Wanyonyi v Republic (Criminal Appeal E053 of 2023)
[2024] KEHC 15922 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 15922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E053 OF 2023

REA OUGO, J

OCTOBER 25, 2024

BETWEEN

MOSES MASINDE WANYONYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Sentence in the Senior Principal Magistrate's Court at Webuye in SO E013 OF 2022 by Hon. P.Y. Kulecho, Principal Magistrate on 3rd August 2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of Defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates of 25th July 2022 and 13th August 2022 within Bungoma County, intentionally caused his penis to penetrate the vagina of LB a child aged 14 years.
2. The Appellant was, upon conviction sentenced to serve 15 years' imprisonment.
3. Aggrieved by the sentence imposed by the trial court, the Appellant filed the present Appeal and listed the following grounds of appeal in his Petition of Appeal:
    1. That I am a first offender and do earnestly and honestly feel remorseful for the offence committed.
    2. That this appeal isn't against the sentence imposed but merely requesting this Hon. Court to consider reducing the same on humanitarian grounds.
    3. That my family is very poor. I was the sole breadwinner of my family and prolonged sentence subjects them to severe suffering hence this request for reduction of sentence.

4. That the sentence imposed be reduced and fall under probative terms and do request this Hon. Court to consider the reduced sentence served under probation.

4. The appellant subsequently filed amended grounds of appeal:

    1. That the age of the complainant was not proved beyond reasonable doubt.
    2. That the mandatory nature of minimum sentences in the SOA No 3 is unconstitutional and not warranted on plea.
    3. That the trial court erred in law and fact in not considering the conduct of the complainant and the circumstance of the case as an important ingredient in the defilement case pursuant to section 33 SOA NO 3 of 2006.
    4. That the sentence is manifestly excessive and not proportionate to the circumstance of this case.

5. In his amended petition, the appellant seeks the conviction to be quashed and the sentence set aside.

6. This being a first appellate court, I am under a duty to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify (see Okeno vs. Republic [1972] EA 32).

7. The evidence before the subordinate court was as follows: LNB (Pw1) testified that she left home on 25/7/2022 in the company of her cousin to Namwatikho shopping centre. They met the appellant and he asked her to be his girlfriend promising to marry her. She informed him that she was a student but gave in to his advances. She boarded his motorcycle and they started cohabiting in his house. Pw1 stayed with the appellant from 25/7/2022 until 13/8/2022 during which period they were intimate. She explained that the appellant inserted his male genital organ into her female genital organ.

8. The victim's father ABW (Pw2) testified that on 25/7/2022 his wife called to tell him that Pw1 did not return home. Pw2 went in search of the girl but did not find her and he reported the case at Mbakalo police station. On 12/8/2022 he received information from his sister-in-law that Pw1 was staying with someone at Misikhu and relayed the information to the police. No 119xxx, PC Simon Said (Pw5) advised Pw2 to return the next morning so that they could raid the appellant's home. The following morning Pw5, Pw2, his niece Melody and PC Khisa went to the appellant's house. They knocked and introduced themselves as the police. The appellant opened the door and they found Pw1 in bed. They arrested the appellant and took him to the station.

9. The clinical officer Leticia Mbalo (Pw3) testified on behalf of her colleague Patrick Koech who examined the child. Pw3 testified that no bruises or lacerations were noted on the genitalia. However, Pw1 had a whitish discharge and the hymen was absent. Pus cells were also seen once urinalysis was conducted. Pw3 testified that no spermatozoa were seen given that Pw1 in her history told the doctor that she had protected sex. Pw3 produced the treatment notes, lab request and report for, PRC form and P3 form as exhibits. No. 100xxx PC Peninah Mwangi (Pw4), the investigating officer, conducted investigations that revealed the appellant was cohabiting with the complainant, recorded witness statements, and charged the appellant.

10. The appellant in his defence testified that he is a farmer. He told the trial court that Pw2 was his business associate and he once sold him maize worth Kshs 10,000/-. When Pw2 failed to pay for the maize,

the appellant beat him. Pw2 then threatened that there would be dire consequences as a result of the appellant's actions.

Submissions

11. The appellant in his submissions argues that the treatment notes indicate that the complainant was 19 years old. The birth certificate on the other hand show that the complainant was 14 years and 3 months. He submits that due to the variance in the evidence, the court should find that the complainant was 19 years old.

12. They also relied on the case of Martin Charo v Republic [2016] eKLR and urged the court to consider the conduct of the complainant. In the Martin Charo case, the court considered the following issues: Did the complainant report the defilement immediately after the incident?; Was the complainant threatened after the incident?; How long was the relationship?; How long did it take for her to report?; Was there a threat on her life?; Were the parents aware of the relationship?

13. The appellant submits that this court should consider the conduct of Pw1, the fact that the appellant was 21 years old, a first offender, and his mitigation. They also relied on the case of Petition No. 97 of 2021 Edwin Wachira & 9 Others.

14. The respondent opposed the appeal because there was overwhelming evidence against the appellant at the lower court. They submit that the appellant was positively identified as the perpetrator and penetration was proved. It was submitted that the complainant was 15 years old at the time of the offence and the appellant benefited by getting a lower sentence as he was charged under section 8 (4) of the *Sexual Offences Act*. They urged the court to find that the sentence meted out to the appellant was not grossly disproportionate to warrant interference.

Analysis And Determination

15. I have carefully considered the appeal, the amended grounds of appeal, rival submissions, and the issues before the court are as follows:

    a. whether the sentence meted was manifestly excessive based on the complainant's age; and

    b. whether the conduct of the complainant is a key ingredient in proving defilement;

    c. whether the prosecution proved their case to the required standard.

16. On the first issue, the birth certificate shows that Pw1 was born on 5th April 2008 making her 14 years at the time of the offence. Although the admission form of Webuye County Hospital indicated the age of Pw1 as 19 years and the P3 form estimated the age of Pw1 as 16, the same were estimates and not professionally determined. In Criminal Appeal No.504 of 2010 Kaingu Alias Kasomo vs. Republic, the Court of Appeal stated thus:

> " 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"

17. In the case of Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No.2 of 2000 it was held inter alia that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

18. The estimated age noted in the victim's treatment records and P3 form was not determined through an age assessment report using scientific methods but rather reflected opinions not based on any scientific formula. They were not accurate. However, the birth certificate shows the victim's age as 14 years old, and in my view, the prosecution proved that the child was a minor aged 14.

19. On whether Pw1's conduct was a key ingredient in proving defilement, the appellant cited the case of Martin Charo v Republic [2016] eKLR in his submissions where the court considered the conduct of the complainant who carried herself as an 18-year-old.

20. The Court of Appeal in Jumapili v Republic [2024] KECA 692 (KLR) held as follows:

> " 24. We turn to the contention that PW1 voluntarily and willingly went to the appellant's house and the ensuing sexual encounter was consensual and that PW1 held herself out as an adult. PW1's testimony was that she was in Standard 5 and "14 years old." Similarly, her father, PW2 told the court that PW1 attended E. Primary School "in standard 5 and is aged 14 years." PW3, produced an age assessment report by Dr. Macharia placing the complainant's age, as of 8th October 2015, at 14 years. The evidence on PW1's age was consistent. It is trite that under the *Sexual Offences Act*, a child below the age of 18 years is incapable, legally, to consent to sexual intercourse.
>
> 25. The claim that PW1 held herself out as an adult is effectively an attempt, belatedly, to raise a defense under Section 8(5) and 8(6) of the *Sexual offences Act*...
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> 26. Apart from the fact that this defence was not raised during the trial there is no evidence at all of what would have led the appellant to believe PW1 to have been over the age of 18 years. On the contrary, evidence showed that PW1 had left school the previous day and was still in her primary school uniform while at the appellant's house."

21. In this case Pw1 testified that she told the appellant that she was a student. On cross-examination, she testified that she had been sent home due to a lack of school fees. Both Pw1 and Pw2 testified that the complainant went to Kibisi Secondary School. There is no evidence that Pw1 had carried herself as an adult. The evidence shows that Pw1 was a minor incapable, legally, of consenting to sexual intercourse.

22. It is undisputed that the appellant was positively identified as he was arrested in his house in the company of the child by Pw5. Pw1 testified that she went to the appellant's house where he inserted his male genital organ into her female genital organ. She testified they engaged in the act of sexual intimacy. The P3 and the Post Rape Care Forms indicate that Pw1's hymen was not intact and was old. The nature of the injury was described as defilement. Pw3 testified that no spermatozoa on account of Pw1 having protected sex. The offence of defilement was therefore proved beyond any reasonable doubt.

23. I now turn to consider the sentence by the lower court. The appellant was charged under sections 8 (1) and 8(4) of the *Sexual Offences Act*. Section 8(4) provides that 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. The appellant contended that the nature of minimum sentences is unconstitutional but made no submissions on which provisions of *the constitution* were violated. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) explained the nature of minimum sentences as follows:

> " Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence."

24. Although the prosecution led evidence that Pw1 was 14 years old, the charge as framed talked of the offence under section 8(4) of the Act. The trial magistrate therefore sentenced the appellant to 15 years and in the circumstances, the sentence was lenient. I find that the appeal by the appellant fails and is dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF OCTOBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Moses Masinde Wanyonyi/ Appellant - In person

Miss Matere - For the Respondent

Wilkister -C/A