Kivuti v Republic (Criminal Appeal E046 of 2024)
[2024] KEHC 14412 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E046 OF 2024

LM NJUGUNA, J

NOVEMBER 20, 2024

BETWEEN

KELVIN KIVUTI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J.N. Githaiga, RM Siakago Magistrate's Court Sexual Offence No. E001 of 2024 delivered on 4th April 2024)

JUDGMENT

1. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 07th May 2024, seeking that the appeal be allowed, conviction be quashed, the sentence be set aside and the appellant be set at liberty. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

    a. By disregarding the appellant's defense without giving cogent reasons, which defense was plausible and impeached the prosecution's case;

    b. By failing to consider the appellant's mitigation in which he stated that he was a first offender; and

    c. By failing to accord the appellant the right to an attorney yet it was his first time in court, hence violating his rights under Article 50 of the *Constitution*.

2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence are that on diverse dates between April 2023 and 28th September 2023, in Karambari location, Mbeere north subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GKI, a child aged 15 years.

3. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, whose particulars are that on diverse dates between April 2023 and 28th September 2023, in [Particulars Withheld] location Mbeere north sub county within Embu County, the appellant intentionally and unlawfully touched the vagina of GKI, a child aged 15 years, with his penis.

4. The appellant pleaded not guilty to both charges and the plea was duly entered. The matter proceeded to full hearing.

5. PW1 was the victim J.K who stated that she was born on 4th February 2008. That in April 2023, she was on her way home from her friend's home to borrow a book when she met the appellant. That the appellant asked her to meet him the following day and she went to the place where he was employed. That the appellant took her to his house and started making love advances to her and then he had sexual intercourse with her without protection. She stated that afterwards, the appellant escorted her home and gave her Kshs 200/= and told her not to tell anyone about it.

6. That she did not tell anyone what had happened and, on many occasions, afterwards she met with the appellant and they had sex. That she discovered she was pregnant after she missed her menses in the month of July, August and September 2023 and in October 2023, she told the appellant about the pregnancy and he promised to help her procure an abortion. That she informed her mother about the pregnancy and in December 2023 when the appellant planned to take her to hospital for the abortion, she refused and told him that her mother had told her not to leave home.

7. It was her testimony that her parents reported the incident at Kathanji Police Station and she was examined at Siakago Level 4 Hospital. That the appellant forced himself on her every time they had sex. She produced her birth certificate as evidence. On cross-examination, she stated that the appellant lured her into his house and had sex with her and he warned her against telling anyone anything or against screaming. She was 8 months pregnant at the time of the testimony.

8. PW2 was the victim's mother who stated that in December 2023, the victim told her that she was pregnant. That she was upset and when she asked who was responsible, she said it was the appellant. That she went to ask the appellant and he did not deny it and they reported the matter to the police at Kathanje Police Station, where they were referred to Siakago Level 4 Hospital. On cross-examination, she stated that she didn't have any grudge with the appellant who had admitted to defiling the victim.

9. PW3 was Martin Murimi, a clinical officer at Siakago District Hospital who stated that upon examining the victim, he noted that there were no lacerations but there was an old broken hymen. That the victim was 20 weeks pregnant. He produced the P3, PRC forms and treatment notes as evidence. On cross-examination, he stated that he examined the victim on 28th December 2023 but the appellant was not examined.

10. PW4 was Sgt. James Kararu of Kathanje Police Post who stated that the incident was reported at the station of 28th December 2023 where they were referred to the hospital for examination. That the appellant was arrested and charged with the offence once they ascertained that the complainant was a minor at the time of the incident. He stated that he knew the appellant because he had been brought to the police station over another offence. On cross-examination, he stated that the witnesses in the case directed him to the appellant's home where he lived with his wife.

11. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.

12. DW1, the appellant, stated that on 09th November 2019, he was at home when PW1 visited him and he was welcomed by his wife. That PW2 was selling PW1 to him for Kshs 500,000/= and while at the hospital, PW2 asked for money to terminate PW1's pregnancy. That he had reported Moses Murimi to the police for malicious damage to property and in December, PW1 told him to withdraw the charges because Morris Murimi was her boyfriend and she was expecting his child. That later, PW1 and PW2 visited him to ask about the case he had against Morris Murimi and he told them that his boss had refused to withdraw it. That after this, PW2 reported the incident to the police and he was arrested.

13. DW2 was Joy Wawira Ngungi, the appellant's wife, who stated that on 09th November 2023, the victim went to their home looking for the appellant. That PW1 requested the appellant to withdraw the case against Morris but his employer refused. That on 12th December 2023, PW2 visited them to enquire about the case but the appellant's employer remained adamant and that is when PW2 threatened the appellant and demanded Kshs 20,000/= to terminate PW1's pregnancy. That the appellant was later accused of defiling PW1. On cross-examination, she stated that she has a 3½ year-old child with the appellant. That Morris had destroyed Ephantus Munyi's fence and he was the only one who could withdraw the charges of malicious damage. That when PW1 and PW2 threatened the appellant, he did not report the matter to the investigating officer.

14. DW3 was Phideas Wangari, the appellant's mother who stated that she did not know if the appellant was having sexual relations with the victim and if he defiled her since he worked away from home.

15. At the end of the defense case, the trial court convicted the appellant of the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act and sentenced him to 10 years imprisonment.

16. This appeal was canvassed by way of written submissions.

17. The appellant submitted that PW1 behaved like an adult to him and that is why she did not speak of any sexual relations with the appellant until she learned that she was pregnant. That the trial court should have considered this fact in its finding, but it didn't. He stated that the victim did not refuse his sexual advances from the first time he gave her a hug. He relied on the case of *Martin Charo v Republic* (Criminal Appeal 32 of 2015) [2016] KEHC 5619 (KLR).

18. The respondent submitted that the elements of the offence were proved beyond reasonable doubt and it relied on the provisions of section 8(4) of the Sexual Offences Act and the case of *DS v Republic* (2022) eKLR and *Edwin Nyambogo Onsongo v Republic* (2016) eKLR. It relied on the provisions of section 2 of the Sexual Offences Act for the meaning of 'penetration' and section 124 of the *Evidence Act*. It was its argument that per section 109 of the *Evidence Act*, onus was on the appellant to prove his allegation that there was a grudge between him and the victim's family. That the trial court exercised its discretion and departed from the mandatory prescribed sentence, which should be upheld by the court.

19. The issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt;

    b. Whether the sentence is harsh and excessive.

20. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32. I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

2. Under section 8(1) of the Sexual Offences Act, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

   a. The age of the complainant- that the complainant was a child;

   b. Penetration occurred; and

   c. The perpetrator was positively identified.

21. Regarding the age of the victim, the Sexual Offences Act defines "Child" within the meaning of the *Children's Act* which defines a "Child" as ".....any human being under the age of eighteen years". The victim was born on 4th February, 2008 and the incident occurred between April 2023 and September 2023. This means that as at the date of the first defilement incident, the victim was 15 years and one month old. In the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR the Court of Appeal held that:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

22. On the element of penetration, PW3 testified that when he examined the victim, she was 20 weeks pregnant and her hymen was broken. This is enough proof of penetration, besides, PW1 said that she had sexual relations with the appellant that caused penetration. The other issue is identification of the appellant as the perpetrator. PW1 testified that the appellant called her to his house and when she went, regardless of her resistance, he inserted his penis into her vagina. That they met several times and they had sexual intercourse each time.

23. In December 2023, she told her mother that she was expectant and that the appellant was responsible. She stated that when she told the appellant that he was the father of her unborn child, he did not refuse and he even put plans in motion to have her procure an abortion. PW2 stated that when she learned that her daughter was pregnant and that the appellant was responsible, she confronted him about the issue and he did not deny it. According to section 124 of the *Evidence Act*, the testimony of the victim on identification of the victim is sufficient and doe not need to be corroborated.

24. In this appeal, the appellant has submitted that the victim did not reject his sexual advances from the onset. He even submitted that when he hugged the victim the first time they met, the victim did not resist that action. Looking at all these factors, in the eyes of this court, there is no doubt as to the identification of the appellant as the perpetrator of the offence.

25. On the issue of sentencing, the appellant was charged under section 8(4) of the Sexual Offences Act which provides for victims between the ages of 16-18 years. The particulars on the charge sheet show that the victim herein was 15 years old, thus the appellant should have been charged under section 8(3) of the Sexual Offences Act which provides for a sentence of not less than 20 years imprisonment upon conviction, thus:

> "(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

26. The appellant did not offer any mitigation and the trial court sentenced him to 10 years imprisonment, relying on the cases of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR and *Wilson Kipchirchir Koskei v Republic* (2019) eKLR. The Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the Sexual Offences Act remain constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> "(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

27. This means that the appellant is subject to the sentence prescribed under the correct provision of the law that is applicable in this matter. It would be very sad if this first appellate court failed to capture this error on the charge sheet, which error should have been arrested and rectified much earlier during the trial. This does not however mean that the charge sheet is fatally defective; it simply means that the court should consider the correct provision of the law under which the offence occurred for purposes of sentencing. That being said, I find that the trial magistrate indeed erred in sentencing the appellant to 10 years' imprisonment as the same is not commensurate with the offence and the circumstances surrounding it.

28. In the end, I find that the appeal lacks merit and the same is hereby dismissed with orders thus:

    a. The trial court's findings on conviction are hereby upheld; and

    b. The sentence of 10 years imprisonment is hereby set aside and substituted with a sentence of 20 years imprisonment.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE