JM v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 4214 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E007 OF 2023

SN MUTUKU, J

MARCH 18, 2024

BETWEEN

JM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against both conviction and sentence of 20 years in Criminal Case No E016 of 2022 for the offence of Defilement by PM's Court at Loitoktok before Hon. Nthuku J.N (principal Magistrate) delivered on 21st July, 2022)

JUDGMENT

1. The Appellant, JM, was charged with the main count of Defilement contrary to section 8 (1) as read together with section 8(3) of the *Sexual Offences Act* (the Act). The particulars thereunder are that on diverse dates between the year 2020 upto May 2022 in Kajiado South within Kajiado County intentionally caused his penis to penetrate the vagina of AH a child aged 14 years.

2. The Appellant faced an alternative charge of Indecent Act with a child contrary to section 11(1) as read with section 11(4) of the *Sexual Offences Act*. The particulars are that on diverse dates between the year 2020 upto May 2022 in Kajiado South within Kajiado County intentionally touched the vagina of AH a child aged 14 years with his penis.

3. He pleaded not guilty to the charges. He was tried and found guilty on the main charge. He was convicted and sentenced to serve 20 years imprisonment.

4. He was aggrieved by the conviction and the sentence and has filed the instant appeal through his Amended Petition of Appeal dated 7th August, 2023 and has raised the following 12 grounds of appeal:

    a. That the Learned Trial Magistrate erred in law and fact in neglecting a cardinal principle in criminal law and procedure as the burden of proof was shifted to the Appellant herein which

the same led to a breach of legal law of burden and standard of proof contrary to section 11(2) (c) of the *Evidence Act*.

b. That the Learned Trial Magistrate dismally failed in law and fact in holding that the prosecution had proved the case beyond reasonable doubt against the Appellant while analyzing and deciding the case against the weight of the evidence.

c. That the Learned Trial Magistrate erred in law and fact in failing to give due regard to material contradictions, discrepancies and inconsistencies in the prosecution case which went to the root cause of their allegations.

d. That the Learned Trial Magistrate erred in law and fact by rejecting the Appellant's defence statement which was plausible, yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution and thus failed or fully violated the stipulation in sections 212 of the C.P.C Cap 75 Laws of Kenya.

e. That the findings and conclusions of the learned trial magistrate on the evidence were improper hence best placed to be interfered with by the High Court.

f. That the Learned Trial Magistrate erred in holding that the complainant was a victim of defilement when she had on several occasions had consensual sex with the Appellant and getting pregnant.

g. That Learned Trial Magistrate erred in law and fact in finding that the case against the Appellant met all the essential and vital corroborating evidence hence capable of sustaining a conviction.

h. That Learned Trial Magistrate erred in law and fact as in her judgement failed to consider the evidence that was brought out by the defence that the complainant was the Appellant's wife and the Complainant's parents were well aware thus arriving at a wrong decision and hence completely offending the provisions of the Law.

i. That Learned Trial Magistrate erred in law and fact by considering and relying on the birth certificate alone yet the complainant's parents alleged that the complainant was in school and that they had reported the matter with the police and no documentary evidence to that effect was produced during trial.

j. That the Learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant to 20years without following the sentencing guidelines of the judiciary as provided by law.

k. That the Learned Trial Magistrate erred in law and in fact by failing to wait for the Victim Impact Assessment Report as well captured in her own judgement and went ahead to convict and sentence the Appellant to 20 years.

l. That the Learned Trial Magistrate erred in law and in fact failing to ask for a pre- sentencing report by the probation officer and went ahead to convict and sentence the Appellant to 20 years.

Appellant's Submissions

5. The Appeal was canvassed through written submissions. The appellant filed his submissions dated 15th November, 2023 and raised three issues for determination;

i. Whether the evidence presented before the trial court proved defilement beyond reasonable doubt?

ii. Whether there were contradictions and inconsistencies by the prosecution witnesses?

iii. Whether the sentence imposed on the Appellant was harsh and excessive in the circumstances of the case?

6. On the first issue they stated that in criminal cases the burden of proof lies with the prosecution as captured in the case of Dominic Labet Mwareng -vs- R(2013)eKLR.

7. It was his case that he and the victim had on several occasions had consensual sex for around 2 years. That when the minor fell pregnant, he agreed to marry her under Masaai customary law. That they lived together with the minor. That the alleged defilement occurred when the minor was around 12-14 years and she never at any time reported the same to her parents or the authorities.

8. On the second issue he stated that the testimony of PW2, the mother of the minor, and that of PW4, the Chief, was contradictory. He stated that PW2 the minor's mother at all times knew that the minor was living with him a fact they had consented to. That when the minor went missing on 24th March, 2022 she informed the chief and balozi before calling him. That he told him that he was with the minor.

9. He submitted that PW2 did not indicate which Chief she had reported to, or indicate whether she had made a report to the police about her missing daughter. He stated that PW4 who arrested him was from Nkama area which was far away from Mashuru where he was arrested.

10. On the third issue the Appellant submitted that the magistrate failed to consider the victim impact report and the sentencing guidelines. He argued that the 20 years sentence was harsh and excessive. He reiterated that he and the minor were living together as husband and wife and have a child and that according to Article 53 of *the Constitution* the best interest of the child requires provision of love and affection from both parents. He argued that the sentence given to him has left both the young mother and child without love and care for 20 years.

Respondent's submissions.

11. The Respondents filed submissions dated 4th August, 2023. The Respondent submitted on the three key elements of the offence of defilement of penetration, age of the minor and positive identification of the accused.

12. On the first issue of penetration the Respondent cited the definition of penetration contained in section 2 of the *Sexual Offences Act* that penetration means partial or complete insertion of the genital organ of a person into the genial organs of another person.

13. It was submitted that from the testimony of the minor, the Appellant met her in 2020 during overnight prayers commonly referred to as 'kesha' after which she went with the Appellant to his house where they had sexual intercourse and thereafter continued having sexual intercourse until she became pregnant and that the Clinical Officer, PW3, examined her and found her to be 5 months pregnant and her hymen broken.

14. On the age of the minor, it was submitted that PW1 stated that she was 14 years old and that this was corroborated by the testimony of PW5 the investigating officer who produced a copy of the minor's birth certificate as an exhibit before the court showing that she was born on 20/9/2008 indicating she was 13 years old at the time.

15. On the element of positive identification of the accused, it was submitted that PW1 testified that she had known the Appellant since 2020. Further, that the Appellant took her to Mashuru where they lived together as husband and wife in the month of April, 2022.

16. The Respondent submitted, on the issue of contradictions and inconsistencies, that the prosecution witnesses remained consistent throughout their testimonies. The Respondent relied on the Court of Appeal case of Erick Onyango Odeng- vs- Republic[2014]eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred -vs- Uganda Criminal Appeal No 139 of 2001[2003]UGCA 6.

Analysis and Determination

17. I have reminded myself of my duty as the first appellate court to re-evaluate, re-analyze and re-consider all the evidence adduced before the trial court with a view to arriving at my own conclusion.

18. The offence of defilement has 3 key elements that must be proved beyond reasonable doubt. The party that bears the burden of proof in criminal matters is the prosecution. It is the prosecution that must prove a criminal case beyond reasonable doubt. This burden of proof does not shift to the accused or appellant. The elements that must be proved beyond reasonable doubt by the prosecution are penetration, age of the victim and identity of the accused. It is the duty of this court, sitting on appeal, to determine whether the prosecution proved these three elements beyond reasonable doubt.

19. I have read the poorly drafted grounds of appeal and it is my understanding that they revolve around contradictions of evidence of prosecution witnesses, insufficient evidence to proof the case beyond reasonable doubt, failure to consider the defence of the appellant and the harsh sentence. In my view, all the 12 grounds of appeal can be summarized into these four areas:

    i. Contradictions and inconsistencies in prosecution evidence.

    ii. Insufficiency of prosecution evidence.

    iii. Failure to consider defence of the appellant, and

    iv. Harsh and excessive sentence.

20. I have read and understood the entire record of the trial court. PW1, who testified under oath after the trial magistrate satisfied herself that the minor understood the nature of oath, testified that she was 14 years old and that she has known the appellant since 2020. She used to buy goods from his shop. In the same year, 2020, she met the appellant at a 'kesha' from where she went with the appellant to his house where they had sexual intercourse. The appellant escorted her at 4am.

21. She testified that she had sexual intercourse with the appellant on several occasions all through to 2021 when she missed her periods. She realized that she was pregnant and informed the appellant who told her that he would marry her.

22. She testified that the appellant left her to run his shop at a salary of Kshs 3,000 and went to Rombo. When her pregnancy began to show the appellant took her to Mashuru on 27th March, 2022 where they lived as husband and wife.

23. The evidence of the victim's mother, PW2, is that the minor went missing on 24th March, 2022, at which time she had dropped out of school and was working at the appellant's shop. On realizing that her daughter was missing she called the appellant on his phone who informed her that she was with the minor. PW2 reported the matter to the Chief and Balozi. She denied that the minor was betrothed

to the appellant. She stated that when she was called by the police to collect the minor, she found that the minor was pregnant.

24. The evidence of the Clinical Officer, PW3 is that he examined the minor, aged 14 years and found that she was 5 months pregnant and her hymen was broken. PW3 produced the P3 form and treatment notes as exhibits 1 and 2.

25. PW4 testified that he was the chief of Nkama location. He met the appellant in 2022 with a girl she said was his wife. He called his mother on phone and was informed that the appellant had eloped with a minor and deserted his legal wife at home. PW4 testified that on 2nd May, 2022 he arrested the appellant and took him to the police with the minor.

26. PW5, Cpl James Goe, testified that on 2nd May, 2022 he was in the office at Ilasit Police Station when he was informed that there was a suspect at a Rombo Police Post who had been arrested at Mashuru. He proceeded to Mashuru where he found the appellant and PW1 in custody. He was informed that the offence was defilement. He called PW1's parents and informed them. On 3rd May, 2022, PW2 went to the station to collect the minor. PW2 handed over birth certificate of the minor to PW5, showing that she was born on 20th September, 2008. He escorted both the appellant and the minor to Loitoktok sub-county hospital for medical examination where the minor was found to be 5 months pregnant.

27. The defence of the appellant, who testified as DW1 is that he was arrested on 2nd May, 2022 at Mashuru together with his wife. He said he was given PW1 legally by her parents to marry her under Maasai customary culture. He said that he did not ask about the minor's age and that he did not know it was an offence to marry an underage girl. He asked for forgiveness.

28. I have subjected all the evidence recorded in this case and I find no contradictions or inconsistencies. That the appellant met the minor and had sexual intercourse with her is not in doubt. From 2020 when the appellant and the minor met and May 2022 when the appellant was arrested, the two had been in a sexual relationship and lived together as man and wife. The minor was pregnant when the appellant was arrested.

29. A careful reading of the evidence clearly shows that the three elements of defilement are present in this case. On the element of penetration, I have considered the evidence of the minor and that of the PW3, the Clinical Officer who examined her. I find that the minor's evidence and that of pw3 the medical officer that examined her. The minor's evidence has been corroborated by that of PW3. I have noted that she remained firm even during cross examination. It was also her testimony that the appellant had got her pregnant and eloped with her to Mashuru where they lived as husband and wife. It is my finding that the element of penetration, as defined under section 2 of the *Sexual Offences Act*, has been proved beyond reasonable doubt. The appellant has also admitted living with the minor as his wife.

30. The age of the minor is also determined through the birth certificate produced by PW5. She was aged 14 years at the time. The appellant has admitted that he did not ask how old she was and that he did not know it was an offence to marry an underage girl. This element of the offence has been proved beyond reasonable doubt.

31. The minor was also able to identify the appellant as the person who defiled her. They met in 2020 and the appellant was arrested in May 2022. He was found with the minor. There is no doubt therefore that the appellant was positively identified as the perpetrator.

32. All the grounds of appeal challenging the errors of the trial magistrate in respect to failure to consider the insufficiency of the evidence, the contradictions and inconsistencies and failure to consider the defence of the appellant must fail. On my own re-evaluation of the evidence, I have noted that the trial

magistrate considered the evidence tendered before her and in a well-reasoned judgment made a finding that the there is sufficient evidence to prove the offence of defilement beyond reasonable doubt. I have no reason to interfere with her findings. I am satisfied that the offence of defilement has been proved beyond reasonable doubt and that the grounds raised by the appellant as stated above are unfounded.

33. I now turn to the ground that the sentence is harsh and excessive. The appellant was sentenced to 20 years imprisonment. The court took his mitigation that he was the sole breadwinner of the family and that he was educating his siblings and that he also has a child depending on him.

34. Section 8(3) of the *Sexual Offences Act* provides 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.

35. The wording in section 8(3) of this Act is distinguishable with the wording in section 8(2) which uses the words:

> 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.

36. The Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR discussed section 8 of the *Sexual Offences Act* thus:

> " In Hadson All Mwachongo v. Republic (2016) eKLR, this Court stated as follows regarding the sentences prescribed by the *Sexual Offences Act*:
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> "The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment."

37. The Court of Appeal was concerned with the interference of the discretion of the trial court in sentencing where the law imposes mandatory sentence. The Court of Appeal cited with approval the Supreme Court of South African decision in In State v. Tom, State v. Bruce (1990) SA 802 (A), where the majority decision of that Court made the following observations on sentencing generally and mandatory sentences in particular:

> " The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law...
>
> A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just

> and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.

38. The Court of Appeal also cited our own Supreme Court in Francis Karioko *Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015* on the issue of mandatory death sentence and reasoned as follows:

> "In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.
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> Being so persuaded, we hold that the provisions of section 8 of the *sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

39. Where defilement is committed against a minor aged between 12 and 15 years, the sentence is 20 years imprisonment. The interpretation adopted by the majority of trial courts is that the wording of section 8(3) and 8(4) imposes a mandatory minimum sentence thereby denying the trial court discretion in sentencing. The Court of Appeal in the Dismas case was of the view that trial courts have discretion in sentencing in cases where mandatory sentences or mandatory minimum sentences are imposed depending on the circumstances of each case. in the Dismas case, the Court of Appeal reduced the sentence of 20 years to 15 years.

40. I am alive to the fact that every case is unique and that each case should be considered based on its unique circumstances. The circumstances of this case are peculiar. The appellant did not ask the victim how old she was. In his mind, she was mature for marriage. She asked the court to forgive him because he did not know that it was an offence to marry an underage girl. Unfortunately for him, this does not afford him defence. Section 7 of the Penal Code is clear on that. It provides that:

> Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.

41. I also note that from 2020 when the appellant and the minor met and started a relationship to May 2022 when the appellant was arrested, there is no action taken by the victim to demonstrate that she was being forced into a sexual relationship. She did not complain to her parents, to the police or anyone in authority. The law, however, protects ignorant children like the victim in this case. At age 14, the victim was not capable of consenting to sex let alone marriage as claimed by the appellant. Out of

ignorance for both of them and perhaps the victim believing that she is mature for a sexual relationship the two lived in this unfortunate union.

42. It is my considered view that the trial court did not err in any manner. However, I will interfere with the sentence meted out to the appellant in this case, given the circumstances of this case and reduce the sentence, which I hereby do, from 20 years to 15 years to run from the date of sentence by the trial court.

43. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MARCH 2024.

S. N. MUTUKU

JUDGE