KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Jonah v Republic (Criminal Appeal 17 (E017) of 2021) [2023] KEHC 23679 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23679 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 17 (E017) OF 2021

AC MRIMA, J

OCTOBER 19, 2023

BETWEEN

AYAS WAFULA JONAH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C. M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. 139 of 2020 delivered on 4th March, 2021)

JUDGMENT

Background:

1. Ayas Wafula Jonah was charged in Kitale Chief Magistrates Criminal (S.O.) No. 139 of 2020. He faced the charge of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on 6th July, 2020 at [particulars withheld], the Appellant intentionally caused his penis to penetrate into the genital organ namely vagina of CNM, a child aged 17 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* whose particulars were that on 6th July, 2020 at [particulars withheld], the Appellant intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of CNM, a child aged 17 years old.

3. The accused denied the charges and was put on trial. After a full hearing, the Appellant was found guilty and convicted on the main charge of defilement and he was sentenced to serve a term of 10 years' imprisonment.

4. The Appellant was aggrieved by the conviction and sentence. He lodged an appeal which is under consideration in this judgment.

The Appeal:

5. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of placing an unsafe conviction pegged on insufficient, contradictory and scanty evidence. He also averred that key witnesses were not called. Noting that his defence was cogent, he urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

6. The Appellant extensively argued his appeal by way of written submissions. He submitted that the ingredient of penetration had not been established due to paucity of evidence. He was emphatic that he was improperly identified as the perpetrator asserting that had crucial witnesses been called, this question would have been properly addressed. He cited that his defence was not taken into consideration by the trial Court. As such, the Court arrived at a decision in error.

7. On the part of the prosecution, through its written submissions, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.

8. Both parties relied on various decisions in support of their respective cases.

Analysis:

9. 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.

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

11. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

12. This Court will deal with each of the issues in turn.

Age of the victim:

13. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.

14. In this case, the complainant herself testified that she was 17 years old and that she was a Form 3 student at [Particulars Withheld] Girls High School. That evidence was corroborated by the Certificate of Birth which was produced as an exhibit. No objection was raised over the same.

15. Going by the foregoing evidence, the complainant was, therefore, a child within the meaning ascribed to the term under the Children's Act.

Penetration:

16. 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."

17. 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).

18. 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.

19. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

20. The issue of penetration was testified to by two witnesses. They are the complainant and PW3 one Dr. Michael Ngovett.

21. In the evidence, the complainant narrated how she was sexually assaulted in the night. She described how a male organ, penis, went into her female genital organ, vagina. The complainant was aged 17 years old and she was pregnant out of an earlier defilement. She, therefore, knew what genital penetration was.

22. PW3 examined the Complainant and filled in a P3 Form. He noted the presence of many epithelial cells in the complainant's vagina which was evidence of penile penetration. A laboratory examination was also conducted that proved numerous pus cells and that she was pregnant.

23. According to PW3, he formed an opinion that the complainant had been defiled.

24. The trial Court observed the witnesses as they testified. The Court did not make any adverse inferences on the demeanor of any of the witnesses. It believed their testimonies.

25. This Court, therefore, finds favour with the analysis and conclusion of the trial Court on this issue. For certainty, the aspect of penetration was duly proved.

Identity of the perpetrator:

26. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.

27. The identification aspect in this matter was attested to by the complainant. The Complainant testified that on the fateful night as she was inside their house with her siblings, she heard some commotion on the door. She peeped through the window and saw the Appellant who walked with a limp. The two had schooled together before the Appellant dropped out of school in Standard 4.

28. The complainant together with her younger siblings went to their parents' house and reported. However, the parents asked them not to fear so much after searching for the intruder in vain. They returned to their house. Suddenly a heavy downpour came. The complainant was surprised to see the

Appellant fall inside the house from the window and quickly got hold of her neck. The Appellant warned the others from raising alarm.

29. According to the complainant, the Appellant had a torch and a knife. She also stated that the light from the torch was bright and aided her to confirm the identity of the intruder.

30. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

31. Evidence by a single witness must be treated carefully and cautiously. 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 said: -

> …. 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made….

32. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

33. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

34. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> “I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error…"

35. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

36. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

37. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

38. The complainant was quite forthright on the identity of the assailant. She explained how she recognized him even before the act. She then raised alarm and informed her parents. When the assailant eventually accessed the house, the complainant was with her siblings, again the complainant easily recognized him by his voice when he threatened the other children who were inside the house. The complainant also readily gave the name of the Appellant to her parents and the police.

39. The Appellant lived in the neighbourhood. He had also schooled with the complainant. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events occurred in the fateful night, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.

40. This Court has also considered the Appellant's defence. It only centered on the manner he was arrested. Given the nature of the charges against the Appellant, the defence does not aid the Appellant in any manner whatsoever. It is for rejection as rightly so found by the trial Court.

41. The trial Court was right in finding that the Appellant was positively identified by way of recognition.

42. There was also an argument that some potential key witnesses were not called. Such does not hold in this matter. The prosecution has a discretion to call witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412). The witnesses called were sufficient to prove the offence.

43. Having found that the Appellant was properly identified as the perpetrator he was rightly found guilty and properly convicted. As such, the appeal against the conviction is hereby dismissed.

Sentence:

44. The Appellant was sentenced to 10 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

45. The Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

46. There is no doubt the offence is serious and indeed inhumane. It was also committed against an innocent child. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

47. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.

Disposition:

48. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Ayas Wafula Jonah, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the *Respondent*.

Regina/Chemutai – Court Assistants.