Onzare v Republic (Criminal Appeal 15 of 2023)
[2024] KEHC 494 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL 15 OF 2023

RB NGETICH, J

JANUARY 25, 2024

BETWEEN

EMMANUEL OMUKUMU ONZARE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. A. Towett (SRM) delivered on the 8th November, 2021 in Eldama Ravine Magistrate's Court S/O No. 18 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(3) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that the Appellant between 29th June,2020 and 7th July, 2020 at Kapdenning village in Koibatek Sub- County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of S.J a child aged 12 years.

2. The Appellant faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No.3 of 2006, the particulars of the charge being that the accused on the diverse dates between 19th June, 2020 and 7th July,2020 at Kapdenning village in Koibatek Sub- County within Baringo County intentionally and unlawfully caused his penis to come in contact with the vagina of S.J.

3. The Appellant denied the charges and the prosecution availed a total of 5 witnesses during the trial in support of the charge 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 prosecution did not prove its case beyond any reasonable doubt as required by law by providing insufficient evidence.

    ii. That the Learned magistrate erred in law and fact by failing to appreciate that crucial witnesses were not called upon by the prosecution to testify.

    iii. That the Learned trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence produced in court did not support or collaborate the charges and neither did create a nexus between the Appellant and the alleged offence.

    iv. That the learned trial magistrate erred in law and in fact by failing to accord the Appellant a fair hearing.

    v. That the learned magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradiction which greatly vitiated the credibility of the prosecution evidence.

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

6. The appeal proceeded by way of written submissions.

Appellant's Submissions

7. The Appellant submits that the prosecution was duty bound to prove the following critical ingredients that forms the offence of defilement

    a. Proof of Penetration

    b. Identity of the perpetrator

    c. Age of the complainant

8. That it is trite law that penetration can be proven by way of witness evidence and by way of expert evidence in form of medical evidence. In this case the prosecution in a bid to prove this brought on board witness evidence adduced by PW 1 and expert evidence adduced by Pw 5.

9. The Appellant submits that PW 1 in her evidence asserted that she met the appellant on the road side and exchanged contacts. She continues to state that the following day, the appellant went for her and they proceeded into the forest and on reaching the forest, the Appellant asked her to remove her clothes and threatened her with consequences if she declined. The complainant asserts that the appellant then removed her trouser and they had sex.

10. That in another episode, the complainant narrates that the appellant sent her kshs 200/= using her friend's mobile number who was however not produced in court. That she confesses that she received the money, boarded the Matatu and proceeded to where the appellant resided. She further narrates that they stayed with the appellant only for the appellant to be arrested while they were at the trading Centre.

11. The Appellant further submit that from the above narration, the court was duty bound to examine the credibility of the said evidence a task that the court abdicated. That in order to have a meaningful understanding of the evidence adduced by the complainant, the court was duty bound to ensure that

sensory details touching on the act were well given. The appellant submit that the complainant ought to have stated to the court the following:-

a. Her mental state.

b. How she felt during the alleged act

c. What happen to her after the alleged incidence e.g. was there bloodshed, was there pain?

d. How she coped with the Incidence.

12. That this and other details could have helped the court to test the credibility of the evidence adduced by the complainant in relation to the alleged offence and whether the evidence adduced revealed that the act committed was that of defilement. That failure by the court and prosecution to ascertain this through re-examination left the evidence adduced scanty, ambiguous, and wanting in details and could not be used to convict the appellant.

13. In support of his argument, the Appellant relies on the decision of the appellate court as enunciated in the case of Julius Kioko Kivuva vs. Republic [2015) eKLR where the honorable court held in part as follows as regards to the, specificity required in the proof of penetration

> " Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases..."

14. The Appellant submits that the prosecution produced medical evidence in form of P3 form and PRC form to create a nexus between the appellant and the alleged incidence but it is important to note, that the medical examination was conducted way after the expiry of 72 hours. That the trial court in a failed attempt to justify its finding on the penetration relied on unscertained facts and held in its judgment that the broken hymen was a clear Indication that penetration occurred.

15. That several courts of appellate jurisdiction have held time and again that the absence of hymen does not mean penetration occurred. The Appellant places reliance in the case law of PW vs. Republic [20121 eKLR and submit that the medical evidence adduced did not create a nexus between him and the alleged offence.

16. On the issue of the incredibility of the evidence of single witness evidence not corroborated, the Appellant submits that the whole case revolves around the evidence of a single witness in this case and it has been held again and again that in the case of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or a girl. That it is dangerous because human experience has shown that girls and women do sometimes tell an entirety false story which is very easy to fabricate but extremely difficult to refute; that such stories are fabricated for all sorts of reasons and sometimes for no reason at all.

17. The Appellant submits that the prosecution disregarded his defence, that he adduced evidence and did not call any witness and the said evidence was not rebutted by the prosecution by invoking the provisions of section 309 of the Criminal Procedure Code. However, the honorable Court dismissed the same without any cogent reasons whatsoever.

18. The Appellant further submit that his defense under section 8(5) of the *sexual offences act* was cogent enough as the same casted considerable doubts to the prosecution and ought to have been considered.

19. The appellant submits that the sentence was excessive based on the circumstances; that sentencing is one of the important elements of a criminal process and cited the case of Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing: -

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; the objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

20. He submits that in Machakos Petition No E17 of 2021, the court was of the prudent view to the extent that the *sexual offences act* prescribed mandatory minimum sentence, with no discretion to the trial court to determine the appropriate sentence to impose such sentences fell out of article 28 of *the constitution*. That this decision was born of the Supreme Court in Francis Kariako Muruatetu which also binds this court pursuant to the provisions of article 63 (7) of *the constitution* of Kenya 2010 that in certain circumstances, minimum mandatory sentences deprive the courts of the requisite discretion to consider the aggravating and mitigating factors. This would allow the courts to mete appropriate sentences which are based on the peculiar circumstances of each case.

Respondents Submissions

21. The Respondents too filed written submissions and submits that the 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.

22. The Respondent submits that it is trite that the burden of proof in criminal cases lies with the prosecution. The standard of prove is beyond reasonable doubt. The phrase burden of proof of beyond reasonable doubt was explicitly captured in the case of Miller -VS-Minister of Pensions (1947) 2ALL ER 372-373 by Lord Denning who stated as follows: -

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remorse possibility in his favor which can be dismissed

with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing short of that will suffice."

23. On whether penetration was proved, the prosecution argues that the act of penetration in a sexual offence case was explained to great extent in the case of Alex Chemwotei Sakong v Republic [21081 eKLR where the court stated 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 JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2018] 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... "
>
> In any event, penetration can be proved circumstantially taking into account circumstances under which the act was committed. In the case of Kassim Ali v Republic (2021) e KLR the court of appeal stated that;
>
> > "So 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"

24. That in this case, the doctor gave evidence that the hymen was not present which proved that a sexual activity had occurred and the evidence of the minor was very detailed as to what exactly happened. She went on to indicate that the accused had intercourse with her 4 times. That the evidence was not rebutted; the first encounter in the forest and soon thereafter, thrice (3) whereby the accused took her to his place where she was locked inside his house whenever he stepped out for 9 days; that this was sufficient evidence to prove penetration.

25. On whether there was Proper identification of the appellant, the Respondent submit that during the trial, the minor described the appellant herein as someone she met in March, 2020; the appellant introduced himself to the victim with his full names and gave her his mobile phone number. The next day she called him and met in the forest; further on the 29th of June, 2020 the accused sent her ksh 200 which she used as transport and proceeded to where the accused resided at Tolmo. She said she stayed at the accused's house for 9 days with the accused locking her in the house whenever he left the house.

26. The respondent further submitted that the appellant confirmed that he met the complainant; that he said he met her crying and took her to his place, prepared dinner for her and allowed her to stay at his place and there is therefore no doubt on identification.

27. On whether appellant's evidence was considered, the respondent submit that the trial magistrate made reference to appellant's defence and evidence of the appellant herein did not shake up the prosecution's case and they pray that this honorable court may so find.

28. In respect to sentence imposed, the respondent submit that the *sexual offences act* prescribes the mandatory minimum sentence of 20 years imprisonment when the victim is between the age of twelve (12) years and fifteen (15); and from birth certificate produced, the minor had 3 days to her 13th birthday at the time of the offence and sentence meted out by the trial court was within the limits of the law and was not harsh nor excessive; that prosecution's case was proved beyond reasonable doubt; that there was no inconsistencies in the evidence adduced and urged this court to dismiss this appeal.

Analysis and Determination

29. This is the first appellate court and the duty of first appellate court was 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."

30. While reanalyzing evidence adduced before the trial court, I am minded of the fact that unlike the trial court, I did not get the benefit of taking evidence from the witnesses first hand and observe their demeanor and for that reason I will give due allowance. In view of the above, I have perused and considered record of appeal together with submissions filed by parties herein and find that following as issues for consideration:-

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

    ii. Whether sentence imposed was harsh and excessive.

(i) Whether ingredients for offence of defilement were proved beyond reasonable doubt

31. The ingredients for the offence of defilement are penetration, age of minor and identification of assailant.

(a) Penetration

32. 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."

33. 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.

34. The complainant herein narrated how she met the accused in a forest where they then went deep into the forest on accused's request and while deep inside the forest, the Appellant removed a condom from his pocket. She first refused but complied after the Appellant threatening to kill her and lay on the ground facing upwards where then the accused removed his trouser and pulled his underwear up to the knees, wore a condom and asked her to remove her inner wear and biker and the Appellant proceeded to have sexual intercourse with her and after finishing, they both put on their clothes and walked to the main path and the accused escorted her to their fence.

35. Again, on the 29th June,2020 at 11:00 a.m, the Appellant send her Kshs.200 which she used as faire to Tolmo where the Appellant resided and she met the accused at Tolmo center. He then took her to his rental room at Tolmo where they slept together on a mattress for nine days; she said they had sexual intercourse three times when he was with the Appellant.

36. Pw5 Doctor Mercy Rotich a medical doctor who examined the complainant found blood stains on her genitalia, hymen was not present, there were no bruises on the genital area and there was discharge from the vagina; and in her opinion, there was sexual activity but she could not tell whether it was forceful. She produced the P3 form and treatment chit in court as exhibit. She confirmed that the complainant was defiled. From the foregoing, there is no doubt that penetration was proved beyond reasonable doubt

(b) Proof of Age

37. In respect to age, in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR the Court of Appeal had this to say:-

> " ... 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."

38. Pw 1 the complainant herein testified that she was 13 years old having been born on the 20th August, 2007. This was confirmed by her mother pw2 and birth certificate produced in court by the investigating officer pw4.There is therefore no doubt that age was proved beyond reasonable doubt.

(c) Proof of the Identity of the Assailant

39. Evidence adduced clearly show that the Appellant was not a stranger to the victim having lived with him in one house for a period of nine days. There is therefore no doubt on appellant's identity.

40. 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."

41. Record show that besides complainant's evidence, which in my view is credible, her evidence was corroborated by evidence of her mother pw2 and the doctor's evidence pw5. Record further show that the trial magistrate considered appellant's evidence which he found a mere denial and did no shake complainant's evidence.

(ii) Whether sentence imposed was harsh and excessive

42. On whether the sentence imposed on the appellant by the trial court was excessive, it is trite law that this court can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code.

43. The revisionary jurisdiction of this court is wide in scope but it is limited to the parameters set out in 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."

44. 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.

45. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

46. 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"

47. 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."

48. I have carefully considered the circumstances of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating

and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law.

49. 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.

50. In this instance, the Respondent is an adult and obviously took advantage of a 13-year-old school going girl and may have put to rest all her ambition for further studies and career. The effect of the offence on the minor are long lasting and the psychological effect is even worse. I find the sentence of twenty (20) years imprisonment that was meted herein is proper and lawful.

51. I note that the mandatory minimum sentence provided under the law is 20 years. I find that there is no reasonable basis for me to interfere with the sentence. From the foregoing, I see no merit in this appeal both on conviction and sentence.

Final Orders:-

52. Appeal on conviction and sentence is hereby dismissed.

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

.....

RACHEL NGETICH

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Elvis - Court Assistant.

Ms. Ratemo - Counsel for state.

Appellant present.