Ali v Republic (Criminal Appeal E070 of 2022)
[2024] KEHC 644 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 644 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E070 OF 2022

KW KIARIE, J

JANUARY 25, 2024

BETWEEN

RASHID ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O case NO. E072 of 2021 of the Senior Principal Magistrate's Court at Shanzu by Hon. D.O Odhiambo–Senior Resident Magistrate)

JUDGMENT

1. Rashid Ali, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the 7th day of May 2021, in Kisauni sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the anus of A.O., a boy child aged nine years.

3. The appellant was sentenced to forty years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was in person. He raised grounds of appeal as follows:

    a. That the learned trial magistrate erred in law and fact by finding that the prosecution had proved the offence of defilement beyond reasonable doubt, although the results of the DNA analysis of the anal swab taken from the victim did not match that of the appellant.

    b. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not prove that the appellant was the perpetrator of the alleged defilement.

    c. That the learned trial magistrate erred in law and fact by failing to find that the disclosed offence for which the appellant could have been convicted was the offence of indecent act contrary to section 11(1) of the *SOA* No. 3 of 2006.

d. That the learned trial magistrate erred in law and fact by failing to consider the mitigating factor of the appellant.

e. That the learned trial magistrate erred in law and fact by discounting and not considering in detail the defence evidence.

f. That the learned trial magistrate erred in law and fact by giving a harsh and excessive mandatory minimum sentence.

g. That the learned trial magistrate erred in law and fact by failing to consider the time spent in remand custody as provided under section 333(2) of the *CPC*.

4. The state opposed the appeal through Alex Gituma, learned counsel who contended that the prosecution proved the case to the required standards. He argued that the sentence was proper.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions, considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.

6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:

a. Whether there was penetration;

b. Evidence must show that the accused is the perpetrator; and

c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they are proven.

7. The complainant testified that he was in the mosque on the material day. After prayers, together with other children, decided to rest. The appellant followed him everywhere he went. He then blocked his mouth and sodomised him. The Ustadh rescued him. At the time of his rescue, the appellant inserted his "dudu" [slang for the penis] into his anus and "urinated on him".

8. Salim Godana Komora (PW2) was the Imam at the Masjid Ali mosque. His evidence was that while preparing for the Friday prayers, a small boy reported seeing the Ustadh covered and sleeping with another small boy. He rushed to find out what was happening. He found the appellant defiling the boy from the anus. The village elder was called to the scene.

9. Asha Juma Ali (PW3) was the village elder called to the Masjid Ali mosque. She found the appellant and some boys. The appellant was accused of defiling the complainant. She assisted in taking him to the police.

10. When Doctor Abdulaziz Mohamed (PW4) examined the complainant, he established that he had a laceration at the anus.

11. The appellant contended in his defence that they only lay side by side with the complainant. He testified that this was at night. However, the prosecution displaced his contention with evidence indicating that the incident occurred during the daytime. There was overwhelming evidence that he

was found in the act of defiling the complainant. His assertion that the trial magistrate ought to have discovered that the evidence disclosed the offence of indecent act contrary to section 11(1) of the *Sexual Offences Act* is displaced.

12. Therefore, the prosecution proved penetration and the perpetrator to the required standards. The DNA test was, in my view, unnecessary.

13. The PCR form indicated that the complainant was born on February 19th, 2011. This confirmed the evidence of H.M.(PW5), his mother, who said at the time of her evidence on the 18th day of January 2022 that he was then ten years old. At the time of the offence, he was nine years old. Section 8 (2) of the *Sexual Offences Act* provides:

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> The prosecution, therefore, proved the age of the complainant.

14. There was overwhelming evidence against the appellant.

15. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson vs. Republic* [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly 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 Vs. REX* (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 Vs. Shershewsity* (1912) C.CA 28 T.LR 364.

16. The sentence prescribed for the offence is life imprisonment. I have not been persuaded that the learned trial magistrate applied the wrong principle or overlooked some material factor.

17. The proviso to section 333 (2) states:

> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

18. In his sentence, the learned trial magistrate did not factor in the period the appellant was in custody in his sentence as required. I therefore order that the appellant's sentence run from the 7th day of May 2021. Except for the date of the commencement of the sentence, the is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE