Loporin v Republic (Criminal Appeal E004 of 2022)
[2023] KEHC 23586 (KLR) (16 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E004 OF 2022

RN NYAKUNDI, J

OCTOBER 16, 2023

BETWEEN

BENJAMIN LOPORIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the diverse dates between 8th and 12th August, 2021 in Turkana West Sub County within Turkana County intentionally caused his penis to penetrate the Vagina of DE a child aged 16 years.

2. He was also charged with 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. The particulars of the offence are that on the diverse dates between 8th and 12th August, 2021 in Turkana West Sub County within Turkana County intentionally caused his penis to penetrate the Vagina of DE a child aged 16 years.

3. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.

4. Being dissatisfied with the said judgement the appellant lodged a petition of appeal filed on 30th June, 2023 against both his conviction and sentence.

   Parties filed written submissions in support of their arguments.

Appellant's Submissions

5. The appellant submitted that at the heart of the trial, was the question of penetration and pregnancy which was note proven. That the court allowed a Clinical Officer (PW3) who did not prepare the medical report or examine the complainant (PW1) to testify without satisfying itself that their evidence meets the exceptions set out by Section 33 of the *Evidence Act*, Cap 80.

6. The appellant further submitted that throughout the entire trial process, the appellant was not supplied with prosecution witness statements and exhibits at all to help him prepare and mount a solid defense including cross-examining the principal witness in the case – the complainant.

7. Additionally, the trial court ignored a glaring inconsistency that an abortion is alleged to have been procured by the appellant but the pregnancy test conducted 3 days later returned a positive pregnancy result. The appellant therefore submitted that the evidence presented by the prosecution was not sufficient to convict the appellant.

Respondent's Submissions

8. Mr. Yusuf Somo, prosecution counsel in opposing the appeal submitted that on the issue of identification, the appellant was well known to the complainant and that the relationship had been going on for some time.

9. Counsel submitted that the complainant testified that she was 16 years of age and that her father testified that she was born on 11.01.2005 and as such she was 16 years at the time of defilement.

10. On the issue of penetration, the respondent submitted that the complainant testified how she was penetrated by the appellant. She gave details on how she met the appellant who took her in as his wife and lived with her for some time.

11. It was submitted for the respondent that the appellant did not raise the question of not being supplied with witness statements during trial. That the appellant participated during the trial and cross-examined prosecution witnesses. It was therefore submitted that the appellant was accorded a fair trial.

12. The prosecution in closing urged this court to consider reducing the sentence meted out given the circumstances of this case.

Analysis andDetermination

13. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] E.A 32.

    The issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

14. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* which provides:

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(4) "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

15. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    3) Positive identification of the assailant.

16. In the case of *Charles Wamukoya Karani v. Republic,* Criminal Appeal No. 72 of 2013 it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."
>
> What does the evidence portend?

Age of the complainant

17. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

18. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

19. The appellant herein has not raised any issue as to the age of the child, an issue therefore that is not in dispute. The trial court rightly found that the complainant was sixteen years old at the time. Particularly, the complainant testified that she was a form 1 student at Katuli Secondary school.

    I find the age of the victim was 16 years old.

Penetration

Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

20. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

> " 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."

21. In light thereof, the appellant has questioned the fact that the pregnancy test came out positive and yet there was an alleged procured abortion. As the trial court rightly noted, pregnancy is prima facie evidence of penetration which subsequently settles the issue of defilement.

22. It was the complainant's testimony that the appellant was someone known to her as they were in a long-standing relationship. She indicated that she had been staying in their home prior to the pregnancy and also after her breaking to him news of her pregnancy.

23. The complainant further confirmed that it was the appellant who took her to hospital at the time of the abortion. The trial court took note of the receipt of payment amounting to Kshs. 1,000/= which was paid by the appellant.

24. PW3- the medical officer testified that the complainant was examined with her urinalysis revealing that she was three months pregnant. It was his testimony that based on her age, clearly, she had been defiled by a person known to her. He stated that in her treatment notes dated 31.10.2021, the complainant complained of abdominal pains and informed them that she had been given some drugs to procure abortion.

25. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I find that the medical evidence supports there was penetration of the child.

Was the appellant the perpetrator?

26. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

27. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

28. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

29. The appellant argued that in the absence of a case proven to the required standard, this court should find that the sentence is unlawful. Section 8 (4) of the *Sexual Offences Act* to convict provides as follows:

> 8(4) "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

30. The most important guidelines on exercising discretion to interfere with sentence on appeal is re-affirmed in the persuasive case from the common law jurisdiction in *Barbaro v The Queen* 2014 HCA 2(27) in which the court observed: "The conclusion that a sentence passed at first

instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some substantial wring has in fact occurred in fixing that sentence. For the reasons which follow, the essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely ne transformed into any positive statement of the upper and lower limits within which a sentence could properly have been imposed. Despite the frequency with which reference is made in reasons for judgement disposing of sentencing appeals to an available range of sentence, stating the bounds of an available range of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and different sentence fixed. Fixing that different sentence neither permits nor require the re-sentencing court to determine the bounds of the range within which the sentence should fall. It follows from the observations which I have made with respect to the fundamental character of the appellant process relating to sentencing the focus of every appellate judge must be upon the precise enunciation of the alleged error or errors wrong application of facts to the principles of law or taking into account irrelevant matters as a consequence a punitive, harsh, and excessive sentence is arrived at against the convict. In the facts of this case that is not the scenario to warrant interference by this court. The evaluation of the record shows the offence is serious. In the circumstances, 15 years' imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence also fails.

31. In the upshot, the appeal herein is dismissed.

DATED AND SIGNED AT ELDORET THIS 16TH TH DAY OF OCTOBER, 2023

In the presence of:

Appellant

Mr.Yusuf for the State

.....

R. NYAKUNDI

JUDGE