Famau v Republic (Criminal Appeal E049 of 2021) [2023] KEHC 23627 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23627 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E049 OF 2021

JN ONYIEGO, J

SEPTEMBER 22, 2023

BETWEEN

YUSSUF IMAN FAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. D.W.Mbuteti delivered on 10th December 2021 in sexual offence case No. E017 of 2020 in Garissa CM's court)

JUDGMENT

1. The appellant herein was arraigned before the Chief Magistrate's Court at Garissa in Sexual Offences Case No.17 of 2020 facing three counts: Count one, he was charged with defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 28.04.2020 at around 1600hrs at Tana North Sub county within Tana River county intentionally and unlawfully did commit an act which caused his genital organ namely penis to penetrate the genital organ namely vagina of FA a girl aged 15 years.
2. He 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 with particulars being that on 28.04.2020 at around 1600hrs at Tana North Sub county within Tana River county intentionally and unlawfully touched the vagina of FA a girl aged 15 years.
3. On Count two, he was charged with Assaulting a police officer contrary to section 103(a) of the *National Police Service Act* No. 11 of 2011 with particulars being that on 03.05.2020 at around 1539 at Tana North sub county within Tana River county assaulted No. 57xxx PC Jirah Mtiki, a police officer who at the time of the said assault was acting in the due execution of his duty.
4. Count three, he was charged with assaulting a police officer contrary to section 103(a) of the *National Police Service Act* No. 11(A) of 2011. Particulars were that on 03.05.2020 at around 1539 hrs at Tana

north Sub county within Tana river County assaulted No. 25xxxx PC Solomon Wanjohi, a police officer who at the time of the said assault was acting in the due execution of his duty.

5. Count four he was charged with resisting arrest contrary to section 254(b) of the *Penal Code*. Particulars were that, on the 03.05.2020 at about 1539 at Tana North sub County within Tana River County willfully resisted lawful arrest by No. 11xxx PC Shadrack Kipchirchir No. 57xxx, PC Jirah Mtiki, PC Solomon Wanjohi, PC Baraka Mweu and PC Kioko Mwinzi, police officers who at the time of the said resistance were acting in the due execution of their duties.

6. He pleaded not guilty to the said charges and the trial proceeded to full hearing. Upon being found guilty under Counts one and four, he was sentenced to serve 20 years' imprisonment in respect of count 1 and then discharged in respect of count four.

7. The appellant being aggrieved by the said conviction and sentence, filed on 17.12.2021 a petition of appeal on the grounds that; his conviction was not safe; his defence was not considered; the trial court declined to recuse himself and further, the sentence meted out by the trial court was excessive and harsh. He therefore prayed that the conviction by the trial court be quashed and the sentence herein set aside.

8. When the matter came for directions, parties agreed to file written submissions to canvass the appeal herein.

9. It was the appellant' submission that the prosecution did not prove its case to the required standards. That the trial court erred by conducting a grossly unfair and unprocedural hearing contrary to the provisions of the *Constitution*.

10. It was his contention that the hearing conducted by the trial court did not uphold the provisions of article 47 and 50 of the *Constitution*. He placed reliance on the case of *R v Lifchus* (1997) 3 SCR to express the position that he ought to have been considered innocent till proven guilty. That the trial magistrate declined to be directed by the directions of the High Court that the file ought to have been transferred to a new magistrate for the purposes of hearing and disposal of the matter. He denied committing the offence and further urged this court to review the sentence by the trial court as the same was not only harsh but also stiff.

11. Mr. Kihara representing the respondent stated that the evidence of the prosecution was cogent, reliable and admissible. It was stated that the prosecution proved its case to the required standard. Further, that the sentence invoked by the trial court was legal and appropriate bearing in mind the circumstances of the case and therefore, the same should be upheld.

12. This being a first appeal, I am mandated to re-analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour". [See Pandya v Pandya (1957) EA (336].

13. Briefly, PW1, IAA testified that on the material day, she had gone to take her clothes from her uncle's place when she met the appellant who offered her a lift on his boda boda. That the appellant took her to Kunasuo Hotel and then to a forest where he defiled her. She stated that upon finishing, the appellant washed her with some dirty water. She stated that she later reported to her sister inlaw and

later to Abshire human rights activist who escorted her to Madogo Police Station and thereafter to the hospital for treatment.

14. PW2, AMN testified that on 03.05.2020, she was informed of a case of a defilement. That she proceeded to the home of the suspect in company of police officers to wit P.C. Mwinzi, P.C. Kipchirchir, P.C. Solomon, P.C. Baraka and P.C. Mitiki. She stated that upon arriving, the appellant was very violent as he removed a knife and resisted arrest. That the accused cut the finger of one officer who attempted to arrest him while he hit another on the head by a stick.

15. PW3, Shadrack Kipchirchir testified that on 03.05.2020, he was requested by his colleague, P.C. Mutuku to escort him to arrest a suspect at Adhele area. That the appellant upon seeing them, resisted being arrested. He stated that the officers fired two shots on the air to scare the appellant who tried to run away but the managed to disarm him and consequently arrested him.

16. PW4, Kenneth Kiprono testified that on 29th April 2020 he examined PW1 and made the following observations; her clothes were torn but had no blood stains; that her libia minora and majora had bruises; her lower abdomen was tender to touch; there was presence of yellow discharge upon lab analysis showing that she had contracted a urinary tract infection. On urine analysis, he found presence of spermatozoa and blood. He concluded that there was a vaginal penetration as the hymen was not intact.

17. PW5, Shadrack Kipchirchir testified that he was the investigating officer in the case after taking over from P.C Jurah Mikiti. He stated that P.C Mikiti previously received a call from PW2 who told him that there was a minor who had been defiled. That he recorded the statement of the minor and thereafter escorted the minor to Madogo Health Centre. It was his evidence that upon trying to effect arrest on the accused person, the accused became violent as he resisted arrest. He stated that he charged the accused with the offence herein. He proceeded to produce the complainant's birth certificate as Pex2

18. The trial court placed the appellant on his defence but as noted on the record, the appellant declined to proceed with his defence when he was called upon to do so.

19. From the respective pleadings and submissions of the parties herein, it is my view that the main issues for consideration by this court are:

    i. Whether the prosecution proved its case against the Appellant to the required standard.

    ii. Whether the sentence meted against the Appellant was excessive in the circumstances.

20. According to the charge sheet, the appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". As was correctly held in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, the critical ingredients constituting the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 as "…any human being under the age of eighteen years."

22. In the case of *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal 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 way 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."

23. In the instant case, the complainant was aged 15 years at the time when the offence herein was committed. The same was buttressed by her birth certificate which showed that the complainant was born on 20.02.2005. It therefore means that the complainant was a minor.

24. On penetration, the same 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. In the case of *Alex Chemwotei Sakong v Republic* [2108] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence by stating that, Penetration as defined under section 2 of the *Sexual Offences Act* means the partial or complete insertion of the genital organ of a person into the genital organs of another.

25. In the instant case, the complainant testified that the appellant after offering her alift, took her to [Particulars Withheld] Hotel and then to a forest where he defiled her. She stated that upon finishing, the appellant washed her with some dirty water. The P3 Form and treatment notes produced as Pex 1(a) and (b) revealed clear evidence of penetration. PW4 corroborated PW1's evidence that upon examining her, he found that her libia minora and majora had bruises and yellow discharge signifying a urinary tract infection. He concluded that PW1's hymen was not intact and that there was vaginal penetration manifested by the presence of blood and spermatozoa.

26. Regarding identification, the appellant was categorical that he was not positively identified. Positive identification of a suspect is what connects the perpetrator and the offence. It is therefore extremely important that any evidence on identification be thoroughly and carefully scrutinized to avoid any miscarriage of justice. In the case of *Kariuki Njiru & 7 others v Republic*, Criminal Appeal no. 6 of 2001 (Unreported) the court held as follows:

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

27. It is not in dispute that the complainant at first knew the appellant as one who had raped her cousin. She testified that the appellant introduced himself to her as well as Yusuf and that she gave his name to Abshire who led police officers to arrest him. Besides, the appellant told her that he knew her together with her father and grandmother. That the same made her built confidence in him and so the appellant carried him and sped off to where he finally defiled her. Of importance to note is the fact that the whole episode happened during the day time hence the presence of enough light for proper identification.

28. According to the trial court, the complainant appeared firm in her testimony which evidence he relied on as reliable hence truthful witness. Under section 124 of the *Evidence Act*, a court can rely on the evidence of a single witness to convict without calling for corroboration as long as the trial court is satisfied that the witness is truthful. See *J.W.A V Republic* (2014) eKLR where the court of appeal upheld reliance on section 124 of the *Evidence Act* to convict by stating that in sexual offences, corroboration was not mandatory. Taking into account the totality of the evidence at hand and the

circumstances under which the offence was committed, I have no doubt that prosecution did discharge its mandate in proving the offence of defilement against the appellant. Any allegations regarding contradictions, the same are minor hence do not affect the otherwise strong evidence tendered by the prosecution.

29. In regards to grounds 1,4 and 8, the appellant argued that the findings by the trial court were null to the extent that he was not accorded a fair hearing considering that the trial court refused to recuse itself and further proceeded to hear the matter despite the appeal before the high court. A perusal of the high court record is clear that the appellant appealed the ruling of the trial court but the high court did not order for stay of proceedings before the lower court nor was any order made to transfer the case to any other court. Therefore, the trial court was in order to proceed with the hearing.

30. The appellant argued that he was not accorded a fair hearing of which I find that the same was not proven as the appellant chose to walk away instead of proving his case. The record reveals that the appellant was offered a chance to prosecute his case but instead walked out of the hearing process. In the given circumstances, the appellant therefore cannot be heard to say that his right for fair trial was not accorded him.

31. On sentence, the question is whether the same was excessive? In my considered view, an appropriate sentence depends on the facts and circumstances of each case among them, the court must consider the gravity of the crime; motive for the crime; nature of the offence; manner of commission of the crime and; other attendant circumstances. See *Alister Anthony Pareira v State of Maharashtra*, [2012] 2 S.C.C 648 Para 69 that: -

> " Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

32. While exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. [See *Soman v Kerala* [2013] 11 SC.C 382. A reading of the judgment by the trial court, reveals that the trial magistrate discharged the appellant herein on count IV and in the end sentenced him to serve 20 years' imprisonment for count one.

33. The Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No. 84 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 3 of the SOA, substituted the 20-year sentence with a 15-year sentence to run from the time the trial court imposed its sentence.

34. Having carefully considered the nature of the offence, the manner in which it was committed, the principles of sentencing above and the sentence imposed on the appellant, I am of the view that the sentence meted out by the trial court was not only legal but also sound under such circumstances.

RoA 14 days

DATED SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 22ND DAY OF SEPTEMBER 2023

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J.N. ONYIEGO

JUDGE