Wamalwa v Republic (Criminal Appeal E003 of 2022) [2023] KEHC 20538 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E003 OF 2022

REA OUGO, J

JULY 13, 2023

BETWEEN

KELLY SIFUNA WAMALWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgement and sentence of Hon. S.O Mogute (P.M) at Bungoma delivered on the 11th January, 2022, Bungoma CMCC NO 67 OF 2020)

JUDGMENT

1. Kelly Sifuna Wamalwa (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.
2. The particulars as per the charge sheet were that on the on 29th June 2020 in Bungoma central sub county within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of AW a child aged 13 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. The accused person pleaded not guilty and the matter went to full trial. The prosecution called five witnesses in support of its case. The Appellant being aggrieved by the conviction and sentence of the learned trial Magistrate lodged his appeal on the following grounds;
    1. That the appellant pleaded not guilty to the charges.
    2. That, the trial magistrate erred in law and fact in conducting proceeding that violated the rights of the appellant as per provisions of the laws of Kenya hence null and void.

3. That the trial magistrate erred in law and in fact in convicting the appellant without proper inquiry and investigations.

4. That the trial magistrate erred in laws and in fact by failing to put into consideration the forensic evidence which did not corroborate as stipulated under section 36 of the *Sexual Offences Act* 2006.

5. That the trial magistrate erred in law and in fact in arriving at a decision while ignoring the appellant's mitigation

6. That the trial magistrate erred in law and in fact by applying wrong principle in convicting the appellant on the weakness of his defence thus failing to admit his defense that sufficiently created a reasonable amount of doubt to the prosecution's accusation.

7. That the sentence imposed upon the appellant is harsh and excessive regarding the circumstances of the case.

8. That the trial court acted with bias by relying on the prosecution side in decision making.

4. This being a first appeal, it is the duty of this to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion bearing in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (See Okeno v Republic [1972] E A 32.)

5. AW (Pw1) testified that on 29/6/2020 she was at [Particulars Withheld] market selling tomatoes and fruits with her aunt M and her sister E away on his motorcycle. There were enough electricity lights in the market at the time. Pw1 agreed to go with him to Nalondo stadium and the appellant asked her to remove her trouser and pant. The appellant removed his trouser too and asked her to sleep on the grass. Pw1 slept on the grass facing upwards. The appellant slept on top of her, removed his penis and put it in her vagina. Pw1 felt so much pain and started to cry but nobody came to rescue her. Pw1recalled that after the appellant finished what he was doing he asked her to wear her clothes and then he took her home. Pw1 took a shower and noticed blood in her vagina and pant and notified her aunt M who notified her mother and they went to report the matter at Nalondo Police Station. She was treated at Nalondo dispensary and Bungoma district hospital. She testified that she knew the appellant prior to the incident as he used to carry her on his motorcycle.

6. The complainant's mother, BN (Pw2) testified that the child is 12 years old having been born in 2008. She recalled that on the material day she had given Pw1 vegetables to go home and prepare. Pw2 testified that Pw1 then left the house and headed towards the market and Pw2 followed her but did not find her at the market. Pw2 went back home. Later on, she hear Mourine quarrelling with Pw1. Pw2 saw blood in her trouser and asked her what happened. Pw1 told her that the appellant had forced her to have sex with him. The matter was reported to the police station and the trouser that she wore also taken to the station. They went to Nalondo dispensary which referred them to Bungoma District Hospital where she was admitted for 5 days.

7. Elias Adoka (Pw3) testified that he was the clinical officer at Bungoma District Hospital. He produced the medical report filled by Dr. Odilla on 6/7/2020. He told court that he has worked with Dr. Odilla for 4 years and is conversant with his handwriting and signature. He testified that Pw1 was admitted on 30/6/2020 and discharged on 5/7/2020. She was treated by Dr. Daisy and Dr. Barasa the Consultant Gynaecologist. He produced the P3 form as Pexh1 and the discharge summary as Pexh2.

8. Dr. Elizabeth Simiyu who works with Dr. Wafula who conducted an age assessment on Pw1, testified that she was conversant with Dr. Wafula's handwriting having worked with him for over 5 years. She produced the age assessment report as Pexh7.

9. The investigating officer, No 228106 CPL Noman Chebeu testified as Pw4. She testified that she was on duty at Nalando station when the matter was reported and advised Pw2 to take the child to hospital. She accompanied the child to the hospital. She saw that the child had blood in her vagina and was flowing down through her legs when she was walking. Pw1 told her that she was defiled by a person named Kelly who is a boda boda rider. The appellant was arrested by CPL Menoa. She recovered the clothes of Pw1, black trouser, pant and red dress and produced them as exhibits. Pw4 was satisfied that the appellant had committed the offence and charged him.

10. At the close of the prosecution case, the appellant was put in his defence and he gave sworn testimony. He denied committing the offence. He testified that on 2/8/2021 he had 3 visitors when he was arrested. He was taken into police custody and charged after 3 days.

11. The appellant in his written submissions filed on 7th February 2023 argue that he was not informed of the charges against him promptly and did not understand the trial process. He did not object to any request by the prosecution and he submits that the trial magistrate ought to have inquired if he understood the charges levelled against him and the consequence of the charge. The trial magistrate did not adhere to provisions of Article 50 (2) (c) of *the Constitution*. He submits that medical examination was only conducted on the victim and not the appellant contrary to section 36 of the *Sexual Offences Act* No 3 of 2006. He submits that the OB number for the report was not produces to show when the matter was reported. Pw3 did not testify as to the victim's state and the treatment administered. He also faulted the prosecution for its failure to avail treatment notes. On the age of the minor, it was not clear if the minor was 12 or 13 years old. The age of the minor was therefore not proved to the required standard.

12. The prosecution filed its written submissions dated 21st March 2023. The prosecution submit that the age of the complainant was assessed by Pw5 to be 13 years. The appellant was well known to the complainant and she referred to him as Kelly. The appellant was well known to her and there were also electricity lights that enabled her to see him. The respondent submits that identification of the appellant was proper with no chance of mistaken identity. Pw1 sustained several injuries on her genitalia and was therefore admitted in hospital for 5 days. The fact of penetration was not in issue. They relied on the case of Karisa Chengo & 2 Others v Republic, Criminal Appeal Nos. 44, 45 & 76 of 2014 where the court stated: that substantial injustice would only arise where a person is charged with an offence whose penalty is death and such a person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise. The prosecution submits that the appellant was not charged with the offence which attract death penalty and he cannot be said to have suffered substantial injustice. They maintain that the prosecution proved its case to the required standard.

Analysis and Determination

13. I have considered the appeal before the court and the rival submissions by the parties. The issue raised by the appeal is whether the prosecution proved the offence of defilement to the required standard; whether the sentence was harsh; and whether the trial process observed the tenets of fair trial under Article 50 (2) (c) of *the Constitution*.The offense of defilement rests upon three fundamental elements: the age of the victim (must be a child), penetration, and the accurate identification of the perpetrator.

14. I now turn to consider whether the prosecution proved penetration. Pw1 gave clear testimony that the appellant slept on top of her removed his penis and put it in her vagina. She felt a lot pain and cried. Upon Pw1 getting home, Pw2 testified that the child told her that the appellant had forced her to have sex with him. Pw2 testified that she saw blood on Pw1's trouser. They reported the matter at the police station and Pw4 who was on duty also saw blood flowing down the child's leg. The testimony of Pw1, Pw2 and Pw4 are further corroborated by the medical evidence presented by Pw3. According to the discharge summary from Bungoma County Referral Hospital, the provisional prognosis on admission was that Pw1 sustained a vaginal tear after being sexually assaulted. The patient was examined under anaesthesia. She was bleeding and had sustained perineal laceration and a vaginal tear. According to the P3 form, it was noted that her external genitalia was stained with blood and had a 1 cm tear on the left lateral vaginal wall. It was also noted that her hymen was not intact. There were blood clots in the vaginal canal and superficial perennial tear of about 2cm. I therefore concur with the finding of the subordinate court that the prosecution proved that there was penetration to the required standard.

15. The next question is whether the identification of the appellant was safe. It is not in dispute that Pw1 was the only person who saw the appellant. She testified that she met the deceased at night but was able to clearly see him as the market had sufficient light. In the case of Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal had this to say regarding section 124 of the *Evidence Act*:

> " as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:
>
> "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."

16. In this case, Pw1 maintained that the appellant was well known to her as he would carry her in his motor cycle. The evidence is clear that when she went home, she told Pw2 that it was 'Kelly Sifuna' that forced her to have sex. At the police station, Pw3 testified that the child told her that she had been defiled by a person by the name 'Kelly' who is a boda boda rider. The P3 form also notes that Pw1 was defiled by a person known to her. I therefore find that on the evidence of Pw1 alone on identification was sufficient. I have also considered that although the incident took place at night Pw1 testified that there was sufficient electric light in the market and she was able to clearly see the appellant. The appellant and Pw1 were also in close proximity while at the stadium in Nalondo. The appellant without a doubt was positively identified.

17. Finally, the prosecution evidence point to the fact that Pw1 was a minor at the time of the offence. Pw2 testified that the minor was 12 years and the age assessment report produced by Pw5 reveal that she was 13 years. The evidence of both Pw2 and Pw5 show that Pw1 was a child below the age of 18 at the time the crime was committed.

18. I also recognize that the victim's age is significant to the court when it is considering the punishment/ sentence to be meted to the accused. The court is called consider whether the sentence meted by the trial

magistrate was excessive. The principles that govern the appellate court's interference with sentencing were aptly stated in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

19. Where an offence of defilement is committed to a child within the age bracket of 12-15 years then the sentence meted is 20 years. Section 8 (3) of the *Sexual Offences Act* provides as follows: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. The evidence of Pw5 was that Pw1 was 13 years. Pw5's evidence still puts the child within the age bracket of 12-15 years and the sentence under section 8(3) of the *Sexual Offences Act* is 20 years. Although the appellant argues that his mitigation was not considered, the record shows that the appellant in his mitigation stated that 'I pray for forgiveness for what I did'. The prosecution also noted that the appellant was a first offender. However, the circumstance and manner in which the offence was committed must also be considered. In this case, the appellant was well known to Pw1 as he used to carry her on his boda boda. He lured the child and took her to the stadium at night. He then defiled her and did not stop even after Pw1 started crying and asked him to leave her. Pw1 as a result sustained severe injuries. She had a perineal tear that was about 2cms and a vaginal tear that was 1 cm and was hospitalized for 5 days. The ordeal was quite traumatic as Pw1 narrated that when the appellant defiled her, she cried out for help but nobody came to her rescue. I therefore find no fault in the finding of the trial magistrate's decision on sentence having sentenced the appellant to 20 years.

20. The appellant also made submissions that he did not understand the trial process and was not affordedadequate time and facilities to prepare a defence contrary to Article 50 (2) (c) of *the Constitution*. The record reveals that the appellant was arraigned on 7/7/2020, took plea denying the charged and made an application for bail. He attended the hearing of the prosecution case which commenced on 29/9/2020 and elected not to cross examine the prosecution witnesses. At the end of the prosecution case, he gave evidence in his defence. In my view, I find no that prejudice was occasioned to the appellant who participated in the trial process and mounted his defence at the end of the prosecution case.

21. In the end, I find that the appeal is without any merit, I uphold conviction and sentence, the appeal is consequently dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF JULY 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant/Kelly Sifuna Wamalwa- Present

Mr. Ayekha -For the State/ Respondent

Wilkister C/A