Epeyio v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 22583 (KLR) (13 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CRIMINAL APPEAL E002 OF 2022

AC MRIMA, J

SEPTEMBER 13, 2023

BETWEEN

ABEDNEGO EPEYIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. B. O. Ondego (Senior Principal Magistrate) in Kapenguria Chief Magistrate's Court Criminal Case (S.O) No. E043 of 2021 delivered on 14th January, 2022)

JUDGMENT

1. The Appellant herein, Abednego Epeyio, was charged with the offence of Defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*. The particulars of the offence were that on 30th October, 2021 at around 0200 hrs. at Chemulunjo area in Alale location within Pokot North Sub-county of West Pokot County, the Appellant unlawfully and intentionally caused his penis to penetrate into the vagina of N.C. a child aged 8 years old.

2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally caused his penis to touch the vagina of N.C., a child aged 8 years old.

3. When the Appellant was arraigned before Court, he pleaded not guilty to the offences. He was tried and subsequently convicted on the main charge of defilement.

4. He was sentenced to serve 20 years imprisonment.

The Appeal:

5. Aggrieved by the conviction and sentence, the Appellant lodged the instant appeal. He raised several grounds impugning the decision of the trial Court. He lamented that the trial Court did not undertake a voir dire examination, that penetration was not proved, that key witnesses did not testify and that there were unreconciled contradictions.

6. In the premises, the Appellant prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.

7. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions filed on 10th March, 2023, the Appellant expounded on the above grounds of appeal and referred to several decisions.

8. In view of the foregoing submissions, the Appellant urged this Court to allow his appeal.

9. The Respondent on its part relied on its written submissions dated 17th February, 2023 and filed on 20th March, 2023. It submitted that all the ingredients to the offence of defilement had been established beyond reasonable doubt.

10. Learned Counsel for the State Mr. Jalson Makori, denied that the offence was premised on a grudge.

11. Justifying deterrence and the impact of the offence on the victim's life in general, as the objectives that informed the Court to sentence the Appellant to 20 years imprisonment, the prosecution urged this Court not to interfere with those findings as they were lawful.

12. Learned Counsel urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.

Analysis:

13. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

14. Having carefully perused the record, this Court is now called upon to determine whether the offence of committing defilement was committed, and if so, whether by the Appellant.

15. However, before discharging the said duty, it is crucial to review the evidence adduced at the trial.

16. The prosecution called a total of five witnesses to establish that the Appellant committed the offence that he was convicted of. It was alleged that PW2 a minor recalled how the appellant went to their home at night when she and her sister Cheptoo were left behind by the parents. The appellant removed her cloths and underwear and slept beside her. PW2 further stated that the appellant went ahead and did "tabia mbaya" the whole night.

    PW 6 a police officer recalls how when he received the complaint, took the minor to AIC Alale Health Centre for an examination. He also did the investigation and age assessment of the minor at Kapenguria Referral Hospital.

17. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.

18. He gave an unsworn defence where he stated that the charges were a frame up due to a grudge that existed between her and PW2, the Complainant's mother over the sale of his chicken.

19. He urged this Court to allow the appeal in its entirety.

20. It is on the above evidence that the Appellant was found guilty on the main charge, convicted and sentenced.

21. The offence of defilement is made up of three ingredients. They are the age of the victim, the aspect of penetration and the identity of the assailant. This Court will consider the said ingredients in seriatim.

Age of the victim:

22. There was no challenge on this issue. The evidence on the age of the victim, PW2, is uncontroverted.

23. Being 8 years old, PW2 was a child under the *Children Act*, 2022.

Penetration:

24. Section 2 (1) 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 person."

25. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

26. Later, the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

27. In sexual offences, Courts are enjoined to examine the evidence of the victim as well as any other, and are at liberty to convict on the sole evidence of the victim if, for reasons to be recorded, such evidence is believable to the Court. (Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya).

28. In this case, the evidence of penetration was rendered by the complainant (PW2), PW1 (the mother of the complainant) and the Clinical Officer, PW5.

29. PW2 described the ordeal that left her private parts inserted with a male sexual organ. She stated that the assailant did the act until he spilled some whitish liquid on the private parts region.

30. PW1 confirmed as much. When she found PW2 crying, she enquired what had happened. On explaining, PW1 checked PW2's private parts and confirmed whitish substances which she knew it was male sperms going by the fact that she was an adult and aware of such.

31. PW5 confirmed from the treatment notes that indeed there had been a penile entry into PW2's private parts. The laboratory examination revealed the presence of red blood cells as well as some epithelial cells, but no spermatozoa were seen since the examination was undertaken three days later.

32. On the basis of the foregoing, this Court returns the finding that penetration was proved.

Identity of the perpetrator:

33. This aspect was so hotly contested on several fronts.

34. There was the issue of the voir dire examination of PW2. The record speaks for itself. The trial Court conducted the examination. It then observed that PW2 did not understand the meaning and nature of an oath. That was the basis of PW2 giving unsworn testimony. Thereafter, the Appellant cross-examined PW2.

35. The contention, therefore, does not hold.

36. On the identity of assailant, the evidence of PW2 and PW3 come to play. PW2 narrated that the Appellant entered their house at night and spoke to her. He threatened her against raising alarm and even told that even if she did so there was no one to rescue her. PW2 stated that she knew the Appellant quite well as they lived in the same home and he was related to them.

37. Further, the Appellant said he was Kiplagat, but PW2 instead that she recognized his voice and knew that he was the Appellant. PW2 also used a D-Light torch which she illuminated on the Appellant and confirmed the identity. PW2 consistently gave the name of the Appellant to her family members as well as the police and that led to the arrest of the Appellant. (See the Court of Appeal in Simiyu & Another vs. Republic (2005) 1 KLR 192).

38. At the very time the Appellant was inside the PW2's house, PW3 confirmed that the Appellant had left the adjacent house where he was to sleep and went out for about one hour. PW3 was wide awake as he knew the Appellant was a suspected stock thief and kept watch over his animals.

40. There is no doubt that the Appellant was placed at the scene of the crime by PW2 and PW3. Their collective evidence withstands the caution that Courts must take when dealing with evidence of single witness. Further, this Court is alive to the proviso to Section 124 of the *Evidence Act* on the evidence of children in proceedings on sexual offences.

41. Just a recap, the Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi vs Republic [1986] KLR 198:
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> 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
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> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the Court emphasized that:

> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....

15. There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

42. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

43. In Wamunga vs Republic (1989) KLR 426 the Court of Appeal stated as under: -

> ... 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.

44. In Anil Phukan vs. State of Assam (1993) AIR 1462 the Court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

45. The witnesses testified before the trial Court. The Court did not make any adverse findings on the demeanour of any of them or otherwise. As the Court believed their testimony, this Court is obliged to take that into serious consideration especially if this Court intends to depart from the factual findings made by the trial Court.

46. There was also the issue of the number of witnesses who testified. The Appellant decried that other key witnesses were not called to testify. Section 143 of the *Evidence Act* does not provide for the number of witnesses to be called to sustain a conviction. Even the evidence of a single witness can result to a conviction. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact."

47. It is only when key witnesses are not called to testify without any explanation, that is when a Court may make an adverse inference that had such witnesses been called, their evidence would have been adverse to the prosecution. That is, however, not the case in this matter. Therefore, there is no basis for this Court to make such an inference.

48. On the aspect of contradictions on the record, this Court is alive to the truism that no two or more witnesses can give the exact nature of evidence on a matter. As such, contradictions are inevitable. However, if such are not of such magnitude as to impeach the prosecution's case or to cause a miscarriage of justice to the Appellant, then such are reconcilable under Section 382 of the Criminal Procedure Code.

49. The alleged contradictions in this matter are of such an insignificant level and are easily reconcilable in law.

50. The defence rendered by the Appellant does not hold. The trial Court rightly so, found that it was an afterthought. Having opted to give an unsworn defence, the Appellant denied the prosecution an opportunity to interrogate the Appellant who raised the issue of a grudge with PW1 for the first time in the defence.

51. On the basis of the above and in taking the totality of the evidence on record, the upshot is that, without any shred of doubt, that the Appellant was properly identified, by way of recognition, as the assailant.

52. Having established all the three ingredients in favour of the prosecution, the conviction was proper and the appeal on the conviction is hereby dismissed.

53. The Court will now deal with the aspect of the sentence. The Appellant repeatedly raised the issue of his age. He claimed to be 16 years old.

54. The Appellant had, however, raised the issue at the plea stage. The Court directed that an age assessment be undertaken. The prosecutor then informed the Court that the assessment had already been done and it was confirmed that the Appellant was an adult. That was on 4th November, 2021. The report is, however, not on the record. The trial then proceeded. In its judgment, the Court stated that the age of the Appellant was 20 years old.

55. At the hearing of this appeal, this Court ordered that the Appellant be taken for age assessment. A report was filed in Court. It is dated 8th February, 2023. The age was estimated to be 18 years old.

56. Going by the only evidence on the age assessment on record, it can be safely deduced that the Appellant was around 16 years of age in 2021 when he was charged and he was around 17 years old when he was sentenced in January, 2022.

57. The Appellant was, therefore, a child within the meaning of Section 2 of the repealed *Children Act*, Cap. 141 of the Laws of Kenya by the time he was charged and eventually sentenced.

58. Section 189 of the repealed *Children Act* placed some restrictions on the use of some words in respect to child offenders. The provision stated as under: -

> 189. Words "conviction" and "sentence" not to be used of child
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> The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.

59. Further restrictions on sentences were placed in Section 190 as follows: -

> 190. Restriction on punishment:
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> 1. No child shall be ordered to imprisonment or to be placed in a detention camp.
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> (2) No child shall be sentenced to death.
>
> (3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school.

60. Section 191 of the repealed *Children Act* provided for the manner in which child offenders may be dealt with when found guilt of committing offences. It stated as follows: -

> 191. Methods of dealing with offenders:
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> (1). In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-
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> a. By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
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> (b) by discharging the offender on his entering into a recognisance, with or without sureties;
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> (c) by making a probation order against the offender under the provisions of the *Probation of Offenders Act* (Cap. 64);
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> (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (Cap. 64);

(k) by making a community service order; or

(l) in any other lawful manner.

(2) No child offender shall be subjected to corporal punishment

61. Despite the above provisions, Courts have dealt with the manner in which minors who are guilty of commission of seroius crimes and who at sentencing or at the hearing of the appeal had turned into adults ought to be dealt with. The issue arose in the Court of Appeal in Kisumu in Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang vs. Republic (2019) eKLR. My Lordships, in refererring to several decisions, had the following to say: -

> Section 191(1) of the *Children Act* sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judical discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the *Children Act*. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. This Court while faced with a similar case in Richard Mwaura Njuguna & another v Republic [2019]eKLR observed thus:
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> > It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue is the High Court case of Daniel Langat Kiprotich vs State [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of

the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:

> This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or here errors.
>
> A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where teh offence committed was a particularly vicious or serius one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn".

Earlier on, this Court in the case of J M K v Republic [2015]eKLR had observed: -

> ....A critical issue in this appeal relates to the appropriate senetnce for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In of Nyeri Criminal Appeal No. 118 2011 (JKK -v- R, (2013)eKLR, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic -v- S. A. O., (A MINOR) [2004]eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot -v- R).

The Court went further and held that:

> The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the Presidnt. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The *Children Act* prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President

> with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhsphs the probation department to take the apepllant through the rgours of coming into terms with his mistake and poor judgment which have consequences such a loss of liberty.
>
> We are in total agrement with the above sentiments and observations. Accordingly we find that committing the apepllant to a borstal institution as prescribed under Section 6(1) of the *Borstal Institutions Act* is not foreseable in view of the appellant's current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the apepllant's culpability.

62. Applying the above to this case, the Appellant is now an adult. The offence he committed was a very serious one more so it was committed against an 8-year-old child. The Appellant, no doubt, needs to be properly rehabilitated.

63. Having said so, this Court, however, finds the sentence of 20 years imprisonment to be excessive to the Appellant. It is this Court's belief that a shorter sentence will yield the required results. To that end, the appeal on sentence succeeds and the sentence of 20 years imprisonment shall be interfered with.

Disposition:

64. Deriving from the above, the following final orders of this Court do hereby issue:

    a. The appeal on conviction is hereby dismissed.

    b. The appeal against the sentence rendered by the trial Court is hereby allowed to the extent that the sentence of 20 years imprisonment is hereby reviewed to a sentence of 12 years imprisonment.

    c. Since the Appellant was remanded during the trial, the sentence of 12 years imprisonment shall run as from 4th November, 2021 when the Appellant was charged.

    d. This file is hereby marked as CLOSED.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 13TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR