Musyoki v Republic (Criminal Appeal E001 of 2022)
[2024] KEHC 2390 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 2390 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E001 OF 2022

JN ONYIEGO, J

JANUARY 31, 2024

BETWEEN

JAMES SAMMY MUSYOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(eing an appeal against the conviction and sentence of Hon. D.W Mbuteti R.M. delivered on 24.12.2021 in Sexual Offences Case No. 28 of 2017 at CMCC Court at Garissa)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 30.11.2017 within Tana River County intentionally caused his penis to penetrate the vagina of IAM, a child aged 6 years.

2. Having returned a plea of not guilty, the matter proceeded to full trial. The trial court upon considering the law and facts, reached a determination that the appellant was guilty of the said offence and therefore imprisoned him to serve life imprisonment. Aggrieved by the conviction and the sentence of the trial court, the appellant filed a petition of appeal on 06.01.2022 on grounds summarized as here below:

    i. That the trial court erred in law and fact by holding and finding that the prosecution proved its case.

    ii. That the trial magistrate erred in law and fact by failing to consider his defence.

    iii. That the learned trial magistrate erred in law and fact by shifting the burden of proof to him.

3. At the hearing of the appeal, parties filed written submissions to canvass the appeal herein. In his submissions filed in court on 28.09.2023, the appellant submitted that the prosecution did not prove its case to the required standards. That it is critical that in defilement cases, prosecution ought to lead

evidence to show that the key ingredients of the offence are established. Reliance to that end was placed on the case of *Charles Wamukoya v Republic* Cr. Appeal No. 72 of 2013.

4. That he was not afforded a fair hearing for the reason that he was not allowed to call his witnesses. Further, he faulted the prosecution for failing to call crucial witnesses to support its case. That the evidence by the minor ought to have been corroborated. He relied on the case of *Stephen Ngui Kyalo v Republic* [2020] eKLR to buttress the fact that prosecution evidence ought not only be credible but also reliable.

5. On sentence, he decried the fact that the same was very harsh and therefore, ought to be reviewed. He relied inter alia on the case of *Phillip Mueke Maingi & others v Republic*, Petition No. E017 of 2021 at Machakos High Court where it was held that a court should strive for a balance between the interests of society, the accused and the seriousness of the offence. That a sentence which over-emphasizes on one element cannot be balanced as it is likely to be a wrong sentence. He therefore urged this court to quash his conviction and thereafter set his sentence aside.

6. Mr. Kihara for the respondent relied on his submissions dated 25.04.2023 thus stating that to prove the offence herein, it was required of the respondent to establish the age of the victim, penetration and identity of the perpetrator. On age, it was submitted that the age of the victim was a crucial element as the same had a bearing on the sentence of a perpetrator of a sexual offence. The respondent relied interalia on the case of *Hudson Ali Mwachongo v Republic* [2016] eKLR whereby it was held that the age of the victim of defilement cannot be gainsaid and that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian, by observation or common sense.

7. On penetration, it was submitted that the same can either be partial or complete insertion of the genital organ of a person into the genital organ of another person. According to learned counsel, the same was proved. In reference to identification, it was submitted that the appellant was identified by the complainant as he was a neighbour.

8. On sentence, the respondent contended that the trial court properly exercised its discretion and sentenced the appellant to life imprisonment having considered the circumstances of the case. This court was therefore urged to dismiss the appeal in its entirety and uphold the sentence by the trial court.

9. This being a first appeal, I am mandated to re-analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour". [See *Pandya v Pandya* (1957) EA (336].

10. PW1, I.A. in her unsworn testimony, stated that the appellant had sent her to buy soap and upon coming back, lured her to watch a video player thus proceeding to defile her. It was her evidence that the appellant threatened to slaughter her should she disclose the same to anyone. She stated that she informed her mother that the appellant removed her trouser and thereafter defiled her.

11. PW2, AA testified that on 30.11.2017 at 8.00 p.m., she was in her house breastfeeding when PW1 stepped out for a short call. At that point, the appellant called PW1 to send her to the shop to buy soap and that the same did not alarm her as it was normal for the neighbour to send her children. She stated that during that specific period, whenever she called PW1, the appellant would reply that she

was watching a video. That the same prompted her to go out and find out what was happening and that is when she found the appellant dressing up PW1. She testified that the appellant told PW1 not to disclose to anyone of the happening.

12. She demanded from the appellant an explanation as to what PW1 was doing in his house but instead, the appellant ran away. She stated that upon asking PW1 what was happening, she declined to share and the same prompted her to remove her pants and observed her private parts to which she saw blood and lacerations. They thus made a report to the Police Station.

13. PW3, Jeremiah Mosbei testified that upon examining the complainant's genitalia, it revealed lacerations and a partially broken hymen with a fresh scar. That there was laceration in the labia minora and the probable weapon was noted as penile. He signed the P3 Form and thereafter produced it as Pex 2. On cross examination, he stated that the minor was aged six years.

14. PW4, Shadrack Kipchirchir testified that he was the investigating officer. He stated that on 30.11.2017 at 10.00p.m., he received a call from the OCS informing him that a defilement suspect had been arrested at Tana Bridge. That he proceeded to the scene in company of his colleagues and thereafter arrested the appellant herein. The appellant was thereafter handed over to Garissa Police station while the complainant was escorted to P.G.H. for medical care. On the next day, a P3 was issued as the injury was classified as harm.

15. DW1, James Sammy Musyoki in his sworn testimony testified that there existed differences between him and PW2 and her husband. That one of PW2's children had stolen Kes. 200 from his house and therefore, having promised that he would report the said matter, PW2 instead promised him that she would ensure that he gets jailed. On cross examination, he stated that PW1 was his neighbour and that he knew her as she used to call him uncle. He confirmed that the complainant used to visit him when his wife was in.

16. Having considered the grounds of appeal vis avis the submissions by both parties, I find that the main issue for determination is whether the prosecution proved its case beyond reasonable doubt by establishing; the age of the complaint; penetration of the complainant's vagina; the identification of the perpetrator and whether the sentence meted out was excessive.

17. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As was correctly held in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

18. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 now repealed as "...any human being under the age of eighteen years."

19. In the case of *Edwin Nyambaso Onsongo v Republic* (2002) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) 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, guardian or medical evidence among other forms of proof.....

20. In the instant case, the age of the complainant was not controverted and the same was stated by PW2 and PW3 to be six years. In that regard I have no doubt the age of the complainant was duly proved.

21. Concerning the question whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

22. In the case of *Alex Chemwotei Sakong v Republic* [2108] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJA) in the case of *Mark Oiruri v Republic* Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
>
> > "...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. 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..."

23. From the medical evidence adduced, there was evidence that the complainant sustained lacerations on her private part and a partially broken hymen with a fresh scar. That there was laceration in the labia minora and the probable weapon was noted as penile. PW2 also testified that upon removing PW1's clothes, she observed that indeed pw1 had been sexually assaulted as she had blood and lacerations. It is my finding therefore that indeed, the complainant was penetrated.

24. On identification, the complainant described in detail all that happened. She stated how the appellant lured her by having her watch a video before proceeding to defile her. The appellant in the same breadth did not deny knowing the complainant as he stated that they were neighbours and PW1 used to call her uncle. It therefore follows that identification was by way of recognition as the appellant was a person well known to the complainant. In my humble view therefore, I find that the appellant was positively identified.

25. As concerns the question of lack of corroboration, the evidence of the minor is corroborated by medical evidence and the victim's mother who confronted the appellant while in his house with the minor and immediately upon observing the minor's genitalia, she noticed that she had fresh injury a fact which confirmed defilement by the appellant who Was the only person in that house. In any event, the conduct of the appellant in running away when pw2 confronted him is wanting.

26. Putting together all facts and circumstances under which the offence was committed, it is apparent that prosecution evidence was overwhelming thus proving its case beyond reasonable doubt. Therefore, grounds 1 and 3 of the appeal are hereby found to be unmeritorious.

27. On the ground that his defence was not considered, I have perused the impugned judgment and noted that contrary to the said allegation, indeed the trial magistrate considered his defence and noted that

the evidence against the appellant was overwhelming. To that extent am convinced that the defence of the appellant was not ignored.

28. On sentencing, clear guidance can succinctly be drawn from the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 where it was held as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, (1950) 18 EACA 147:
>
> > "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
> >
> > To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, (1912) CCA 28 TLR 364."

29. The appellant decried the fact that the sentence meted out by the court was not only harsh but also disproportionate in the given circumstances. He therefore urged that the same be reviewed.

30. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal N0. 12 of 2021 replaced a life imprisonment term with a 40-year imprisonment where an appellant had been charged with the offence of defilement of a child aged 41/2 years.

31. Similarly, the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No. 84 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 3 of the *SOA*, the Court substituted the 20-year sentence with a 15-year sentence to run from the time the trial court imposed its sentence.

32. In the instant case, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment.

33. In the given circumstances therefore and taking into account the mitigation on record, am inclined to confirm the conviction but set aside the life imprisonment and substitute the same with 20 years' imprisonment.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY 2024

J. N. ONYIEGO

JUDGE