Mwaniki v Republic (Criminal Appeal E064 of 2022)
[2023] KEHC 19135 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E064 OF 2022

LM NJUGUNA, J

JUNE 14, 2023

BETWEEN

DENNIS MURIMI MWANIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein filed the petition of appeal on 14.12.2022 wherein he has challenged the conviction and sentence by the trial court in the Senior Principal Magistrate's Court at Runyenjes in *Sexual Offence* Case No. E11 of 2022. The trial court convicted the appellant of the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offences Act* No. 3 of 2006 and he was sentenced to serve ten (10) years imprisonment.

2. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as enunciated on the face of the amended petition of appeal.

3. At the hearing of the appeal, the parties chose to rely on their written submissions to argue the appeal.

4. The appellant submitted that the trial court failed to note that the evidence by the prosecution was insufficient to form the basis of a conviction. That the age of the complainant is an essential ingredient of the offence of defilement and the same forms a vital part of the charge and in as much as the same was determined by the birth certificate, the same ought to have been verified by conducting a DNA. Further, it was submitted that penetration was not proved as the offence was allegedly perpetrated on diverse dates between 24th and May 25, 2022 at unknown time contrary to the fact that the date and time of the offence of the charge ought to be clearly indicated on the charge sheet. That the doctor's evidence was contradictory and that the same was not corroborated by the complainant's evidence to sustain the said charge.

5. The appeal is opposed by Ms. Mbevi, the Learned Prosecution Counsel who submitted that the same is devoid of merit and thus should be dismissed. The respondent submitted that all the ingredients of the offence of defilement were proved and relied on the case of S*imiyu & Another v Republic* [2005] eKLR. It was submitted that penetration was proved as the complainant vividly described what happened when she was in the house of the appellant. That she slept in the house of the appellant and wherein they had sex on the first night; additionally, PW1 produced P3 and PRC Forms as exhibits 1 and 2 respectively capturing the healed laceration on the complainant's hymen at 9 and 11 o'clock and lower part of her vagina which appeared inflamed. On the age of the complainant, it was submitted that the complainant was aged seventeen (17) years; PW4 testified that the complainant was aged 17 years and a birth certificate produced as Exhibit 3 which confirmed that the complainant was aged 17 years and 5 months. Reliance was placed on the case of *Faustine Mchanga Vs Republic* [2012] eKLR. Further, it was stated that the appellant was positively identified in that PW4 stated how she borrowed a stranger a mobile phone and called the appellant herein. That thereafter, she took a bodaboda to the home of the appellant and the same therefore proves the fact that they were familiar with each other. In relation to sentence, it was submitted that the appellant was charged under section 8(4) of the SOA which anticipates the age bracket of 16 and 18 years and provides for minimum and mandatory sentence of fifteen years. Reliance was placed on the case of Shadrack Kipchoge Kogo v Republic eKLR wherein it was pointed out that in order for a trial court's sentence to be overturned, it must be shown that the trial court made an error in law, considered irrelevant factors or that the sentence was excessive and disproportionate. This court was thus urged to dismiss the appeal herein.

6. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on both conviction and sentence wherein the appellant contends that his conviction was not safe and further that, his sentence was harsh and excessive under the obtaining circumstances.

7. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno Vs Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v Republic* [2005] 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter, the court should draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR).

8. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

9. It must be appreciated that under section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of *Woolmington Vs DPP 1935 AC 462 and Miller Vs Minister of Pensions* 2 ALL 372-273.

10. In the case that was before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. In *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013,

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

11. The question therefore is whether the above elements were proved to the required standards.

12. On the age, it's trite that the same forms a vital part of the charge. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. It was argued that in as much as the birth certificate was produced, the prosecution ought to have conducted DNA in order to satisfactorily prove the age.

13. A child is defined as a person under the age of eighteen years. Is the complainant herein a child?

14. The complainant testified that she was aged Seventeen (17) years and the same was corroborated by the birth certificate which indicated that the complainant was born on 01.11.2004 and the offence herein was allegedly perpetrated on diverse dates between 24.05.2022 and 25.05.2022. A simple arithmetic, therefore, shows that at the time of the offence herein, the appellant was aged 17 years, 5 months and 24 days.

15. In the case of *Edwin Nyambaso Onsongo v Republic* [2002] eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that:

> ....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, guardian or medical evidence among other forms of proof.....

16. As such, I am satisfied that the complainant was a minor which satisfies the legal requirement.

17. In regards to whether there was penetration, section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

18. In this case, the complainant testified how she had a confrontation with her mother and thereafter left to mama Cate where she stayed for two days. That on 24.05.2022, she stayed in the house of the appellant for two days during which time she had sex with the appellant.

19. The complainant gave a graphic account of all that transpired. Even without corroboration, her evidence was cogent enough for the court to return a verdict of guilty. It is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. (See *George Kioji v Republic* Nyeri Criminal Appeal No. 270 of 2012 (unreported). The court was of the view that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."].

20. Further, PW3, testified that upon examination of the complainant, he found that the complainant was defiled and that there was a whitish discharge from the vagina of the complainant. That the

complainant had previously had sexual encounters prior to the defilement herein. He stated that she had healed laceration on her hymen at 9.00 O'clock and 11O'clock, while the lower part of the vagina was inflamed. He further stated that lab tests were done which all turned negative save for pregnancy which returned positive. He produced the PRC and P3 Forms which returned a positive feedback that indeed the minor had been defiled.

21. On identification, the appellant herein was someone known to the complainant for she testified that the appellant was her friend and that they previously met at school games. The appellant equally testified that he knew the complainant as they were friends. Additionally, he testified that the two days that the complainant stayed at his house, they had sex as the complainant had told him that she was out of school and that she was aged seventeen and a half. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552 where he said:-

> " Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

22. It is my finding that the appellant in the instant case was properly and positively identified by the complainant for he was a boyfriend to the complainant.

23. On whether the evidence and the defence of the appellant was considered, from the record, the appellant in his sworn evidence did not deny having sex with the complainant citing reasons that he was under the impression that the complainant was no longer going to school and further, that the complainant told him that she was aged seventeen and a half; and as correctly noted by the trial magistrate in her judgement, the appellant herein did not cast any doubt on the prosecution's case. Therefore, the ground fails.

24. On the ground that medical examination was not conducted to corroborate penetration, I seek for guidance from the case of *Martin Okello Alogo v Republic* [2018] eKLR, cites the case of *Williamson Sowa Mbwanga v Republic* where the Court of Appeal stated:

> " .....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.....It is partly for this reason that Section 36 (1) of the SOA is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

25. In the case herein, penetration was proved by the evidence of the complainant, the appellant herein and the medical officer. As such, the allegation by the appellant that the same was not proved is thus baseless.

26. On why the medical examination was conducted on 03.06.2022 almost a week after the alleged perpetration of the offence herein, from the evidence adduced by the medical officer, he was categorical that he examined the complainant on 03.06.2022 after referral by the OCS and found that she had previous sexual encounters before the case herein. That he signed and dated the PRC Form; he also filled the P3 form which was identical to the PRC Form which he produced as PEx 1 and PEx 2 respectively. It therefore follows that the alleged medical examination that the appellant has referred

this court to was indeed produced before the court and the same formed the basis upon which the court based its determination.

27. The appellant was sentenced to serve 10 years imprisonment; Section 8(4) states that: a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

28. As I interrogate the above against the position adopted by the Court of Appeal for East Africa in the case of *Ogola S/O Owoura v Reginum* (1954) 21 270, the court was of the view that;

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., [1950] 18 E.A.C.A 147:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewky, [1912] C.C.A. 28 T.L.R. 364."

29. It is trite that sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court. [See Court of Appeal decisions in *Dismas Wafula v Republic [2019] eKLR and Eliud Waweru Wambui v Republic* [2019] eKLR].

30. In the given circumstances, therefore, I find that the trial court exercised its jurisdiction appropriately and therefore find no merit in the appeal both on conviction and sentence. The same is hereby dismissed.

31. It is ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent