Kibuge & another v Republic & another (Criminal Appeal E005 of 2023) [2024] KEHC 497 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E005 OF 2023

RB NGETICH, J

JANUARY 25, 2024

BETWEEN

COSMAS KEMBOI KIBUGE ..... 1ST APPELLANT

COSMAS KEMBOI KIBUGE ..... 2ND APPELLANT

AND

REPUBLIC ..... 1ST RESPONDENT

REPUBLIC ..... 2ND RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement delivered by the Senior Resident Magistrate Hon. Caroline R.T. Ateya dated 30th January 2023 at Kabarnet H.C Criminal case No. E038 of 2020)

JUDGMENT

1. The Appellant was charged in count 1 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 being that on the 10th day of December, 2020 in Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of CCC, a child aged 14 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the sexual offences act no. 3 of 2006, the particulars of the charge he faced an alternative Marge of committing an indecent act with a child contrary to Section 11(I) of the Sexual Offences Act No.3 of 2006; Particulars being that on the 10th day of December 2020 within Baringo County, intentionally touched the vagina, breast and buttocks of CCC, a child aged 14 years.

3. The Appellant denied the charges and the prosecution brought on board a total of 5 witnesses during the trial in support of their allegations and upon hearing and determination of the matter, the court

found the accused guilty as charged in Count 1 and convicted him of the offence of defilement and proceeded to sentence him to serve 20 years imprisonment.

4. The Appellant having been aggrieved and dissatisfied with the above-mentioned judgment, appeals against the judgment on the following grounds: -

   i. That the Learned Trial Magistrate erred in both law and fact by failing to find that the prosecution had not proved their case beyond reasonable doubt to warrant conviction of the appellant;

   ii. That the Learned Trial Magistrate erred in both law and fact in disregarding the appellant's defence thereby arriving at a manifestly unjust conclusion that the appellant was guilty of the offence.

   iii. That the learned trial magistrate erred in both law and fact by finding there was penetration when no such evidence was preferred and or proved beyond reasonable doubt to warrant the manifestly harsh conviction;

   iv. That the Learned Trial Magistrate erred in both law and fact by finding that the age of the complainant had been proved beyond reasonable doubt when there was evidence to the contrary that the exact age of the complainant was not proved, thereby arriving at a manifestly wrong conclusion and conviction;

   v. That the Learned Trial Magistrate erred in both law and fact by failing to find the medical evidence before court was insufficient to warrant a conviction since the medical officer's evidence did not sufficiently establish penetration.

   vi. That the Learned Trial Magistrate erred in both law and fact by failing to establish medical evidence linking the appellant with the alleged offence since the complainant was taken to hospital immediately and no spermatozoa of the appellant was found to link him with the offence;

   vii. That The Learned Trial Magistrate erred in both law and fact by failing to find that the complainant allegations were unfounded and/or were motivated by a grudge some of the witnesses held against the appellant, particularly his former girlfriend who he had disagreed with and left her for another lady.

   viii. That the Learned Trial Magistrate erred in both law and fact by importing extraneous and circumstantial evidence which was not part of the evidence before the court thereby arriving at a manifestly wrong conclusion that the appellant was guilty as charged;

   ix. That the Learned Trial Magistrate erred in both law and fact by convicting the appellant on the charge of defilement when the evidence tendered by the prosecution was insufficient to support the conviction;

   x. That the Learned Trial Magistrate erred in both law and fact by shifting the burden of proof from the prosecution to the appellant;

   xi. That The Learned Trial Magistrate erred in both law and fact in sentencing the appellant to a custodial sentence when there were favorable circumstances and conditions in his favour for a non-custodial sentence.

xii. That the Learned Trial Magistrate erred in both law and fact by failing to thoroughly analyze the evidence on record thereby arriving at a manifestly unjust conclusion that the prosecution had proved its ease beyond reasonable doubt.

xiii. That the Learned Trial Magistrate erred in both law and fact by failing to take into account the uncontroverted evidence of the appellant and disregarding it thereby arriving at a manifestly wrong conclusion and conviction.

xiv. That The Learned Trial Magistrate erred in both law and fact by failing to find that there was insufficient evidence to support a conviction in that there was no evidence to corroborate the complainant's allegation that he was involved in the offence complained of;

xv. That the Learned Trial Magistrate erred in both law and fact by imposing a manifestly harsh sentence and conviction inspite of the existence of circumstances in the case which would warrant otherwise.

5. The appellant prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.

Appellant's Submissions

6. The Appellant submits that the prosecution did not prove their case beyond reasonable doubt and or to the required standard to warrant the manifestly harsh conviction and sentence meted by the trial court.

7. The Appellant submits that the prosecution`s case is marred with a litany of contradictions and unexplainable incidences. That the burden of proof lay upon the prosecution to prove beyond a shadow of doubt the allegations against the appellant. That the evidence adduced by the prosecution was scanty and the court should not have relied on to convict and sentence the appellant; that the prosecution merely engaged in suppositions and theorization to support their case.

8. The Appellant submit that the crucial witnesses for example the arresting police officers and Winnie who is the appellant's former girlfriend whose evidence could have explained the place of the appellant and the complainant at the house at the time of arrest as per the prosecution's allegations were not called to testify, casting into doubt the prosecution's case.

9. That the medical examination report produced is also doubtful as to the connection with the accused. That for PW1, a minor of 14 years old, the act of defilement would have been easily proved by way of vaginal swap which would have indicated whether there was penetration, whether the internal parts of the vagina were torn and/or with bruises on her genitalia, and/or whether there were spermatozoa, considering the medical examination was done almost immediately after the alleged incident. That although a high vaginal swab was done on PW1, it showed no spermatozoa on her vaginal parts, hymen was found intact, labia majora and minora were found normal, thus no penetration could be established in the circumstances and the court could not therefore entertain the act of penetration having occurred.

10. He further submits that his allegation that he was framed following a grudge between him and his former girlfriend Winnie who was also a friend/relative of the complainant, PW1 and her brother PW2 and crucially, who accompanied the police officers to arrest him, were swept under the carpet by the prosecution; and Winnie the Appellant's girlfriend, although a crucial material witness who was pre involved with the arrest of the appellant was also not called as a witness at the trial casting doubt as to

the motives and impartiality of the investigating officer. That these are credible claims needed thorough investigations to ascertain their veracity and the burden lay on prosecution.

11. The Appellant further submit that the age of the complainant was also not conclusively ascertained as there were conflicting ages given although a birth certificate was produced. That in the charge sheet, the age of the complainant was put at 14 years, whereas in her evidence in court, she stated she was 15 years. That this disparity and conflicting information as to the complainant's age was not explained and or resolved by the prosecution. The Appellant cited the case of Hillary Nyongesa -vs- Republic 2010) eKLR, where the court stated as follows: -

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim"

12. In respect to penetration, the Appellant submits that PWI the complainant stated that she went to the appellant's house on 09/12/2020 and stayed there until 12 /12/2020 when her brother one E who is PW 2 herein arrived at the appellant's house with police officers and accompanied by a girl. That they had sex with the appellant on the night of 09/12/2020 but the medical report produced by the Clinical Officer showed that although a high vaginal swab was done on PW1, it showed no spermatozoa on her vaginal parts and only a foul smell discharge was observed.

13. The Appellant further submit that the foul vaginal discharge noted in the medical report could be as a result of one or more reasons and not necessarily due to defilement. That the hymen was also examined and found not to have been broken, the internal parts of the vagina were not torn and or injured, labia majora and minora were found normal and questioned how penetration could have occurred. That the fact of the appellant having been allegedly found in bed with the complainant, one cannot conclude that there was any defilement. This had to be corroborated by circumstantial, medical, and or other evidence among others, which did not happen in this case; further that laboratory test also yielded no spermatozoa and that the external and internal genitalia were found to be normal; and cited the case of Mary Wanjiku Gira v Republic, Criminal Appeal No.17 of 1995, where the court stated as follows:-

> " Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused`s freedom and at times life."

14. That in this case, the whole prosecution case was founded on mere suspicion and the trial court therefore fell into error by relying on mere suspicions and did not record its reasons for believing the uncorroborated evidence of PW 1 as required of it under section 124 of the evidence Act. It therefore arrived at a manifestly wrong conclusion and judgement and he urges this court to hold so and find for the appellant.

15. It is the appellant's contention that he was framed and the charge was fabricated against him cannot be ruled out and this lends credence to the evidence by the appellant that he was framed by PW2 who had a grudge against him over the girl called Winnie, who was the appellant's former girlfriend, and who in fact tipped off PW2 as to the whereabouts of PW1, leading to the arrest of the appellant.

16. The Appellant submits that the objective of the investigator and prosecutor is not to just obtain conviction at all costs; they are expected to be professional in the conduct of their investigations and not to be driven by malice or other collateral considerations. That they must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which

would ordinarily involve taking into account the versions presented by both the complainant and the suspect.

17. The Appellant further submits that the sentence was manifestly high and cited the case of Hamisi Bari & Another vs. Republic [1987] eKLR where the court stated as follows:-

> " We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."

18. In respect to sentence, the appellant submits that section 8(3) provides for minimum imprisonment of 20 years imprisonment. That he was sentenced to 30 years imprisonment which is harsh and excessive and did not explain reason for imposing 30 years imprisonment and not the minimum 20 years. He urged this court to allow this appeal on conviction and sentence set aside sentence and set him free.

Respondent's Submissions

19. The Respondents too filed written submissions and submits that following are the factors or points of consideration.

    i. Whether the prosecution discharged its burden of proof

    ii. Whether there was penetration

    iii. Whether the appellant/accused was positively identified

    iv. Whether the learned magistrate considered the evidence of the appellant/accused

    v. Whether the sentence is harsh and illegal.

20. The Respondent submit that to prove the offence of defilement, the prosecution is required to prove three main ingredients of the offence being identification or recognition of the offender, penetration and the age of the victim.

21. On the issue of the identification and recognition of the appellant, the state counsel submit that the issue of identification has not been challenged in this appeal.

22. On penetration, she submits that it was the evidence of Pw l that she had intercourse with the appellant on the night of 9th December, 2020 by stating that she had sex with Kemboi, that they slept on the same bed and had sex just once. She clarified that the person he had sex with is called Cosmas Kemboi and was the accused before court. She cited the case of Kassim Ali v Republic (2006) e KLR where the court of appeal stated as follows: -

> " ...the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

23. That it was the evidence of Pwl that he had sexual intercourse with the appellant herein on the night of 9th December, 2020 and 10th December, 2020 in the appellant's house; that the evidence was uncontroverted during cross examination and the clinical officer PW3 concluded that PW 1 was defiled and infected with urinary tract infection as confirmed by treatment record, he produced in court. Further that the Appellant stayed with the minor at his house for 2 days and he had sex with her.

24. It is the Respondents submission that in the circumstance, the sentence was not excessive and urged this court to dismiss this appeal.

Analysis and Determination

25. This is the first appellate court and our duty as such was well set out in the case Okeno Vs. Republic [1972] E.A 32 as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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."

26. In view of the above, I have perused record of appeal and considered submissions by parties herein and identify issues for determination as hereunder: -

    i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt

    ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

27. The ingredients for the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant.

28. Penetration is defined under Section 2 of the Sexual Offences Act as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

29. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

30. The complainant CCC testified as Pw 1 That on 10/12/2020 at 9.00 a.m., she was at Marigat at her friend's place. She stated that her friend is called Cosmas Kemboi the appellant herein She stated that she had gone to his place on 9/12/2020 where she spent the night there. She said Cosmas Kemboi is her boyfriend. She confirmed that her brother E went to Appellant's house in company of three officers and a girl called W and interrogated her. She stated that the Appellant had asked her to meet him in Marigat meet in Marigat town and that he did not force her to go to meet him but they met after appellant calling and he accepted him. She said they stayed in appellant's house for 2 days and that they had sex and when police arrived in the house on 12/12/2020, they kicked the door while they were still asleep on the bed. They were arrested and taken to Marigat hospital on 12/ 12/2020.

31. The complainant testified that she has a birth certificate which shows she was born in 2006. She stated that the accused before court is called Cosmas Kemboi and that he is the one she had sex with.

32. Pw3 Doctor Langat Chirchir, Chief Clinical Officer Marigat sub county hospital stated that he has a P3 Form of Chelagat who visited their hospital on 13/12/2000 alleging to have been defiled while at Marigat Inn. That on examination, her left hand was swollen where the injury was one day old. Probable weapon - blunt object and that she was treated by being given brufen and antibiotics.

33. The Doctor testified that for defilement, he observed foul smelling discharge from her private part. Her labia minora and majora were normal. That the discharge was reddish brown. VDRL was negative, HIV negative, hepatitis B negative. He stated that on high vaginal swab, red blood cells, protein pus cells- and blood were present. Pregnancy test was negative. I concluded she was defiled. There was urinary tract infection. He produced the P3 dated 13/12/2020 and the treatment notes as evidence.

34. This Court is therefore required to review all evidence that is availed before it in order to establish if indeed penetration did occur. In this case, the complainant was categorical that she had sexual intercourse with the Appellant twice on the night of 9th December, 2020 and 10th December, 2020. The Chief Clinical officer testified that she examined the compliant and concluded that she was defiled. I have already found based on the evidence of the victim corroborated by medical evidence that there was penetration. I conclude therefore that penetration was adequately proved based on the evidence of Pw 1 and the medical evidence of Pw 3.

35. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... 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."

36. Pw1 the complainant testified that she had a birth certificate which she shows indicating she was born in 2006. Pw 4 one No.226645 Cpl. Solomon Lolima who was the investigating officer from Marigat police station stated that Caroline was 14 years and that he had her birth certificate showing that he was born on 15/5/2006 which he produced as exhibit in court. In my view, the report was sufficient proof of the age of the victim that she was 14 years at the time of the offence.

37. The other ingredient of the offence of defilement is proof of the identity of the assailant. PW1's testimony is that she visited the Appellant on the 9th December,2020 and stayed in his house till the 12th December,2020 when the police stomped into the Appellant's house where they arrested the Appellant and the Complainant. The Complainant in her testimony in court kept mentioning the name of the Appellant as Cosmas Kemboi whom she alleged was her boyfriend.

38. From the foregoing, it is clear that the Appellant was not a stranger to the victim having lived with him in one house for a period of four days. It is therefore plausible that the victim was able to not only identify him but to recognize him as the person who committed the act. That from the foregoing it is conclusive therefore that the offence of defilement was proved beyond reasonable doubt.

39. On whether the evidence of the prosecution witnesses was corroborated, Section 124 of the Evidence Act, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

40. In the present case, it was the testimony of Pw1 that she visited the house of the Appellant on the 9th December,2020 where she stayed up to 12th December,2020 when they were arrested and the Appellant placed in police custody. This evidence is further corroborated by the evidence of Pw2 and Pw3 and Pw5 the investigations officer; they all confirmed the information as given by Pw1.

41. From the foregoing, it is clear that the prosecution evidence was well corroborated and the assertion by the Appellant that the evidence was uncorroborated holds no waters.

42. The Appellant complaints that crucial witnesses including one Winnie and the arresting officers were not availed to give evidence in court hence a miscarriage of justice. Although the prosecution at all times are required to make available all the witnesses, I wish to consider the law and past court decisions on the issue. The appellant alleges that the trial magistrate did not consider the impact of the prosecution's failure to call key witnesses.

43. The Court of Appeal in Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005 held:-

> " ....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

44. In the East African Court of Appeal in Bukenya & Others vs Uganda [1972] E.A 549, the court held that:-

a) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent;

b) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case;

c) Where evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

45. The foregoing notwithstanding, it is trite law that a conviction can be based on the testimony of a single witness, a position that was captured by the Court of Appeal of Uganda in Okwang Peter vs Uganda Criminal Appeal No. 104 of 1999 where the court held: -

> " Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the

greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.

46. The victim herein gave evidence on how she spent two days with the appellant in the appellant's house. She said the appellant was her boyfriend and the had sex together and even when the complainant's brother and the police arrived at the appellant's house, she was in bed with the appellant.PW2 who is the brother to the complainant confirmed this and their evidence was also confirmed by pw5 who was the investigating officer .The appellant argued that Winnie and the arresting officers did not adduce evidence but in my view evidence of the complainant, her brother ,the investigating officer and the doctor was sufficient prove of the charge against the appellant. Failure to avail the two witnesses did not occasion any miscarriage of justice.

47. As to whether the Appellant's defence was not considered, I note that in the judgment, the trial magistrate indicate that she had considered the appellant's defence. I also note that in his defence, the appellant said he met the victim on a public road on 30th June,2020. That he went ahead to inform court that the complainant was in distress and he decided to offer her a place to spend the night. He said the girl slept in a couch and that he travelled to Kapsabet the next morning and when he came back, he did not find the complainant. Despite the fact that he said he travelled to Kapsabet with a friend, he did not avail the friend to testify. From the foregoing I find that the appellant placed himself at the scene of the offence and his defence did not shake prosecution case.

ii. Whether sentence imposed was harsh and excessive

48. Article 165(6) and (7) of the Constitution and section 362 as read together with section 364 of the Criminal Procedure Code empowers the High court to exercise supervisory powers over subordinate courts. Under section 362 of the Criminal Procedure Code which states as follows:

> " The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

49. In my view, section 362 should be read together with section 364 of the Criminal Procedure Code which specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by Sections 354, 357 and 358 of the Criminal Procedure Code if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

50. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that

a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

51. Similarly, in the case of Wanjema vs. Republic (1971) E.A. 493 the court stated as follows:-

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

52. In determining whether to revise the sentence imposed herein, I note section 8(1), (3) of the Sexual Offences Act provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits am 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.

53. I take note of the fact that the appellant was an adult who took advantage of vulnerability of a young school going girl aged 13 years. In my view, sentence of Thirty (30) years imprisonment imposed against the appellant is appropriate. It is neither harsh nor excessive. I therefore have no reason to interfere with the sentence.

54. Final orders:-

Appeal on both conviction and sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 25TH DAY OF JANUARY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Elvis - Court Assistant.

Ms. Ratemo - Counsel for state.

Appellant present.