Wanjohi v Republic (Criminal Appeal E045 of 2023)
[2024] KEHC 14173 (KLR) (14 November 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E045 OF 2023

AK NDUNG'U, J

NOVEMBER 14, 2024

BETWEEN

ELIAS WANJOHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E031 of 2022– L. Nyaga, RM)

JUDGMENT

1. The Appellant in this appeal, Elias Wanjohi was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 20/05/2022 at about 2030hrs in Laikipia East Sub-county, Laikipia County unlawfully and willfully caused his penis to penetrate the vagina of SW a girl aged 15 years. On 21/06/2023, he was sentenced to twenty five (25) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he appealed to this court challenging the conviction and the sentence vide amended ground of appeal filed alongside his submissions. The conviction and the sentence are being challenged on the following grounds;

    i. That the learned magistrate erred by not finding that the medical evidence produced in court did not prove penile penetration.

    ii. The learned magistrate erred convicting him to 25 years instead of 15 years without credible evidence from the doctor.

    iii. The learned magistrate failed to note that the evidence of the complainant was involuntary and the charge sheet was defective.

iv. The learned magistrate erred finding that the prosecution case was proved beyond reasonable doubt.

v. The learned magistrate erred by not finding that the case was fabricated.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the prosecution did not prove beyond reasonable doubt that there was penetration. The charge sheet was defective in that it indicated that the complainant was 15 years whereas PMF3 indicated that she was 16 years. That he was charged under Section 8(1) as read with Section 8(3) instead of Section 8(4). That he was prejudiced as it is mandatory for any charge to be based on existing law. The complainant was 16 years old and he was sentenced to 25 years instead of 15 years as the law provide and the magistrate did not proffer any reason for sentencing him to 25 years. He submitted that the relevant law provides for a sentence of not less than 15 years hence the sentence of 25 years was manifestly excessive for a first offender and the sole breadwinner for his family.

4. He submitted that the prosecution failed to prove their case in that the complainant did not tell the court whether she felt pain, that the complainant informed the court that she was tied with a rope but examination conducted from head to toe was normal, there was no discharge and the hymen was old broken despite testifying that she was raped three times and the rope used was not produced in court. He further submitted that the trial court should have been wary of a single witness evidence as the complainant could have fabricated things bearing in mind that she was taken to the police cell where she was locked.

5. The Respondent in opposing the appeal submitted that the ingredients of the offence were proved to the required standard. That the age was proved by the victim's birth certificate that she was 15 years. Penetration was proved by the victim's testimony and the clinical officer and identification was proved. As to whether the charge sheet was defective, the counsel submitted that the charge sheet and the birth certificate indicated that the complainant was 15 years old whereas the evidence by the victim and witnesses stated that she was 16 years old. He submitted that this did not dislodge the fact that the victim was still a minor at the time the offence was committed. On the sentence, he submitted that the sentence was justified and reflected the severity of the offence considering the aggravating circumstance of the case and that the trial court considered the mitigating factor vis a vis the aggravating circumstances of the case.

6. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

7. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

8. The evidence before the trial court was as follows. PW1, a chief testified that he went to the Appellant's house and found the mattress on the floor and he instructed him not to sit there since he had a visitor. He informed him that he had decided to change his wife. He later went to the Appellant's house to borrow a matchbox where he found the complainant whom he recognised. He went to her father and informed him and accompanied by the complainant's father, they reported the matter to the police. Police proceeded to the scene and found the house locked. The Appellant was not there but the complainant opened the window from inside and she was rescued. They went to police station where they recorded their statement and the complainant was taken to hospital.

9. On cross examination, he testified that he found the Appellant in his house with a friend lighting a jiko and that the complainant was not in PW1's house but the Appellant's house.

10. PW2, the complainant's father testified that the complainant went missing and he looked for her to no avail. At around 9.00 am the next day, PW1 approached him and asked him whether he knew where his daughter was. He also informed him that he found the complainant in some house. They reported the matter and the police accompanied them to the scene where they found the door locked from outside. They called out the complainant and she was ordered to open the window and come out. She was taken to hospital. Accompanied by PW1, they looked for the Appellant where they found him in a meeting and told him that he was needed at police station and he headed there. He identified the complainant's birth certificate.

11. On cross examination, he testified the police ordered the complainant to come out through the window since he had locked her in. That he did not find the Appellant in the house and that the complainant was deep asleep and they had to wake her up. He stated that she was sleepy and appeared confused.

12. PW3, the complainant testified that she left home at around 7:00pm to her friend Grace house to borrow a book. On her way back home, she passed a man and after some time, she was held on the mouth tightly and she was dumbfounded. The man carried her to his house where her mouth was tied with a rope, her hands were tied and she was pushed to the wall. She was ordered not to talk. She testified that the man removed her clothes and he removed his clothes and raped her. The man left the house and came back with food which he ate. They slept and, in the morning, he told her that he was going to get breakfast. He came back later and untied her and ordered her not to talk. He had come with another man whom he ordered not to sit on the bed where she was. He put a red hat on her but she removed and the stranger saw her face.

13. The Appellant left but he applied some white substance on her mouth and when she licked, she became sleepy. She slept and after sometimes, she heard knocks from far and she was ordered to open the window and she got out of the house through it. She found her father and police and another man. She was taken to police station where she was interrogated. She told the court that by rape she meant that the Appellant removed his clothes, removed her clothes and put his penis in her vagina and he did this three times and when he was doing it, she has been tied on the wall and her mouth was also tied hence she could not scream. She testified that she was able to identify the Appellant in the morning. She testified on cross examination that she was not forced to testify.

14. PW4, the clinical officer testified that he examined the complainant. He testified that on head to toe examination, all was normal. On genetalia examination, there was laceration on vaginal wall around labia majora, hymen was broken-old, there was no discharge, HIV and VDRL tests were negative, urinalysis was normal and on vagina swab examination, 2-5 pus cells were seen. He concluded that there was penetration. He produced the P3 and PRC form as Pexhibit 1 and 2 respectively. He testified on cross examination that his finding was that the complainant was defiled and that he did not examine the Appellant so he could not tell whether he was the one who defiled her.

15. PW5 produced the complainant's birth certificate as Pexhibit3 on behalf of the investigating officer. The investigating officer did not testify.

16. The Appellant in his sworn testimony testified that he was a scrap metal dealer and he moved from Katheri to Likii on 21/05/2022. He had already paid for the house and had moved some items and on the said date, he found the window broken into and he found his sport shoes and a cap missing. He looked for the caretaker and he was told that the caretaker was at a meeting and he decided to go there but while there, he was held on the back by a man and the caretaker who informed him that the

man needed some iron sheets to make jiko so they should leave for more details. At the gate, he found 6 more men who had sticks and stones and he was informed that he had slept with the man's daughter but he denied and informed them that he was in the process of moving from Katheri. He was escorted to the police station but before they arrived there, they asked for Kshs.30,000/- to settle the matter which he did not have. He was taken to police station and he did not find the girl. He testified that the girl's statement was that she had gone to Eric's house, the caretaker of the plot and he saw the girl for the first time in court.

17. He maintained on cross examination that he did not know the complainant and he met Eric the caretaker when he was looking for a house. That he had a family whom he left at Katheri packing their items. He further testified that he had not settled at Likii yet. That he did not have a grudge with the complainant's father but the complainant's uncle might have harboured a grudge since he was also in scrap metal business and wanted to neighbour his business.

18. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

19. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

20. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " 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."

21. In the present appeal, the charge sheet indicated that the complainant was 15 years. PW1, PW2 and PW3 all testified that the complainant was 16 years old. PW5, a police officer produced the complainant's birth certificate as Pexhibit3. I have perused the birth certificate and it indicates that the complainant was born on 12/10/2006. The offence is said to have been committed on 20/05/2022 hence the complainant was 15 years at the time of the commission of the offence and a few months shy to 16 years.

22. It is trite law 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 (see the case of Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017]).

23. It therefore follows that the age of the complainant was proved by the birth certificate. The trial court therefore rightly held that the complainant was 15 years at the time of the commission of the offence. Though there was variance on the age between the charge sheet and the evidence on record, the same did not prejudice the Appellant as the age is only a determinant of the sentence to be imposed.

24. As regards to proof of penetration, the Appellant submitted that the complainant failed to describe whether she felt pain, that she informed the court that she was tied with a rope but examination conducted from head to toe was normal, there was no discharge and the hymen was old broken despite testifying that she was raped three times, the rope used was not produced in court. He further

submitted that the trial court should have been wary of a single witness evidence as the complainant could have fabricated things bearing in mind that she was locked at police cell.

25. The complainant in her testimony told the court that the Appellant tied her mouth and hands and pushed her on the wall and raped her. She described that he removed his clothes, removed her clothes and inserted his penis in her vagina. He did this three times during the night. The testimony of PW4 confirmed that there was proof of penetration. He testified that there were lacerations on the outer genitalia and there was presence of pus cells. He concluded that there was proof of penetration. His findings were captured in the P3 and the PRC form which he produced as Pexhibit1 and 2 respectively. As to whether the complainant said she felt pain or not is a non-issue because what the court was called upon to determine with the material placed before the court, was whether defilement was proved or not. It is not whether the complainant felt pain or not. It is also not true that the complainant was locked at police cells

26. From the above, I find that penetration was proved to the required standard following the complainant's testimony which was corroborated by the medical evidence.

27. Having established that the complainant was defiled, the question that begs is whether the complainant was defiled by the Appellant.

28. There is no evidence whether the complainant knew the Appellant from before. She was captured at night and she testified that in the morning, she was able to recognise the Appellant. PW1 testified that he heard people talking in the nearby house which belonged to the Appellant. He went to the Appellant's house where he found a mattress on the floor and he was ordered not to sit on it since the Appellant had a visitor. He asked him whether it was Maggie (Appellant's wife) but he informed him that he has decided to change Maggie. He left and returned later to borrow a matchbox which the Appellant instructed him to pick it. He peeped in the house and saw the complainant whom he recognised. He informed her father and the matter was reported to the police.

29. With the police, PW1 and PW2 proceeded to the Appellant's house where they found the door locked. The complainant was inside deep asleep and she had to use the window to come out. The Appellant did not deny that the house where the complainant was found belonged to him. He only stated that he had recently moved from Katheri to Likii and had not moved in yet since he had only moved some items. He also knew PW1 whom he claimed that he was the caretaker. He did not also deny that he had a wife called Maggie. It therefore follows that PW1 knew the Appellant and also knew his house.

30. The Appellant claimed that he moved to Likii on 21/05/2022, a day after the commission of the offence. However, he did not put across this issue during cross examination of the prosecution witnesses and especially PW1. It was raised too late in the day. Such a defence ought to be put to the witnesses so that they can have an opportunity to give their side. Failure to raise it when cross-examining the witnesses leads to the inevitable conclusion that it is an afterthought which cannot possibly be true. I therefore find that the prosecution proved that the appellant was the perpetrator.

31. The Appellant also claimed that he was convicted on a single witness evidence and the trial court should have been wary of this. It is noteworthy that a conviction can be based on a single witness testimony as was held in Anil Phukan vs State of Assam 1993 AIR 1462, 1993 SCR (2) 389 as follows: -

> " A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone".

32. Furthermore, the charge of defilement is a sexual offence. Sexual offences are usually not committed in public, they almost always happen in privacy or secrecy or away from the public eye. It should not be expected that there would be eyewitness evidence to such events. The only available account would be that of the victim.

33. On the sentence, the Appellant was sentenced to twentyfive (25) years imprisonment. He termed the sentence as manifestly excessive. The charge under section 8(3) provides that;

> " 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."

34. The use of the term

> " ...is liable upon conviction to imprisonment for a term of not less than twenty years..."
>
> in ordinary English means that the trial court has a discretion whether to impose a custodial sentence or some other kind of punishment. It does not mean that the trial court is bound to impose imprisonment in all cases. But once the trial court decides that the accused deserves a custodial sentence, then it must impose a term of imprisonment of not less than 20 years.

35. I have reviewed the record of the trial court on sentencing. Sentencing is at the discretion of the trial court. An appellate court will not interfere unless it is shown that the trial court considered irrelevant factors or failed to consider relevant matters or misapplied the law. In the instant appeal, I note the court considered the aggravating factors that led it to impose the sentence meted out. I have no ground upon which to interfere with the sentence.

36. With the result that the appeal fails and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF NOVEMBER 2024.

A.K. NDUNG'U

JUDGE