Jonda v Republic (Criminal Appeal 69 of 2021)
[2023] KECA 374 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 374 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 69 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 31, 2023

BETWEEN

MWANDAZA JONDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (J.N. Njagi J.) dated 29th January 2020 in High Court Criminal Appeal No 142 of 2018 arising from the original trial in Mombasa CM Criminal Case SO 29 of 2018)

JUDGMENT

1. Mwandaza Jonda, the Appellant herein, has lodged a second appeal in this Court against his conviction and sentence for the offence of defilement. He has in this respect appealed the judgement delivered on January 29, 2020 by the High Court (J. Njagi J.) on his first appeal, being High Court Criminal Appeal No 142 of 2018. The High Court upheld the Appellant's conviction for defilement by the Chief Magistrates Court at Mombasa, but reviewed the sentence from 20 years' imprisonment to 10 years' imprisonment.

2. The Appellant had been charged before the Chief Magistrate's Court (hereinafter "the trial Court") with one count of the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars were that the Appellant, on diverse dates between April 10, 2018 and May 16, 2018 in Jomvu Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of AM, a girl aged 15 years old. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The Appellant pleaded not guilty to the charges and was convicted and sentenced to serve 20 years' imprisonment after a trial in which four witnesses testified for the prosecution, and in which he testified in his defence and called one defence witness. The Appellant was dissatisfied with the decision of the

learned trial Magistrate and appealed to the High Court at Mombasa, faulting the trial Magistrate for convicting him without establishing that there existed the requisite mens rea and actus reus; for failing to appreciate that the victim carried and conducted herself as an adult; for convicting him without appreciating the hostile relationship between the victim and her biological mother who had attempted to marry her off to older men; for failing to exercise discretion in passing the appropriate sentence under the circumstances hence handing out an excessive sentence of twenty years; and failing to consider and be bound by decision from superior courts on emerging trends and developments of jurisprudence in the area.

4. The learned Judge, in his judgement dated January 29, 2020, was satisfied with that the victim was 14 years old when she started living with the Appellant as evidenced by her birth certificate; that the Appellant, while stating that the victim was his wife did not raise the defence under section 8(5) of the *Sexual Offences Act*, and neither did the complainant's mother have capacity to give consent to the marriage of an underage girl; and that the fact that the Appellant bought school books for PW1 meant that he was aware that the victim was underage. The learned Judge was also satisfied that penetration was admitted by the Appellant and corroborated by the medical evidence, and thereby concluded that the Appellant defiled a 15-year old girl. The conviction by the trial court was consequently upheld but the sentence meted on the Appellant was reduced to 10 years' imprisonment, after considering the decision by the Supreme Court of Kenya in *Francis Karioko Muruatetu Another v Republic* (2017) eKLR and that of the Court of Appeal in *Evans Wanjala Wanyonyi v R* (2019) eKLR.

5. The Appellant is dissatisfied with the decision by the High Court, and the grounds for his second appeal, which are the subject of this judgment, are that the learned Judge of the High Court erred by ignoring the provisions of section 8 (5) of the *Sexual Offences Act* No. 3 of 2006; by upholding the conviction of the Appellant despite the victim having carried and conducted herself as an adult; and by failing to appreciate the hostile relationship that existed between the victim and her biological mother who had earlier on attempted to marry her off to an older man. Further, that while the learned Judge exercised discretion and reviewed the sentence from twenty (20) years to ten (10) years imprisonment, the same was still oppressive to the Appellant, and the period that the Appellant has been in custody from December 13, 2016 to date would be sufficient punishment under the circumstances of the case.

6. We heard the appeal on the Court's virtual platform on September 28, 2022, and the Appellant was present appearing from Shimo la Tewa Prison, learned counsel, Mr. Chacha Mwita appeared for the Appellant, while the Respondent was represented by learned prosecution counsel, Ms. Valarie Ongeti. Mr. Chacha Mwita and Ms. Ongeti highlighted their written submissions, dated July 19, 2022 and July 12, 2022 respectively.

7. In order to appreciate the grounds raised by the Appellant, it is necessary to briefly highlight the evidence that was adduced in the trial Court. The victim, AM, who testified as PW1, stated that she dropped out of school and that after her mother mistreated her, she went to live the Appellant "as he was the only one who cared for her". She testified that she stayed in the same room with the Appellant, and used to have sex with him, and that he was her boyfriend. That after staying with the Appellant for a month, her mother, sister and brother-in--law came to where they were staying, and later on her mother came and met with the Appellant and his brother. After a while the mother then came with the police and the Appellant was arrested, and PW1 was taken to hospital and examined, and recorded a statement with the police.

8. SK, the victim's mother testified as PW3, that she reported the disappearance of PW1 to the police station on April 18, 2018, and that she later on saw PW1 with the Appellant, and accompanied PW1 to the house in which they were living, PW3 then reported the matter to the police, who arrested the Appellant on May 16, 2018. PW3 tendered PW1's birth certificate as evidence that she was born

on May 2, 2004, and denied marrying off PW1 to the Appellant. PC Jackline Orioki (PW4) who was the investigating officer, testified that she received the report from PW3 that PW1 was missing, and later on that PW1 was living with a man, and that the Appellant was arrested on May 16, 2018. PW4 accompanied PW1 to hospital where she was examined, and later charged the Appellant with the offence of defilement. Dr. Aisha Ali, a medical officer based at Coast General Hospital who testified as PW2, produced a PRC form filled on May 16, 2018 by a Dr. Said as Exhibit 1, and a P3 form filled by a Dr. Maneno on 24th May 2018 as Exhibit 2. Her evidence was that upon examination, PWI was found to have a broken hymen.

9. The Appellant in his defence testified that PW1 was his wife and that PW3 had visited them and negotiated dowry, but had him arrested when he decided to pay the dowry to PW1's father instead. He called his brother Tshumba Jonda (DW2) as a witness, who reiterated that PW1 was his sister-in-law and was married to the Appellant, and that PW3 had come to at their home and inquired when they were going to pay dowry.

10. It is in this context that the Appellant's counsel submitted that that the victim presented herself as an adult; that the hostile home environment drove her away from home to solace with the Appellant who took care of her well-being; that the victim's mother PW3 was not distressed over the disappearance of the victim and had several dowry negotiations with the appellant, hence indicative that she encouraged and did not deem the relationship between the appellant and the victim as improper. The counsel detailed inconsistencies in the evidence of PW1 and PW3 in this regard, and that it would not have been possible to ascertain the age of the victim as her birth certificate was not available and was issued during the trial on August 20, 2018. It was therefore the argument of counsel, while citing the case of *Eliud Waweru Wambui v R* (2019) eKLR, that the statutory defence in section 8(5) of the *Sexual Offences Act* had been established, and the Appellant was entitled to benefit from it.

11. Counsel also challenged the evidence adduced by PW2 for lacking weight and warranting a conviction because the victim had broken her virginity in 2017, therefore the medical reports could not attest to the role of the Appellant in the victims's broken hymen. In addition, that the examining officer was a nurse and not a doctor. With regard to the sentence, counsel submitted that even if the appeal were to fail on the issue of conviction, that the period already served be considered as sufficient in the unique circumstances of this case, and reliance was placed on the decision in *Philip Mueke Maingi & Others v DPP*, Machakos High Court Constitutional Petition E017 of 2021, that sentencing should be based on aggravating circumstances or lack thereof, and not on the minimum and maximum sentences set by legislation.

12. The prosecution counsel on her part urged that the age of the victim was proven vide the birth certificate that was exhibited, which although procured late as the details were entered on September 12, 2013, was a valid document. It was maintained that penetration was not in doubt as the victim testified that she lived with the appellant, as corroborated by medical evidence in the P3 and PRC form. The counsel pointed out that the Appellant was recognized as the victim's boyfriend, hence identified as the perpetrator. On the availability of the defence under section 8(5) of the *Sexual Offences Act*, it was urged that the same is not supported by evidence. Lastly, on the sentence, counsel cited the case of *David Mutai v R* (2021) eKLR for the proposition that there was no error in sentencing hence no reason to interfere with the sentence meted on the appellant.

13. Our role as a second appellate court was succinctly set out in *Karani v R* (2010) 1 KLR 73 as follows:

> " .... By dint of the provision of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered

matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

14. A perusal of the Appellant's grounds of appeal and submissions reveals three issues for determination. The first is whether the re-evaluation of the evidence adduced at trial disclosed proof of the offence of defilement; the second is whether the defence in section 8(5) of the *Sexual Offences Act* was available to the Appellant; and lastly, whether the sentence imposed on the Appellant was legal.

15. On the first issue, this Court (Makhandia, Ouko & Murgor, JJA) reiterated in *John Mutua Munyoki v Republic*, [2017] eKLR, that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:

    i. The victim must be a minor, and

    ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

16. The material legal question which required to be addressed was whether there was sufficient evidence adduced that the victim was a minor and was penetrated by the Appellant. On the validity and sufficiency of the birth certificate that was produced as an exhibit as evidence of the victim's age, the High Court noted as follows:

> " The birth certificate produced in court indicated that she was born on April 2, 2004. The birth certificate was issued on August 20, 2018 as the case was ongoing, however the birth certificate indicates that the information therein was entered into the register of births on September 12, 2013. The information in the birth certificate was therefore entered into the register of births many years before the case against the Appellant came up. The information therefore must be correct. The trial court was therefore right in going by the age of birth in the birth certificate, and the prosecution did thereby proof that the complainant was born on April 2, 2004 and she was therefore aged 14 years when she started to live with the Appellant".

17. The manner of proof of age was the subject of the decision by the Uganda Court of Appeal in *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, where the Court held that apart from medical evidence, age may also be proved by birth certificate, the victim's parents, or guardian and by observation and common sense. A birth certificate was produced by PW3, who was the victim's mother showing that the date of birth of the victim (PW1) as April 2, 2004. PW1 on the other hand testified that she was born on April 1, 2003. In addition, the question whether the victim was 14 or 15 years of age at the time of the offence is a question of fact, with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were tenacious in nature as noted by this Court (Makhandia, Ouko & M'Inoti JJA) in *Maripett Loonkomok v Republic* [2016] eKLR. The High Court therefore did not err in finding that the victim was aged 15 years from the evidence adduced.

18. On the sufficiency of the evidence adduced on penetration, the victim (PW1) testified that the Appellant was her boyfriend, they were living together and had sex severally, which facts were not disputed by the Appellant, who in his defence stated that the victim was his wife. The medical evidence by PW2 merely corroborated penetration, and the Appellant's arguments that there was another other person who had previously engaged in sexual intercourse with the victim was not only irrelevant in

the circumstances, but also did not create any doubt as regards penetration by the Appellant, given his admission. The High Court did not err in finding that penetration was thereby proved.

19. The second issue for determination is whether the defence under section 8(5) of the *Sexual Offences Act* was available to the Appellant. After noting that a child below the age of 18 years cannot consent to sex and marriage, the High Court found as follows as regards the defence in section 8(5):

> " Nowhere in his defence did the appellant raise the defence stipulated in Section 8(5) of the *Sexual Offences Act*. All what he said was that the complainant was his wife. He could as well have married her knowing that she was below the age of 18 years. The fact that he bought her schoolbooks would suggest that he knew that she was underage. If at all the complainants mother went ahead to negotiate dowry payment for an underage girl that was against the law as she could not have given consent to marriage of an underage girl".

20. It is however notable that the defence in section 8(5) was raised by the Appellant's counsel in the submissions he made in the High Court, and he cited various legal authorities in this regard. The defence was also considered and found not to apply by the learned trial magistrate. To this extent the High Court did err in failing to consider and re-evaluate the evidence on whether or not the defence was applicable.

21. Section 8(5) of the *Sexual Offences Act* in this respect provides as follows:

> " It is a defence to a charge under this section if-
>
> a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> b. the accused reasonably believed that the child was over the age of eighteen years."

22. This Court (Nambuye, Musinga, & Kiage JJA) held as follows in *Eliud Waweru Wambui v R* (2019) eKLR on the application of the defence in section 8 (5):

> " We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense." Section 8(6) in this regard provides as follows:
>
> "(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

23. Our view is that section 8(5) requires a conjunctive as opposed to a disjunctive reading and application, for the reasons that firstly, the word

> " and" in its ordinary usage is as a conjunction, connecting words, phrases and sentences that are to be taken jointly, and secondly, a departure from this ordinary meaning will have to be

required by the purpose of the statute. Therefore, starting with the ordinary meaning and construction of section 8(5), it is our view that the defence therein is available only if, firstly a child makes a deceptive representation that they are an adult that leads to such a subjective belief on the part of the accused person; and, secondly, the accused person demonstrates that reasonable circumstances existed that made him or her form an objective belief that the child was an adult. It is also our view that the absence of the term "reasonable" in section 8(5)(a) and its presence in section 8(5)(b), and the linkage of the two paragraphs by the conjunction "and", imports the co-existence of both a subjective and an objective element of the defence that both require to be demonstrated by an accused person.

24. In addition, a disjunctive application and interpretation of the word "and" of section 8(5) in our view could not have been intended by the legislature, as it would result in the absurd, unjust and disproportionate situation where the defence is made available to an accused person where a child holds himself or herself out as an adult, even when all surrounding circumstances clearly demonstrate otherwise, and would clearly be contrary to the purpose of the *Sexual Offences Act* and the mischief the section 8 of the Act seeks to address, which is the protection of children from defilement. Lastly, we also hold the view that the need and rationale for section 8(6) was not to place any qualifications on sub-section (5), but on the contrary, to place an obligation on an accused person to demonstrate that reasonable grounds existed to form a belief that a child was of age, for the defence in section 8(5) to be available.

25. Coming back to the present appeal, the Appellant's defence was that the victim was his wife, PW1's mistreatment by, and hostile relationship with her mother led PW1 to live with him, and that it was the victim who persuaded the Appellant to get intimate after convincing him that she was an adult and by her assertive conduct. Further, that the complainant's mother also participated in dowry negotiations. It is notable in this respect that under section 8(5), the deceptive representation must be made by the child to the accused person, and the material time is at the time of the commission of the offence.

26. The evidence relied upon of the alleged deception by the victim was that of PW1's alleged persuasion and consent to live and have sex with the Appellant, and PW1 testified as follows in this regard:

> " ...Mwandaza bought school books for me I felt that he was the only one who cared for me. I asked him to let me stay with him. In April 2018 he agreed to stay with me. We stayed together for almost one month. One day my mum, sister and my brother-in-law came and saw where I stayed and left. Later on my mum came and met Mwandaza with his brother....
>
> ...I would sleep in one of the rooms with Mwandaza. Sometimes we would have sex. This happened once I convinced him to have sex with me. This happened in April 2018....
>
> ... I have known Mwandaza for 6 months now. He is my boyfriend. He bought me shoes and took care of my needs. His family treated me well. My mother never asked me to leave Mwandaza's house when she visited me...."

27. "To deceive" is in this respect defined in the Oxford Dictionary as "to make a person believe what is false", and "to mislead purposely", and it is explained in The *Black's Law Dictionary*, Ninth Edition at page 1091 that such a misrepresentation usually denotes not just written or spoken words, but also any other conduct that amounts to a false assertion or an assertion that does not accord with the facts; that whether a statement is false depends on the meaning of words in all the circumstances, including what may be fairly inferred from them; and that concealment and non- disclosure may also have the effect of a misrepresentation.

28. It may be inferred that PW1 put herself out as having reached the age of consent from her testimony that she convinced the Appellant to have sex, and the non-disclosure of her actual age in the circumstances may also lends itself to this conclusion. It is thus our finding that the first subjective element of the defence in section 8(5) (a) was in this respect demonstrated by the Appellant. In arriving at this decision, it is necessary to emphasise that the fact that needed to be established by the defence is the misrepresentation about their age by a victim, and not whether or not the child had legal capacity to consent to sex or marriage.

29. On the objective element of the defence, two relevant surrounding circumstances were brought out by the evidence. The first is that PW1 had dropped out of school, and indeed PW1 testified that she quit school two years prior to the cohabitation with the Appellant in 2016 after standard eight, and that the Appellant had bought her school books. The fact that PW1 did not continue with her secondary school education was collaborated by PW3. A reasonable person would have in the vulnerable circumstances that PW1 found herself in, sought clarification as regards PW1's age, and if she was indeed an adult, irrespective of PW1's representations and conduct.

30. This brings us to the second relevant circumstance, which was the alleged dowry negotiations between the victim's mother (PW3) and the Appellant and DW2. PW1 testified that her mother used to mistreat her and ask her to get married and that PW3 did visit her and the Appellant, and demanded money from the Appellant and his brother, and specifically demanded Kshs 12,000/= from the Appellant's brother. The Appellant and DW2 also testified that they had dowry negotiations with PW3. PW3 in her testimony denied having sought dowry from the Appellant's family, PW4 (the investigating officer) testified that the complainant's mother (PW3) stated that "she played along as if agreeing to the dowry negotiations to cover her plans of involving the police until the accused person would be arrested".

31. It is evident that even if there was such a representation about dowry payment by the victim's mother to the Appellant to imply that PW1 had attained the age of marriage, it was made after the cohabitation between the Appellant and PW1 had commenced, and therefore after commission of the offence. As explained in the foregoing, the material time that this objective representation needs to be made is before or at the time of first sexual intercourse with the victim, which is when the commission of the offence of defilement first occurs. It is thus our view the objective element was not satisfied for these reasons and that the defence in section 8(5) is not available to the Appellant.

32. We are also mindful that the Appellant needed to demonstrate the application of the defence on a balance of probabilities, and not beyond reasonable doubt, and it was upon the prosecution to disprove its application beyond reasonable doubt. This Court (Asike-Makhandia, Kiage & Odek, JJA) observed as follows in *Sammy Chacha Chacha v Republic* [2020] eKLR in this regard:

> " There is no indication from the judgment of the learned Judge as to the standard of proof he expected the appellant to discharge in order to benefit from the defence provided for in section 8(5) and (6), which was a crucial non-direction. Had he appreciated that the appellant's burden was to be discharged on a balance of probabilities, he would have come to the conclusion that the appellant was more likely than not to have been deceived by the appellant's express lie about her age. Moreover, the general conduct of both SBC and her mother PW2 was such as to cause the appellant to reasonably believe, on a balance of probabilities that the appellant was over the age of 18 years."

33. We accordingly find that the Appellant's conviction was safe, and the sentence of ten years' imprisonment imposed on the Appellant by the High Court was also legal. It is notable in this respect that a minimum sentence of twenty years' imprisonment is provided for conviction for the offence

of defilement with a child between the age of twelve and fifteen years under section 8 (3) of the *Sexual Offences Act*, and the sentence imposed by the High Court was in the circumstances lenient. We accordingly dismiss the appeal in its entirety.

34. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR