Chepkwony v Republic (Criminal Appeal E009 of 2022) [2024] KEHC 9472 (KLR) (29 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E009 OF 2022

RL KORIR, J

FEBRUARY 29, 2024

BETWEEN

NOAH KIPYEGON CHEPKWONY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 4 of 2020 by Hon. Omwange J. in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant herein was convicted by Hon. Omwange J., Senior Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the charge were that on 15th January 2020 in Sotik sub-county, he caused his penis to penetrate the vagina of VC, a child aged 13 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were on 15th January 2020 in Sotik sub-county, he intentionally touched the vagina of VC, a child aged 13 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called three (3) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.
5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.
6. Being dissatisfied with the Judgment dated 3rd February 2022, Noah Kipyegon Chepkwony appealed to this court on the following grounds which I reproduce verbatim:-

i. That I pleaded not guilty to the charges and I maintain the same.

ii. That the learned trial Magistrate erred in law and fact by depending evidence that was founded on the conspiracy of the girl and the mother.

iii. That the learned trial Magistrate erred in law and fact by not analysing the contradictory and inconsistent evidence of the witnesses.

iv. That the learned trial Magistrate erred in law and fact by dismissing my plausible defence.

7. The Appellant further filed Amended Grounds of Appeal and relied on the following grounds which I reproduce verbatim:-

i. That the learned trial Magistrate erred in law and fact by failing to detect that there was no forensic examination was conducted on the blood stains present in the inner clothes of the victim. That PW1 was also unbelievable in her testimony.

ii. That the learned trial Magistrate erred in law and fact by failing to appreciate that two witnesses were not called to testify before the trial court being Elicos Cherono and Wesley.

iii. That the trial Magistrate erred in law and fact, the Appellant was not examined by doctors to prove penetration.

iv. That the learned trial Magistrate erred in law and fact by not considering the Appellant's mitigation and the sentence meted out was harsh and excessive.

8. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in the case of *David Njuguna Wairimu v Republic* (2010) eKLR where it held:-

> "The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence on basis of the law and the evidence to satisfy itself on the correctness of the decision".

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled VC (PW1) on 14th January 2020. PW1 testified that on the material day she arrived home from school at around 5 p.m. and found people including the Appellant taking alcohol that her mother had prepared. That when they went to sleep, the Appellant removed her trouser and pant and inserted his male organ into her female organ.

10. Doris Cherotich (PW2) who was the clinical officer testified that she examined the victim (PW1) on 15th January 2020 and found that she had bruises on her labia majora and minora. That the hymen was not freshly broken but was perforated. PW2 further testified that she found pus cells. It was her conclusion that there was evidence of vaginal penetration.

The Appellant’s Case.

11. The Appellant, Noah Kipyegon Chepkwony testified in his defense that he was arrested on 15th January 2020 by nyumba kumi officers and was informed of the charges at the police station. That he was not examined and that Wesley was the one who was found in the subject’s home. It was his testimony that he was framed.

12. Albina Chumo (DW2) testified that she was the Appellant’s mother. That the Appellant arrived at midnight as she slept. She further testified that she saw the Appellant on 15th January 2020 at 3 p.m. and came to know of the charges later at 5 p.m.

13. On 24th January 2023, this court directed that this appeal be dispensed off by way of written submissions.

The Appellant’s Submissions.

14. It was the Appellant’s submission that the Prosecution failed to conduct forensic examination on the victim’s blood stained inner clothing and that they rushed to charge him without connecting him to the offence. That the investigating officer failed to visit the scene to establish whether there was any blood stained clothing.

15. The Appellant submitted that the Prosecution relied entirely on circumstantial evidence which was not cogent and was doubtful.

16. It was the Appellant’s submission that the Prosecution failed to summon Elicos Cherono and Wesley who slept with the victim in the same room. That they would have helped to shed more light on the case and that no reason was given to explain the failure of the Prosecution to summon them.

17. The Appellant submitted that he was framed after he refused to be in a relationship with Elicos Cherono who was the victim’s mother. He further submitted that he was not examined by the doctor therefore he was not linked to the offence.

18. It was the Appellant’s submissions that the sentence of 20 years was improper and unlawful. That the sentence fell foul to Article 28 of the *Constitution*. It was his further submission that this court should consider his mitigation that he was a first offender and had a family which depended on him. That he did not commit the offence and had already forgiven the witnesses and that he will always love them.

The Prosecution’s/Respondent’s Submissions.

19. It was the Respondent’s submission that it was clear from the victim’s and the clinical officer’s testimonies that there was penetration. That the victim testified that as they were sleeping, the Appellant removed his male organ and inserted into her female organ and she felt a lot of pain and bled. It was their further submission that the clinical officer (PW2) stated that the victim had bruises on her labia minora, had a perforated hymen and that the victim’s inner clothing were blood stained.

20. The Respondent submitted that the victim was aged 13 years at the time of the incident. That a Birth Certificate was produced and this evidence was not challenged by the Appellant during the trial.

21. The Respondent submitted that the issue of identification was not in doubt. That on the material day after defiling the victim, the Appellant switched on the light which enabled the victim to see him well. That the victim also identified him by name and even stated that they were neighbours. The Respondent further submitted that the investigating officer (PW3) was also able to identify the Appellant in court.

22. It was the Respondent's submission that the Appellant's defence was very weak and was not sufficient to challenge the prosecution evidence. That the Appellant did not call his wife as the witness and that his mother (DW2) stated that the Appellant arrived in the house at midnight while drunk.

23. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 14th February 2022, the Appellant's Amended Grounds of Appeal and written submissions both filed on 20th February 2023 and the Respondent's written submissions dated 20th February 2023. The following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Defence places doubt on the Prosecution case.

    iii. Whether the Sentence preissued against the Accused was fair and just.

i. Whether the Prosecution proved its case beyond reasonable doubt.

24. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

25. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony. The Court of Appeal in *Eliud Waweru Wambui v Republic* (2019) eKLR, held:-

> "There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."

26. Rule 4 of the *Sexual Offences Rules of Court* 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

27. No. 107574 (PW3) produced a Birth Certificate and the same was marked P.Exh 5. The Birth Certificate indicated that V.C (PW1) was born on 1st July 2006. The authenticity of the Birth Certificate or its production was not challenged during the trial. I find the Birth Certificate admissible and based on its contents it is my further finding that the time of the commission of the alleged offence, V.C was aged 13 years.

28. With regard to the issue of identification, the victim (PW1) stated that on the material day when she arrived from school, she found her mother, Wesley, the Appellant and two other young children. PW1 further testified that after the Appellant defiled her, she pushed him away and the Appellant went and took a light and shone it and she was able to see him.

29. Regarding identification of an Accused at night, the Court of Appeal in the case of *Nzaro v Republic* (1991) KAR 212 held:-

> "Identification/recognition at night must be absolutely watertight to justify conviction".

30. Similarly, the Court of Appeal in *Shadrack Shuatani Omwaka v Republic* (2020) eKLR, held:-

> "....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."....

31. It was clear that the offence was committed in the dark. The victim testified that she was able to identify the Appellant because he shone a light in the room before he ran away. This testimony was not challenged by cross examination. I am satisfied that the victim clearly saw the Appellant on the material night in their room.

32. The victim testified that the Appellant was her neighbour and the same was confirmed by the Appellant when he was cross examined.

33. Further the victim also positively identified the Appellant in the dock. In the case of *Muiruri & Others v Republic* (2002) KLR 274, the court held that:-

> "...............We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

34. There is no doubt in my mind that the Appellant was well known to the victim (PW1). It is my finding that the Appellant was positively identified as the perpetrator of the offence by the victim.

35. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person.

36. 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.

37. V.C (PW1) testified that on the material day as she was sleeping, the Appellant woke up, removed her trouser and pant and inserted his male organ into her female organ. This testimony remained unshaken as the Appellant did not cross examine PW1 on the events that occurred on the material night.

38. Doris Cherotich (PW2) who was the clinical officer at Ndanai Health Centre testified that she examined the victim on 15th January 2020, and that the injuries were about five hours old. That upon examination, she found that PW1 had bruises on the labia majora and minora and that her hymen though not freshly broken was perforated. It was her conclusion that there was evidence of vaginal penetration.

39. PW2 produced a P3 Form which was marked as P.Exh 4. The P3 Form indicated that the injuries were five hours old and that the victim had suffered bruises on both her labia minora and majora.

40. The above findings upon medical examination of PW1 corroborated the evidence tendered by the clinical officer (PW2). I am satisfied based on the testimonies of PW1 and PW2 and the contents of the P3 Form that V.C (PW1) was penetrated on the material day.

41. It was a ground of the Appeal that the Appellant was not subjected to a medical examination to prove that he was linked to the offence. He also stated that there was no forensic examination conducted on

the blood stains on the victim's inner clothing so as to link him to the offence. Section 36(1) of the *Sexual Offences Act* provides that: -

> Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

42. The Court of Appeal in the case of *Robert Mutungi Mumbi v Republic* (2015) eKLR, held that: -

> " Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

43. Similarly in *AML v Republic* (2012) eKLR the Court of Appeal held:-

> " The fact of rape or defilement is not proved by a D.N.A test but by way of evidence."

44. It was therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was penetration, which indeed they have.

45. The Appellant stated that the Prosecution failed to call the victim's mother and Wesley who would have been helpful in shedding light on the events of that material night. It is the position of this court that the Prosecution has the discretion on the number of witnesses it is to call and this court cannot dictate or compel the Prosecution on the number of witnesses it should avail. This court is only concerned whether the Prosecution was able to prove its case to the required legal standard.

46. Section 143 of the *Evidence Act* provides as follows:-

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

47. In *Julius Kalewa Mutunga v Republic* (2006) eKLR the Court of Appeal held as follows:-

> " ...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."

48. I am also persuaded by Kariuki J. in *Edward Wanyonyi Makokha v Republic* (2020) eKLR, where the court held that:-

> " The court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the

prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case."

49. It is my finding that the Prosecution evidence as tendered was sufficient as they were able to establish the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Defence places doubt on the Prosecution case.

50. I have considered the Appellant's defence in which he denied committing the offence. The Appellant's defence was aptly captured early in this Judgment.

51. The Appellant did not testify as to the events of the material night but simply stated that he was arrested the following day and informed of the charges he faced at the police station. When he was cross examined he stated that he lived with his wife, Joan and that she was at home the day he was arrested. The Appellant did not call his wife as an alibi witness.

52. His witness Albino Chumo (DW2) who was his mother testified that the Appellant arrived home at midnight and that she saw him again the following day at around 3 p.m. When she was cross examined, DW2 stated that the Appellant arrived home at midnight while drunk.

53. I dismiss the Appellant's submission of being framed by the victim's mother up as an afterthought. He did not bring up this issue when he had the chance to cross examine the victim and the investigating officer (PW3). He also did not bring it up in his defence.

54. In totality, I find that the Appellant's defence did not raise or place a doubt on the Prosecution's case.

iii. Whether the Sentence preferred against the Accused was just and fair

55. The general principles upon which the first appellate court acts in regards to sentencing are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. See *Nelson Ambani Mbakaya v Republic* 2016 eKLR

56. The penal section for a defilement case for a child of 13 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that: -

> A person who commits an 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.

57. The Appellant was sentenced to 20 years as prescribed by the law. Though harsh, it was remained a lawful sentence.

58. As I pen off this judgement, I must observe that the circumstances of the offence were rather disturbing. This court finds the conduct of the victim's mother rather perplexing. She brewed illicit alcohol in her house where she had minor children. Without a care she let her drunken clients including the Appellant spent the night in her house and in the same room with her minor children including the complainant. By this absurd action the mother exposed her daughter to harm. It is no wonder that she did not testify in this case. For reasons not apparent to this court, she exposed her children to danger and failed to protect them.

59. The above observation however does not absolve the Appellant from the offence for which he was properly convicted. I affirm the conviction.

60. The Appellant shall serve 15 years' imprisonment from the date of sentence in the trial court being 3rd February 2022.

    Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024.

....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief Mr. Njeru for the State, Appellant present in person and Siele (Court Assistant)