failure by the State to do so even with an opportunity to rendered its case fatal.

10. The appellant urged that the charge sheet was defective for failing to accord with the evidence adduced at the trial hence the trial Court erred in convicting and sentencing the Appellant based on such a Charge Sheet. Further, that it is the contention of the Appellant that if the Respondent had a reason to believe that the Complainant was indeed 13 years then he was charged under the wrong section of the law. He maintained that it is mandatory that the legal provision creating the offence should be read alongside the specific penal section failure which

it renders the Charge Sheet fatally defective. Counsel submitted that the Magistrate in her Judgment acknowledged that the Appellant was charged under the Offence Section read with the wrong Penal Section and as such the defect is not curable. He cited the case of *Peter Ngure Mwangi v Republic* [2014] eKLR and urged that the Prosecution was bound by the charges the Appellant was called upon to answer. Therefore, convicting the Appellant on a Charge that does not inform the trial process and subsequently sentencing him in a contrary Penal Section denotes an illegality which the Appellate Court should sanction as this resulted to a miscarriage of justice.

Analysis & Determination

11. This being a first appeal, I am guided by *Okeno v Republic* [1972] EA 372 where it was stated that:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantitlal M Ruwala v R*, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."

Upon considering the petition of appeal and the submissions thereto, the following issues arise for determination;

1. Whether the charge sheet was defective
2. Whether the prosecution proved their case to the required standard
3. Whether the conviction and sentence should be set aside

Whether the charge sheet was defective

12. The current approach on defective charge sheets is best exemplified by the principles in *Sigilai v Republic* [2004] 2 KLR 480 held as follows:

> " The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

The courts have also recognised the expressed provisions in section 134 of the *CPC* to the effect that:

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

13. The appellants' contention on this ground was that the charge sheet charged him with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* which state as follows;

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon convicted be sentenced to imprisonment for life.

14. The evidence on record being a birth certificate that was produced by PW5 proved that the complainant was 13 years old as at 8th January 2019, the material date of the offence. The trial court acknowledged that the appellant had been charged under section 8(2) and not 8(3) of the *act*.

15. It is evident that there was a defect in the charge sheet however, whether such defect shall cause a court to interfere with the sentence or order passed by the trial court is another issue altogether. In this regard I am guided by section 382 of the *Criminal Procedure Code* which provides in part:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice ... "

16. In the case of *Edward Katana Safari v Republic* [2015] eKLR, the court of Appeal stated;

> " The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of *J.M.A v R* [2009] KLR 671, it was held *inter alia* that:
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> > " It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the *Criminal Procedure Code* was meant to cure such an irregularity where prejudice to the Appellant is not discernible"

17. The purpose of the determination of the age of the complainant serves the purpose of determining the length of the sentence to be meted out. Further, in light of recent jurisprudence on mandatory sentences, the appellant cannot be said to have suffered any miscarriage of justice by the mix up.

18. Whereas the charge sheet was defective, I find that the same did not occasion a miscarriage of justice as the trial court took into consideration the correct age of the minor when sentencing the appellant.

Whether the prosecution proved its case to the required standard

19. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients

are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (see *George Opondo Olunga v Republic* [2016] eKLR)

Age of the Complainant

20. In *OA v Republic* [2019] eKLR it was stated as follows: -

> "It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

21. The age of the complainant was proved by production of the birth certificate produced by PW5. She was found to be 13 years old at the time of the offence.

Identification

22. The Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 426 stated as follows;-

> "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 error before it can safely make it the basis of conviction."

23. The appellant was identified by recognition as he was a neighbour. Further, the incident occurred during the day therefore there was sufficient lighting to identify the appellant. His identity was corroborated by the evidence of PW2.

Penetration

23. Penetration was proved by the medical evidence of PW5 who examined the complainant. This corroborated the evidence of the complainant on the act and the evidence of PW2 who found the complainant bleeding from her private parts.

24. It is my considered view that the prosecution proved its case beyond reasonable doubt.

Whether the sentence and conviction should be set aside

25. The fundamentals to be taken into account by the trial courts in sentencing are pursued by applying one or more of the following objectives:

    a) Denunciation

    b) Deterrence

    c) Separation

    d) Rehabilitation

    e) Reparation

    f) Offender-victim-community restoration

26. The other factors listed below are relevant to the exercise of the courts remedial discretion on sentencing. The grounds for arriving at a fair and just decision may overlap but ultimately the question is whether the final verdict on the sentence to be imposed is clear, consistent, and proportionate to the crime committed. Therefore these additional principles must be taken into account by the various courts in assessing the legality or validity of a sentence.

    a) The principle that sentences should be increased or reduced in accordance with the existence of aggravating and mitigating circumstances

    b) The principles of parity

    c) The principles of totality

    d) The principle of imposing the least restrictive appropriate sanction

    e) The principle of restraint in the use of imprisonment, with particular attention to the circumstances of Aboriginal offenders

27. Backed and grounded majorly in the above principles and the statutory framework the Appellant has not met the criteria for review of his sentence.

28. As the prosecution proved its case to the required standard I find no reason to interfere with the same. further, the trial court upon finding that the appellant should have been charged under section 8(3) of the *Sexual Offences Act*, sentenced him to 20 years' imprisonment. section 8(3) of the *Sexual Offences Act* states;

    (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.

29. In my considered view the sentence was commensurate with the offence committed and I shall not interfere with the same save for the emphasis that the effective date of 11th January 2019 be complied with inconsonant with the original order of the trial court. The appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12TH DAY OF JUNE 2023

.....

R. NYAKUNDI

JUDGE