Anjere v Republic (Criminal Appeal E028 of 2022)
[2024] KEHC 2855 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E028 OF 2022

SC CHIRCHIR, J

MARCH 20, 2024

BETWEEN

JACKSON OBUNYAKHA ANJERE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Ollimo RM in Butere SO.58/2020 delivered on 30th March 2022 at the chief Magistrate's court at Butere in Sexual offences Case No. 58 of 2020.)

JUDGMENT

1. Jackson Obunyakha, the Appellant, was charged with the offence of defilement of a 6 year- old girl contrary to Section 8 (1)(2) of the *Sexual Offences Act* No. 3 of 2006 .

2. The particulars of the offence were that on the 10th day of October 2020 at Khwisero sub-county within kakamega county intentionally caused his penis to penetrate the vagina of GN a girl aged 6 years

3. He was charged with an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *sexual offences Act* no. 3 of 2006.

4. The appellant pleaded not guilty to the charges and he was tried and convicted of the main charge, and sentenced to life in prison.

Petition of Appeal.

5. He was aggrieved by the outcome and filed this Appeal, setting out the following Grounds:

    a). That the learned trial magistrate erred in law and in fact by failing to accord him the right to fair trial violating Article 50 (2)(b)(j) of the *constitution* of Kenya

b). That the learned magistrate erroneously convicted him basing on evidence that was contradictory in nature, inconsistent, uncorroborated and malicious.

c). That the learned trial magistrate grossly erred in law and facts by failing to call crucial witnesses.

d). That the charge sheet was defective and the learned trial magistrate grossly erred in law and facts by assuming the role of prosecution by helping them to prove their case.

e). That the trial magistrate erred on both law and facts by not appreciating his defence and mitigation and dismissing the same unreasonably.

f). That the trial magistrate erred in law and in facts by convicting and subsequently sentencing him over a charge that was not proved beyond reasonable doubt as provided by law.

g). That more grounds to be adduced during the hearing there of and after receiving the proceedings of the trial court.

6. The appellants prayed that the conviction to be quashed and the sentence set aside .

7. The Appeal was canvassed by way of written submissions.

Appellant's submissions.

8. The Appellant submits that the charge sheet was defective in that it did not specify the sentence for the offence he was charged with; that the word " unlawfully" was omitted; that while the victim's age on the charge sheet was indicated as 6 years, the evidence led indicated that she was 7 years.

9. He further submits that the prosecution evidence was full of contradictions and inconsistencies and ought not to have sustained a conviction.

10. He further submits that the prosecution did not call vital witnesses, such as the children, who were playing with the complainant. He cites "Mercy" , who allegedly saw the accused calling PW1, a representative of Mundoli dispensary where the complainant was first examined; the village elder who had gone to the accused home ;the men who allegedly went to the complainant's homestead and PW1's grandfather who had called the chief. He relied on the case of *Bukenya and others v Uganda* (1972) EA 549, in this regard.

11. The appellant further submits that the prosecution failed to prove the age of the victim. He stated that no age assessment was conducted to know the exact age of the complainant. He relied in the case of Bungoma v HCCR Appeal no 89 of 2016 *Kelvin Kiprotich Amos Alias Rotich v, republic* in which the court gave extensive guidelines on how to determine the age of the victim.

12. He submitted that the prosecution did not prove its case beyond reasonable doubt since the case was shoddily investigated and that he should therefore benefit from the gaps and contradictions in the case.

13. He further contends that penetration was not proved as the complainant's evidence was not corroborated by medical evidence.

14. On the sentencing, he submits that it was excessive and harsh and that the life sentence was cruel, inhuman and degrading and the court should consider a lesser sentence. He relied in the case of *Bernard Barasa v Rep* COA CR No. 313 of 2018 and requested the court to consider section 333 (2) of the *CPC*.

Respondent's submissions

15. It is the Respondent's submissions that all the ingredients of the charge of defilement was proved;

16. On the element of penetration, the prosecution submits that the testimonies of PW1 and PW2 were corroborated by PW4, the clinical officer who produced the P3 form , PRC and the treatment notes. The documents confirmed that the victim had dry white stains on her genitalia, and that the vagina was hyperaemic red with the absence of a hymen , which confirmed that the complainant was defiled.

17. On identification, the respondent submitted that PW1 positively identified the person who had defiled her as Machungo; they lived in closed proximity to each other and that it is her, the complainant, who later who led PW2 and PW 3 to the appellant's house.

18. The prosecution urges the court to consider the aggravating circumstances in this case, which include the age of the victim and the nature of injuries. The Respondent relies on the case of *Abdalla v Republic* Criminal appeal no. 44 of 2018 to buttress their submissions in this regard.

Evidence in brief

19. PW1 was the complainant. After the *voir dire* examination , the court directed her to give unsworn statement. She identified the accused person as Muchongo stating that he lived in close proximity to them. She testified that on 9th October 2020, her grandmother had sent her to "tinga" (posho mill) at about 12.00 pm. On her way back , she met with the accused who signalled her to go to where he was hiding in a bush. The bush was along the road.

20. When she went to him, he blindfolded her with a "kitamba" (scarf) and led her to a house, covered her nose and mouth and proceeded to remove her trouser , her white t-shirt and her panty. She stated that "akanieka dudu yake ndani" .(He inserted his penis in my vagina) while pointing at her vaginal area . She stated that he also inserted his penis in her anus. She started crying. The accused threatened to cut her with a panga if she told her mother.

21. She further testified that when she went home, she did not tell her mother what had transpired because she was scared. She clarified that he also inserted his fingers on her vagina, that he first inserted his fingers , then his penis. He then instructed her to return to his house the next day.

22. She further testified that, the following day, she was playing with some children next to " Duka Moja" when the Accused spotted her . The accused called her, blindfolded her and led her to his house and removed her trouser and panty and inserted his penis in her vagina . He then told her to be going there on a daily basis. On the third day , he gave her money. On the first day he had given her a ten shilling coin and on subsequent days he gave her twenty shilling coin.

23. She further told the court that, when she went home, she had trouble walking well. Her mother noticed it, examined her then took her to Munduri ,and later to Khwisero Health centre. They later made a report to the police station. She initially feared to disclose the perpetrator but did disclose when her mother spanked her . She identified the Accused in the dock.

24. On cross examination, she stated that Mercy saw the accused signalling her to come and that the reason she did not report to her mother was that the accused threatened to strangle her or cut her with a panga. She stated that she visited his place three times and it was after the third incident that she informed her grandmother.

25. PW2 was the grandmother to the complainant. She testified that on 10/10/2020 at about 3 pm, she saw PW1 approach from the gate and observed that she had difficulties in walking. She asked her daughter-in- law to help her examine the complainant's vagina. She saw blood and some whitish discharge ; when she asked her to explain what had happened to her, the complainant started crying and begging not

to be beaten. She then told her that she had been defiled by “Baba mwingine”. She told them that she knew where the man lived, and that the man had threatened her.

26. She escorted PW1 to Mundoli dispensary and later to Khwisero health centre where she was treated . The next day , they went to Khwisero police station .

27. She further testified that it was PW1 who led her, the Area chief and the village elder to the accused ‘s home . The complainant was able to identify the accused, among two other persons who were present in the Accused’s homestead. She led the chief inside the house and She identified the chair upon which she was defiled. The Accused was arrested by the chief. She further told the court that she was the guardian of the child’s mother lived mother was residing in Bungoma. She told the court that the complainant was born in 2013 and identified her birth certificate.

28. On cross examination, she stated that she knew the accused from the time she got married there (her matrimonial home,) and they had never differed.

29. She further told the court that she learnt of the incident when she saw that PW1 had difficulties.

30. PW3 was the senior chief- Mulwanda location . He told the court that on October 12, 2020, he received a call from SO ,PW1’s grandfather. He informed him that PW1 had been defiled. He advised him to take her to the hospital.

31. On 18th 10.2020, he went to PW1’s home and interrogated her. PW1 told him she knew the person well and she knew the place where the crime took place. On October 19, 2020, PW1 led her, PW2 and some villagers to the Accused’s home. They found the Accused at his home and PW1 exclaimed “ chief, ni huyu” (“chief, it is him”) . He informed the Accused about the accusation that the complainant had labelled against him and later escorted him to Khumusalaba police post.

32. On cross examination, he told the court that he and the Accused hailed from the same village. He admitted that the Accused had been one of the community policing officers; that was not aware of any crime that had previously been associated with the Accused .

33. Questioned by the court ,the witness told the court that the accused lived alone as he had separated with his wife.

34. PW4, the clinical officer at Khwisero Health centre recalled that on 10.10.2020, the complainant came to the facility. She gave a history of having been sexually assaulted. Examination showed white stains on her vagina and the vagina was red . The hymen was absent and been freshly broken. Urinalysis was positive for epithelial and leucocyte cells. Vaginal swap was positive for epithelial and pus cells. He concluded that the patient had been defiled. He filed the PRC form and the P3 Form.

35. On cross examination, he told the court that he received the patient at 7.00 pm and confirmed that she had not changed her clothes. He did not notice any blood stains on her clothes . The patient reported that her genitalia had been wiped by a piece of cloth by the suspect. He noted that the freshly broken hymen was reddish and that if the intercourse had been prior , the vagina would not have been tender.

36. PW5 was the investigation officer . He told the court that he took over investigation after the initial officer was transferred. She stated that the incident was reported on 9.10.020. She was present at the station when the complainant was brought and report made.

37. She further told the court that the complainant was born on February 22, 2013 and produced the child’s birth certificate

The Defence case

38. The accused was put on his defence and opted to give a sworn statement. He told the court that on 9th October 2020 at around 11.00 am, he was at a burial ceremony of one simon Omwitstale. The said simon was a neighbour to the complainant. He thereafter proceeded for a meeting at the Assistant chief's office. On October 10, 2020, he was at home doing chores, and thereafter went for the meeting at the Assistant chief's office.

39. He recognized the sketch plan of his house when shown to him . He stated that he had a bed , and nothing could have stopped him from defiling the complainant on the bed if the allegations were true. His home and that of the complainant are about three and kilometres apart, he sated . He claimed that the distant between him and the complainant's home was far and that if indeed he had defiled her, she would have come across a passer -by on the way. He further stated that there were no children playing in his compound; that in any event , the complainant had not provided the particulars of the children she had been playing with.

40. He further told the court that he was arrested on October 19, 2020 and there was no explanation as to why the police took so long to arrest him.

41. On cross examination, he stated that he did not know PW1 prior to the alleged incident but he knew the child's grandmother(PW2) He also did not understand why the child had implicated him.

Determination

42. This is a first Appeal, and am cognisant of my duty to reconsider the evidence tendered at the trial, re- evaluate it and make my own findings without ignoring the findings of the trial court. I must also give due allowance to the fact that I never heard or saw the witnesses testify. (Ref: *Njoroge v R* (1987) KLR 19.)

43. I have therefore considered the said evidence. I have equally considered the grounds of Appeal and the parties' submissions. In my view , the following issues arise for determination

    a). Whether the charge sheet was defective

    b). whether there were contradictions and gaps in the prosecution's case

    c). where vital witnesses were left out

    d). whether the prosecution proved its case beyond reasonable doubt.

    e). Whether the sentence was harsh and excessive.

Whether the charge sheet was defective?

44. The Appellant submits that the charge sheet does not specify the sentence prescribed for the crime, and the word unlawfully is missing on the charge sheet.

45. On the particulars of a charge sheet, Section 134 of the *criminal procedure code* provides as follows: " Every charge or information shall contain , and shall be sufficient, if it contains a statement of the specific offence or offences with which the person is charged , together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". (Emphasis added)

46. There is no requirement therefore that the charge sheet need to spell out the sentence prescribed for the particular offence or that the word unlawful must be stated. The charge sheet also contained

reasonable information such that the Appellant was well informed of the offence he was facing. He has not complained that he did not know the nature of the charge he was being tried for. This complain is without any merit and the same is hereby dismissed outrightly.

Whether there were contradictions and gaps in the prosecution's case

47. The Appellant contention is that whereas the complainant talked of having been defiled on October 9, 2020 , her grandmother (PW2) contradicted her by stating that on 10.10.2020 she saw the complainant walking through the gate with some difficulty . Another contradiction, the Appellant submits , is between the testimony of PW2 and PW4, in that whereas the PW2 stated that she saw blood in the complainant's vagina , PW4 told the court that he never saw blood stains on the complainant's clothes.

48. In *Richard Munene v Republic* [2018] eKLR, the court of Appeal had this to say about contradictions and inconsistencies in the evidence of prosecution witnesses: "Contradictions, discrepancies and inconsistencies in the evidence of a witness go to discredit that witness as being unreliable. Where contradictions discrepancies and inconsistencies are proved, they must be resolved in favour of the Accused."

49. It is trite law however, that it is not every minor contradiction or inconsistency in the evidence of the prosecution witness that will be fatally affect the prosecution's case. It is only when such inconsistencies or contradictions are substantial and directly relevant to the main issues in question and thus necessarily creates some doubt in the mind of court that an accused person is entitled to benefit from it (Ref: *Eric Onyango v R*(2014)eKLR

50. In the present case , I do not find any contradictions on the cited portions of evidence . Either the Appellant did not comprehend the said portions or is out to deliberately mislead the court. The fact that the complainant was defiled on the 9th does not negate the fact that PW2 noticed her condition the following day. In any event the complainant told the court that the Appellant also defiled her the day following the 9th, which day would then be the 10th. As to the issue of blood, there is no contradiction either. PW2 talked of examining the child's vagina and noticing blood. On the other hand PW4 was asked a specific question and he responded to it, that is if he had seen any blood on the victim's 's clothes and his answer was in the negative. Thus PW2 was making reference to the child's vagina , while PW4 was referring to the her clothes. Further and in any event, PW4 further told the court that the complainant reported that the perpetrator wiped her vagina with a cloth.

51. This ground of Appeal is again without merit and I dismiss it.

Whether vital witnesses were left out.

52. The Appellant argues that several witnesses were left out. He cited " Mercy" who was allegedly playing with the complainant when the Appellant allegedly called her; the medical personal from Mundoli dispensary where the complainant was first attended to ; the complainant's grandfather, who allegedly placed a call to the chief, and the village elder who went to the Accused's home.

53. Section 143 of *Evidence Act* (Cap 80) ,provides as follows:

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

54. Further in the case of *Keter v Republic* [2007] 1 EA 135, the Court of Appeal had this to say about the number of witnesses required to prove a fact: - "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

55. In the instant case, the evidence of PW1, was corroborated by PW4 on the aspect of penetration; on identification, her evidence was corroborated by PW2 and PW3. Her age was proved by the evidence of PW5 The testimony of the " Mercy " or the village elder or a Representative from mundoli dispensary were not necessary as the testimonies of the witnesses who testified were sufficient to prove the ingredients of defilement , namely :penetration, identification of the perpetrator and age of the victim.

Whether the prosecution proved its case beyond Reasonable Doubt

56. The offence of defilement is rooted on three main ingredients, being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

57. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and each must be proved for a conviction to be arrived at.

58. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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.

59. On the Age of the child, the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect to prove of age in defilement cases:

> " ... 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."

60. A birth certificate was produced showing that the complainant was born on 22nd February 2013. The alleged offence occurred on 10th October, 2020. She was therefore 7 years and 8 months old at the time of the offence. The fact that the charge sheet indicated that she was 6 years instead of 7 years does not negate the fact that she was a child under 11 years at the time of defilement. The element of Age of the victim was duly proved.

61. The second ingredient for determination is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as: "The partial or complete insertion of the genital organ of a person into the genital organs of another person."

62. Penetration is proved through the evidence of the complainant and where necessary, be corroborated by medical evidence .

63. In this case, it was the evidence of the complainant that the accused had called her while on her way from the "Tinga" where she had been sent by her grandmother. She narrated how the accused blindfolded her and led her to his house and proceeded to remove her trouser, her white t-shirt and pant and later inserted his penis inside her vagina. The words used by the complainat were: " akanieka dudu yake ndani (pointing at her vagina; and Akanieka dudu yake kwa chuchu yangu" (he inserted his penis in my vagina) ". As correctly noted by the Trial Magistrate, such euphemisms are often used by children to describe the act of defilement.

64. The trial Magistrate gave reasons as to why she believed the complainant's testimony. In so doing she was ensuring due compliance with the provisions of section 124 of the *Evidence Act*.

65. Further the Evidence of the complainant was corroborated by PW4, who testified that vaginal examination of the complainant's vagina showed that the hymen had been freshly broken and tests carried out showed the presence of epithelial cells. Both findings were evidence of defilement

66. Am satisfied that defilement was proved.

67. On the final element of identification, it was the evidence of PW1 that the appellant was a neighbour and she was able to identify him as "Machungo". The complainant led PW2 and the Assistant chief to the Accused's house. It was the defence of the accused that he was in the community policing unit and that he visited families in the community. He seemed to suggest that that might explain why the child knew him. However why would the child lead the chief to the Appellant's house and not any other house, yet there was no suggestion of any acrimony between her guardian and the Appellant. Not only did the complainant lead the chief to the house but she pointed out the place where the defilement took place. The complainant identified the Appellant by telling the chief: " chief ni huyu" The complainant had no reason to lie about the person who had defiled her. It is evident that the two knew each other well. This was therefore a case of identification by recognition. It is trite law that recognition of an attacker is more satisfactory, more assuring and more reliable than identification of a stranger as it depends on personal knowledge of the Assailant by the complainant.(see *Ajononi & others v Republic* (1980) KLR 54. It is my finding that the Appellant was positively identified as the perpetrator.

68. In conclusion, am satisfied that the prosecution proved its case beyond reasonable doubt and the conviction of the Appellant is hereby upheld.

69. On the sentence it is the Appellant's submission that the life sentence meted out was harsh and it should be overturned.

70. In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated that: - "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

71. The Appellant was charged under Section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The provisions state as follows:

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

(2) 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.

72. Thus the sentence prescribed by the *Act* is the minimum, and is mandatory. The trial court took into consideration both the mitigating and aggravating factors, but it is obvious that the sentence was informed by the mandatory provisions of section 8(2) of the Act.

73. However in the recent decision of *Manyeso v Republic*(CR App No. 12/2021) (2023) KECA 827 (KLR) The court of Appeal declared life imprisonment as being unconstitutional. Consequently, and for that reason, I will set aside the life sentence .

74. The Appellant told the court that he was a first offender and he was remorseful; that he was 58 years old at the time of sentencing, that was in march 2022. He is now shy of 60 years. He further submitted that he was a responsible citizen evidenced by the fact that he was a community policing officer.

75. However, the victim was a child of a tender age of 6 years. The Appellant took advantage of the victims' vulnerability. He also acted in breach of trust as he was one of the community's leaders. Considering the victim's tender age, the child must have been left with a lot of psychological trauma.

76. Taking into account both the above mitigating and aggravating factors I will substitute the life sentence with a 25 years imprisonment. The sentence will run from the date of conviction by the trial court.

DATED , SIGNED AND DELIVERED AT KAKMEGA THIS 20ND DAY OF MARCH 2024

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- court Assistant.