Busolo v Republic (Criminal Appeal 35 of 2021)
[2024] KEHC 3310 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 35 OF 2021

JN KAMAU, J

MARCH 19, 2024

BETWEEN

PAUL IBWAGA BUSOLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (PM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No 59 of 2018 on 13th May 2020)

JUDGMENT

Introduction

1. The Appellant herein was charged 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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon S. O. Ongeri (PM), on the charge of defilement and was discharged of the alternative charge. He was sentenced to twenty five (25) years imprisonment.

3. Being dissatisfied with the said Judgement, on 8th October 2020, he lodged the Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.

4. Despite this court directing the parties to file Written Submissions, none had been filed as at the time of writing this Judgment. The Judgment herein is therefore based on the evidence that was adduced during trial.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), and (4) of the Petition of Appeal were dealt with under this head as they were all related.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. In his Petition of Appeal, the Appellant claimed that the age of the Complainant herein (hereinafter referred to as "PW 1") was not established as required by law.

13. Notably, PW 1 gave unsworn testimony. She testified that she did not know her age.

14. MLKK (hereinafter referred to as "PW 2") was her grandmother. When PW 2 was recalled to testify on 16th October 2019, she informed the court that PW 1 was born on 17th May 2009.

15. Samuel Chelule (hereinafter referred to as "PW 5") was the Clinical Officer who examined PW 1. He testified that she was eleven (11) years old.

16. No 58517 PC John Epai (hereinafter referred to as "PW 6) testified that PW 1 was aged between nine (9)- eleven (11) years old. He pointed out that the minor was not subjected to age assessment.

17. Notably, no birth certificate or baptismal card was produced in court to prove PW 1' s age. No age assessment was done.

18. In the absence of documentary evidence, observation and common sense can assist the court in determining a minor's age. In the case of Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of Musyoki Mwakavi v Republic [2014] eKLR.

19. In further advancement of this argument, in the case of Joseph Kieti Seet vs Republic [2014] eKLR, the court therein held that a minor's age could be proved by common sense, a position this court agreed with.

20. In the case of Evans Wamalwa Simiyu vs Republic [2019] eKLR, the court therein accepted the approximate age of the minor therein as had been indicated in the P3 Form.

21. In this case, PW 1's age was proven by her guardian and medical evidence. The Appellant did not rebut this evidence by adducing evidence to the contrary. He could not therefore purport that PW 1's age had not been proved to the required standard.

22. This court was therefore persuaded to accept that PW 1 was aged eleven (11) years of age as at the time when the offence was committed on 19th November 2018.

B. Identification

23. Notably, PW 1 testified that the Appellant's house was near their house. PW 2 confirmed that he stayed a hundred (100) metres from her house.

24. Nigel Onyango (hereinafter referred to as "PW 4") testified that on the material day, the Appellant found him playing with PW 1. He sent him to the shop to buy cigarette and sweets. His evidence was that when he came back and gave him the cigarette, he (the Appellant) took PW 1 and left with her. He said that he gave one sweet to PW 1.

25. His further evidence was that his grandmother asked him to call PW 1. He said that when he went to the Appellant's house, he found PW 1 putting on her pant and the Appellant was also putting on his underwear.

26. PW 1, PW 2 and PW 4 positively identified the Appellant at the dock during trial. PW 1 and the Appellant knew each other because they were neighbours. The incident occurred at 5.00 pm when it was still daylight and favourable for a positive identification of the Appellant herein as the perpetrator of the offence herein. There was no possibility of a mistaken identity. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition

C. Penetration

27. According to PW 1, she was at home on the material day with her grandmother when the Appellant came and picked her, took her to his house, lay her on his bed, removed her pant and inserted her penis. She stated that she felt great pain. Her evidence was corroborated by that of PW 2, PW 3 and PW 4.

28. It was PW 2's testimony that she was informed by PW 4 that PW 1 had been taken by the Appellant and that when she tried to follow up, PW 4 came back running to her and informed her that she had seen both PW 1 and the Appellant putting on their underwear at the Appellant's house. She stated that when she found PW 1, she was not in her blue trouser which she said was in the Appellant's house. When they opened the Appellant's house, they found the blue trouser and left it on the seat. She testified that PW 1's inner wear was red.

29. On his part, PW 5 told the Trial Court that PW 1 had a freshly torn hymen which was swollen and tender with visible reddening as a result of the inflammation. He said that there were visible tears on both labia and majora. He added that a high virginal (sic) revealed as spermatozoa. This court understood this to have been a high vaginal swab. He concluded that PW 1 was forcefully defiled and had unprotected sex. He produced Post Care Rape (PRC) form, Treatment Note, Laboratory Request Form and P3 form as exhibits in support of the Prosecution's case.

30. It was noteworthy that PW 1 gave an unsworn testimony which was upheld by the Trial Magistrate and thus led to the Appellant's conviction.

31. The law relating to unsworn statements was well expressed in the case of Mercy Kajuju & 4 Others v Republic [2009] eKLR where they were found to have no probative or evidential value.

32. However, the evidence of a child under the age of fourteen (14) years may be received even if it is not on oath, provided that the court is satisfied, after conducting a voire dire examination, that the child possesses sufficient intelligence and understands the duty to tell the truth.

33. In the present case the child was said to have mental issues and slow. This court had due regard to the case of Oloo v R [2009] KLR, where the Court of Appeal held that:

> " In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence."

34. Notably, PW 1's evidence was well corroborated by that of PW 4 who witnessed both PW 1 and the Appellant wearing their under wears and scientific evidence of PW 5 that confirmed recent penetration and hence this court could not fault the Trial Court for having arrived at the decision that it did. The Appellant's defence was simply a denial and did not outweigh the inference of guilt on his part depicted by the Prosecution case.

35. The Trial Court found PW 1's evidence to have been well corroborated by scientific and factual evidence. It could not therefore have been faulted for having found that the Appellant did in fact penetrate PW 1 and that the Prosecution had proved its case beyond reasonable doubt.

36. In the premises foregoing, Grounds of Appeal Nos (1), (2), and (4) of the Grounds of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

37. Ground of Appeal No (3) of the Petition of Appeal was dealt with under this head.

38. The Appellant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same provides as follows:-

> " 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."

39. This court therefore noted that the sentence of twenty five (25) that the Trial Court meted upon the Appellant was lenient in the circumstances of the case it he had the discretion to sentence him to life imprisonment.

40. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

41. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

42. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

43. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another v Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

44. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

45. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

46. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake v Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

47. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

48. Whereas the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could also exercise its discretion not to interfere with the decision of the lower court if there were aggravating circumstances. This was a case that this court took the view that a stiffer sentence would have been more suitable. It therefore declined to interfere with the decision of the Trial Court as the sentence of twenty five (25) years imprisonment that was meted upon the Appellant herein as the same was fair in the circumstances of the case herein to punish him for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

49. Going further, this court found it prudent to consider if the Appellant had spent time in custody while his trial was ongoing and if so, to take it into account and further direct that the same be taken into account while computing the sentence that he was going to serve.

50. In this regard, Section 333(2) of the Criminal Procedure Code provides as follows:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

51. This duty to take into account this period is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided that: -

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

52. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

53. A perusal of the proceedings of the lower court showed that there was no indication in the court file if the Appellant herein was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 19th November 2018 and was sentenced on 13th May 2020. The period that he spent in prison between 19th November 2018 when he was arrested and 12th May 2020 therefore ought to be taken into account while computing his sentence.

Disposition

1. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 8th October 2020 was partly merited but only on the aspect of the period that he spent in remand while his trial was ongoing. His conviction and sentence be and are hereby upheld as they were both safe.

55. For the avoidance of doubt, it is hereby ordered and directed that the period between 19th November 2018 and 12th May 2020 that the Appellant remained in remand be and is hereby taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

56. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF MARCH 2024

J. KAMAU

JUDGE