Bett v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 23233 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E011 OF 2022

JR KARANJA, J

OCTOBER 9, 2023

BETWEEN

DELMAS KIPRUTO BETT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Delmas Kipruto Bett, appeared before the Chief Magistrate at Kapsabet facing a charge of defilement, Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. In the Alternative, he was charged with committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act*.

2. It was alleged that on diverse dates between 17th and 18th October, 2020 within Nandi County, the Appellant defiled MC a girl aged fifteen (15) years or intentionally caused his male sexual organ (Penis) to come into contact with her female sexual organ (vagina).

3. After a full trial, the Appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment. Being aggrieved, he preferred the present appeal on the basis of the grounds set at in his petition of appeal filed herein on the 5th day of May 2022 and contained in the record of appeal filed herein on 22nd March, 2023 by Messrs. Rotich Langat and Partners Advocates.

4. At the hearing of the appeal, learned counsel, Mr. Rotich appeared for the appellant while the Learned Senior Principal Prosecution Counsel (SPPC), Ms. Oduor, appeared for the State/ Respondent.

   Both counsel filed their respective written submissions in support of and opposition to the appeal. The rival submissions have duly been given consideration by this court.

5. Apparently, the Appellant's arguments are hinged on the fact that at the material time of the offence the Complainant, presented herself and behaved like an adult and ought therefore have been treated

as grown up who knew what she was doing. In the circumstances, it would follow that the offence was not proved beyond reasonable doubt.

6. In that regard, the Appellant relied on the decisions in *Martin Charo v Republic* (2015) eKLR and *Evans Wanjala Siibi v Republic* (2018) eKLR and urged this court to allow the appeal and quash his conviction by the trial court.

   On sentence, the Appellant contended that it was harsh and excessive in the circumstances. He therefore agitated for its setting aside or reduction.

7. In its opposition to the appeal, the State/ Respondent contended that the evidence availed in court by its witnesses did establish and prove that the Appellant was guilty as charged. Thus, the prosecution discharged its burden of proving the offence against the Appellant beyond any reasonable doubt.

8. With regard to the sentence, the respondent contended that it was lawful and deterrent enough to discourage would be offenders. The Respondent therefore called for the dismissal of the appeal for want of merit.

   Against all the foregoing back ground the duty of this court in deciding this appeal was to revisit the evidence availed at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

9. Briefly, the prosecution case was that the Complainant (PW5) was at the material time a form one student and at about 4:00pm on the 17th August, 2020 she was in the company of the Appellant, her boyfriend and a person whose occupation she did not know. They remained together upto 8.00pm when they proceed to the Appellant's house consisting of only one room. When therein, they listened to some music up 2.00am when they decided to sleep on a mattress.

10. In the process, the Appellant and the Complainant engaged in sexual intercourse after which they went into slumber upto the following daybreak. In the meantime, the Complainant's mother, MC (PW4), noted that her daughter had disappeared from home. She went in search of her and alerted a lady called Madam Emily Cherono who later informed her that her daughter had been traced and found.

11. The mother (PW4) proceeded to Kapsabet Police Station and found her daughter there. She was with two people. She failed to disclose to her mother what had happened to her but was taken to hospital for medical examination.

12. At the hospital, the Complainant was examined by a Clinical Officer, Patrick Kenei (PW3). Thereafter, the Officer completed and signed the necessary medical examination report (P3 form - PMFI 1) indicating that the Complainant had been defiled. The Appellant, for whatever purpose, was also examined by the said Clinical Officer.

13. The Complainant's company with the Appellant and others at the material time aroused the suspicion of a neighbour Joana Cheruiyot (PW1) who assisted in the apprehension of the Complainant along with the Appellant and their friends by a Village elder, Henry Akagatia Sabatia (PW2) in a house rented by the Appellant and one Brian Ndondo.

14. After being reported to the police, the matter was investigated by PC. Vincent Mulwa (PW6) based at the Kapsbet Police Station. In the course of the investigations he gathered that the Complainant had disappeared from her home and visited her boyfriend, the Appellant, with whom they spent the night and engaged in sexual intercourse. He (PW6) arranged for the Complainant to be medically examined and obtained statements from the witnesses. Thereafter, the present charge was preferred against the Appellant.

15. The Defence case was a denial and a contention that the Appellant was at his place of work on that material date of the incident and later, while at home cleaning his residence he was confronted by some people who wanted to know the occupants of a house which they pointed out. Same ladies who were at that house were asked whether they knew him (the Appellant). Their answer was in the negative. He maintained that he did not commit the material offence.

16. The foregoing evidential facts were considered by the trial court which thereafter concluded that the prosecution's case had been established against the Appellant beyond any reasonable doubt. Having re-considered the evidence in its totality it is the view of this court that the fact that the Complainant engaged in sexual intercourse with the Appellant was clearly established and proved by the Complainant's own evidence as duly corroborated by the medical evidence availed by the Clinical Officer (PW3). This therefore rendered the Appellant's defence a mere denial in that regard which was in any event, clearly rebutted and disproved by the very strong and credible evidence availed by the prosecution.

17. The evidence by the Appellant's neighbour (PW1) and the Village Elder (PW2) implied that their suspicion of the association between the Complainant and Appellant was aroused by the Complainant youngness and the report from her mother (PW4) of her disappearance from home at the material time.

18. Indeed, the Complainant's mother confirmed that her daughter was a minor at the material time. She produced the necessary birth certificate (P.EX 3) which showed that the Complainant was born on 6th June, 2004 thereby placing her age at sixteen (16) years or thereabout. The age of the Appellant as per the medical report (P3 form) was placed at twenty (20) years.

19. It therefore followed that the Appellant engaged in sexual intercourse with a minor child aged about sixteen (16) years. It was obviously a case of an adult male person engaging in sexual intercourse with a female child thereby committing the offence of defilement notwithstanding that the Complainant child voluntarily and with her consent participated in the unlawful act.

20. The case was clearly not that of a child engaging in sexual intercourse with another child. In such a scenario the boy child is greatly disadvantaged and treated ruthlessly by the law as compared to the girl child who may have willingly consented to the act. It may be judicially noted by this court that that kind of scenario is prevalent among teenagers adolescents.

21. No wonder, in the case of *Evans Wanjala Siibi* (*supra*) cited herein by the appellant the court lamented thus: -

> "..... we think with respect, that had the two courts below adopted a more fair minded and even handed approach to the case, they would at the very least have sought to establish the Appellants age. Instead, what emerges is a rush to punish him in a zealous deployment of the Sexual Offence Act for the supposed protection of the Complainant. Once again the unfair consequences of a skewed application of that statute predominance against the male adolescent is quite apparent, two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour, while the boy, Juliet; Romeo is branded the villain hauled before the court and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term....."

22. In the present case, the Situation illustrated in the aforementioned case did not apply for the simple reason that the appellant was not a minor engaging in a sexual act with another minor. He could not therefore be treated by the trial and indeed this court as a minor. His age was confirmed to be over eighteen (18) years, hence, an adult. He should have known better that to engage in sex with a minor despite her consent.

23. In law, a minor is deemed to be incapable of giving consent to a sexual act. The Appellant's argument that the Complainant behaved like an adult and willingly sneaked into a man's house for purposes of having sex thereby deserving treatment as a grownup who knew what she was doing was untenable in the circumstances of the case. The cited case of Martin Charo v Republic (supra) in that regard, could not apply.

24. The Appellant could not therefore seek solace in Section 8(5) of the *Sexual Offences Act* or even Section 8(6).

Under Section 8(5), it is a defence to a charge of defilement if: -

> "(a) It is proved that such child, deceived the Accused Person in to 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."

The belief referred to in Sub-Section (5) (b) is under Sub-Section (6) to be determined having regard to all the circumstances, including any steps the Accused person took to ascertain the age of the Complainant.

25. In this case, it was apparent that the question of deception on the part of the Complainant did not arise. The circumstances of the case strongly indicated that the Appellant had full knowledge that the Complainant was a minor below the age of eighteen (18) years when he failed to control his sexual libido and decided to have sex with her without resistance. It did not matter that she was his girlfriend, he ought to have waited for her to complete Secondary School and be of age, capable of consenting to a sexual act.

26. In the upshort, this court is satisfied that the Appellant's conviction by the trial court was sound and proper and is hereby affirmed. With regard to the sentence, although the Appellant was charged under Section 8(3) of the *Sexual Offences Act* which provides for imprisonment for a term of not less than twenty (20) years for a person who commits defilement with a child between the age of twelve and fifteen years, the correct provision should have been Section 8(4) of the Act as borne by the evidence that she was over fifteen years at the time of the Offence.

27. The trial court was therefore correct in sentencing the Appellant Under Section 8(4) of the Act which provides for imprisonment for a term of not less than fifteen years for a person who commits defilement with a child between the age of sixteen and eighteen years.

It would therefore follow that the sentence of fifteen years imprisonment imposed upon the appellant was lawfully and mandatory thereby depriving the trial court of any discretion to reduce it.

28. However, in view of recent jurisprudence coming from the Superior Courts on the Mandatory nature of sentences the not recent being the decision of the Court of Appeal in Julius Kitsao Manyeso v Republic Cr.App. No. 12 of 2021 at Malindi, which revolved around Section 8(2) of the *Sexual Offences Act* providing for a mandatory sentence of life imprisonment and which "Mutatis mutandis"

applies to this case in principle, this court thinks that for a first offender whose amorous nature took a hold of him and clouded his mind the fifteen years imprisonment was rather excessive in the circumstances.

29. Consequently, the sentence is hereby set aside and substituted for a sentence of seven years imprisonment from the date of conviction.

In sum, other than the alteration in sentence, the Appeal is dismissed for want of merit.

DELIVERED AND DATED THIS 9TH DAY OF OCTOBER, 2023

J. R. KARANJAH,

JUDGE