Anyango v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 20503 (KLR) (21 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E050 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

NICHOLAS ODHIAMBO ANYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal herein emanates from the conviction and sentence by the trial court Hon. V.M. Kosgei PM in Karatina MSCO.E009/2020. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No.3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006. The particulars of both the main and the alternative counts were well stated on the charge sheet.

2. The appellant pleaded not guilty and the matter proceeded to full hearing and wherein the prosecution called six witnesses in order to prove its case. The appellant was placed on his defence and tendered his evidence.

3. The trial court considered the evidence tendered by both parties and on 27/8/2021 the trial court delivered its judgment where the appellant was convicted and subsequently sentenced to 15 years imprisonment.

4. It is this conviction and sentence that the appellant is challenging before this court by way of petition of appeal filed in court on November 14, 2022. He further filed an amended petition of appeal together with his written submissions. Basically, the appellant's grounds of appeal are that the trial court erred in law and in fact;-

    i. In failing to appreciate that the victim demonstrated doubtful integrity and her evidence was doubtful.

ii. By misdirecting herself that there was forceful penetration yet the conduct of the victim was consistent with an adult; and

iii. By failing to appreciate that the prosecution's evidence was riddled with discrepancies and the proof was below the required standards.

5. The appeal was canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

6. The appellant submitted that PW1's evidence was not credible and the trial court ought not to have relied on the same. Further that there was no forceful penetration and the victim behaved more like an adult than a minor. That she moved from her parent's home to the appellant's place in his absence and further voluntarily eloped with the appellant after duping him that she was of adult age and pregnant. He submitted that the fact that the victim left a note as to where she had gone portrays a person who was a willing partaker and not a person who was forced and she conducted herself as appellant's wife. The appellant relied on the case of *Martin Charo v Republic* (2016) eKLR. He thus invited this court to consider the defense under section 8 (5) and (6) of the *Sexual Offences Act*. He further submitted that PW1's evidence contradicted that of PW2 and PW3 as the latter evidence indicated that PW1 took her clothes and left voluntarily and as thus the prosecution's evidence was contradictory and was not sufficient to prove the prosecution's case to the required standards being that of beyond any reasonable doubts. Reliance was placed on the case of *Woolmington v dPP* (1935) AC 462 amongst other authorities. The appellant as thus prayed that the appeal do succeed.

7. On behalf of the respondent, it was submitted that the prosecution's evidence was sufficient to prove the elements of the offence the appellant was charged with. Further that the trial court indeed considered the defense under section 8(5) and (6) of the *Sexual Offences Act* 2006 and that the said defense was not available in the instant case.

8. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and 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. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was 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). However, it must be stated that there is no set format to which re-evaluation of evidence by the first appellate court should conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See *Alex Nzalu Ndaka v Republic* [2019] eKLR).

9. I have indeed analyzed the evidence which was tendered before the trial court. In a nutshell, PW1 testified that she was 17 years old as she was born on 15/3/2004. That on 13/12/2020 at around 8.00a.m. she prepared herself for the church and the appellant herein called her and informed her that he was not going to church and that PW1 decided to go to his place and she did not find him. That he was directing her via the phone and when he went where he was (his place) he took her phone and did not allow her to go home and as such she did not go home on that day. On Monday he went to work and on Tuesday they went to Kiambu and stayed there until Sunday and that they were arrested by police at Kiamachimbi. Her evidence was that it was the appellant who forced her to accompany him and that he had locked her in the house. That defilement occurred on Sunday only and that the

appellant forced her to have sex with him. Her evidence as to the events of the week were consistent in cross examination and re-examination.

10. The victim's father testified as PW2 and his evidence was basically that on December 13, 2020 PW1's mother called him and informed him that she didn't see PW1 in the church and neither was she at home and that she did not find her clothes but a note indicating that she had gone and left a phone number to call. That when he called the said number she said she was in Murang'a and the phone was switched off. That PW1 called her mother and informed her that she was in Kisumu with Odhiambo (the appellant) and they switched off the phone. That they reported to the police and they were arrested in Kiambu.

11. PW3 WM testified that on 13/12/2020 she went to church but didn't see PW1 and when she went home, she also didn't find her there but she left a note with a number saying that she had gone with the accused as she was pregnant. That on 14/12/2020 she found out that she was with Odhiambo and when he was called he said that he knew where PW1 was and she would go back home later. When she called later they said they were in Kisumu but she later learnt that they were in Kiambu and they were arrested while in Kiambu. In cross examination, she testified that the appellant even called and said that she was in good hands and expecting a child.

12. PW4 EG testified that on 14/12/2020 her grandchild was looking for someone to herd her cattle and he engaged the appellant and he said that he would go with his wife. His grandchild agreed to the appellant going with his wife and the accused went with the said lady who said was his wife who was from his home town. That he took them to Kiambu and when he learnt of the whole story he took PW1's parents to Kiambu and that is how they were arrested.

13. PW5 Dr. Stephen Nderitu produced P3 and PRC Forms in relation to the victim herein and testified that upon examination, no injuries were seen and that the laboratory tests for HIV and pregnancy were negative.

14. PW6 PC Gladys Nzilani testified as having investigated the matter after it was reported by PW2 and PW3 on 17/12/2020 and further having arrested PW1 and the appellant after being led by PW4.

15. The appellant was placed on his defense and he testified that on the said day PW1 called him and he told her that he would not be attending church and they agreed to meet at 11.00a.m. That he was called by the caretaker and informed that his radio and the lights to his house were on and when he went home he knocked the door and PW1 opened the same and upon enquiry as to what happened she said she was being mistreated at home by her stepmother and that she was looking for her real mother. That he informed her that she had secured a job in Kiambu and she said that they should go together and they left on Monday but she spent the Sunday night in their house and they stayed in Kiambu until 20/12/2020. His evidence was further that PW1 had told him that she was 18 years of age having completed school three years earlier and that he only knew she was underage when she went home with full school uniform. That he never forced her to have sex with him but the same was with her consent.

16. I have considered and analyzed the evidence which was tendered before the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno Vs Republic (supra) and re-stated in Kiilu and another Vs. R(supra), the amended grounds of appeal and the written submissions by the parties herein, it is my view that the main issue for determination is whether the prosecution tendered sufficient evidence to prove its case to the required standards.

17. As I have already stated, the appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No.3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11 (1) of the Secual Offences Act No.3 of 2006.

18. Section 8(1) provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". Section 8 (3) on the other hand provides that "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. It is therefore clear from there provisions and its indeed trite that for the charge of defilement to stand, the prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. The standard of proof is settled and it's beyond any reasonable doubts.

19. As to proof of age, the importance of proving the same was emphasized by the Court of Appeal in *Kaingu Kasomo v Republic*, Criminal Appeal no.504 of 2010 (UR) where the court stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same was as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

20. In the case before the trial court, the charge sheet indicated that the victim was a child aged 16 years. PW1 testified that she was born on March 15, 2004. The investigating officer produced a copy of the birth certificate for the minor and which indeed confirmed the said date of birth. The offence was committed on diverse dated between 13/12/2020 and 20/12/2020. It therefore means that at the time of the offence, the victim was about 16 years and 9 months. She was as thus a child (minor) and thus the first element of the offence was proved.

21. As for penetration, the evidence by PW1 was to the effect that she visited the house of the accused on 13/12/2020 and they spent the night in the said house before they left for Kiambu the following day and that they had sex only on that Sunday night. Though there was no other evidence which corroborated her evidence, the appellant in his defense did not deny the same but only raised a defense to the effect that PW1 conducted herself as an adult and indeed agreed to the sexual intercourse and that she did it voluntarily. It is clear thus, that penetration by the appellant was indeed admitted by him in his defense. I find, therefore, that the prosecution was able to proof that there was penetration by the accused.

22. The appellant raised a defense to the effect that the victim's evidence was of doubtful integrity. However, looking at the prosecution's evidence as a whole and which the appellant did not challenge with a controverting evidence, it is clear that PW1 spent the night in the appellant's house. The appellant having admitted having sex with PW1, he cannot turn around and retract his admission on appeal. I thus don't agree with the said ground. Further I don't agree with the ground that the prosecution's evidence failed the test as to its adequacy. His testimony that the victim consented to the sexual act indeed confirms that there was penetration, by himself upon a child (she was under the age of 18). As thus ground 3 of his amended petition of appeal fails.

23. However, I note that the appellant had raised before the trial court the defense under section 8(5) and (6) of the *Sexual Offences Act*. The appellant indeed made lengthy submissions to the effect that the said defense was available to his case. The said sections provide as thus:

> " (5) It is a defence to a charge under this section if-
>
> a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. The accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

24. His evidence before the trial court was that the victim had told him that she was 18 years and that she had completed school three years before. That he learnt that she was a student when she went home with full uniform and that she voluntarily agreed to sex. In his submissions in support of the appeal, he submitted that the victim behaved like an adult in that she left her parent's home and went to his home and further agreed to elope with him voluntarily.

25. For one to rely on the defense undersection 8 (5) and (6) of the *Sexual Offences Act*, one must prove that the child, deceived him into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of eighteen years.

26. In *Janet Jepchirchir v Republic* [20210 eKLR, and which decision I find persuasive, the Learned Judge held as thus:-

"(25) Moreover, Subsection (5) is explicit that the deception must emanate from the child; and that it must be satisfactorily proved that the minor deceived the accused person as to his/her age. As pointed out by the Court of Appeal in *Eliud Waweru Wambui v Republic* [2019] eKLR, the burden of proving deception for purposed of Subsection (5) is on the accused person, though the standard is on a balance of probabilities, and on the basis of the accused's subjective view of the facts."

27. In the instant case, there was no evidence which was tendered by the appellant to prove or even suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him believe that PW1 was over the age of eighteen years. His evidence was that PW1 went to his house and that she threatened to kill herself. They spent the night in his house before leaving for Kiambu the following day. That she had told him that she was 18 years and had finished school. However, in cross examination, he stated that he did not ask her as of her age. I don't think even asking the victim her age would have been sufficient to be termed as deceiving. The appellant needed to do more than that. Further the fact that she went to his house and also followed him to Kiambu does not mean that she was of age of majority. In my view, there was nothing which could be said to have deceived him to believing that PW1 was over 18 years. No evidence was tendered before the trial court in that respect. As thus ground 2 of the amended petition of appeal fails. However, considering the circumstances under which the offence was committed, and the age of the appellant, I find that the sentence was excessive. The sentence of 15 years is hereby set aside and in its place, a sentence of 8 years is hereby imposed on the appellant.

28. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State