**Ekarot v Republic (Criminal Appeal E013 of 2022)**
**[2024] KEHC 4100 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4100 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUSIA**

**CRIMINAL APPEAL E013 OF 2022**

**WM MUSYOKA, J**

**APRIL 26, 2024**

**BETWEEN**

**MOSES EKAROT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the conviction and sentence by Hon. EC Serem, Resident Magistrate, RM, in Busia CMCSO No. E028 of 2020, of 1st March 2022))***

**JUDGMENT**

1. The appellant had been convicted of defilement of a 15-year-old girl, and was sentenced to serve a 20-year jail term. The defilement allegedly happened between 20th July 2020 and 23rd July 2020.

2. He was aggrieved, hence the appeal. The grounds of appeal, in the petition, dated 21st April 2022, revolve around the charge being defective, the evidence being hearsay and contradictory, the evidence lacking probative value, the medical evidence and the defence being disregarded, and fair trial principle not being observed.

3. The appellant has filed supplementary grounds of appeal, where he raises issues about penetration not being proved, the exact age of the complainant not being established, the appellant and the complainant not being found together, the date place and time of the offence being uncertain, the medical evidence exonerating the appellant, the evidence not being tight enough to warrant conviction, case not proved beyond reasonable doubt, appellant not accorded a fair trial, sentence lacking discretion, and the evidence being contradictory and having gaps.

4. The appeal was canvassed by way of written submissions, following directions given on 14th February 2024.

5. The appellant argues 5 points. Firstly, that penetration was not proved, as the medical examination exonerated him. Secondly, that the age of the complainant, PW1, was not proved, as no medical evidence was produced. Thirdly, the identity of the perpetrator was not established, for there was no physical description of the appellant. Fourthly, the charge was defective, for being framed to effect that the offence was committed contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, instead of being framed in words to effect that it was contrary to section 8(1) as read with section 8(3) of the Act. Fifthly, and finally, that PW1 was not a credible witness, for her evidence on defilement was not supported by the medical evidence, and that a broken hymen alone was not proof of the defilement.

6. The respondent submitted on 6 grounds. Firstly, that, although the charge was not drawn as per convention, it carried sufficient disclosure of the case against the appellant to enable him mount a defence, as per *Benard Ombuna v Republic* [2019] eKLR. Secondly, on the age of PW1, her father testified and produced a certificate of birth. It is submitted that PW1 testified on how the appellant inserted his penis into her vagina, which testimony was corroborated by the medical evidence presented by PW4. Thirdly, on failure to call vital witnesses, it is submitted that there is no requirement that a particular number of witnesses be called, as only such witnesses as are sufficient to establish the charge are to be called, as per section 140 of the *Evidence Act*, Cap 80, Laws of Kenya, and *Keter v Republic* [2007] EA 135. Fourthly, it is submitted that presence of contradictions in evidence are to be expected, but they would be of consequence only where they affect the main substance of the case, or point to deliberate untruthfulness, as stated in *Twehangane Alfred v Uganda* [2003] UGCA. Fifthly, on arrest, the fact of error or misstatement of the date of the arrest of the appellant did not make the arrest improper, and on the allegation of torture, it is submitted that the proper way of addressing such complaints is by way of a constitutional petition. Sixthly, it is submitted that the sentence was unconstitutional, going by the decision in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J). Seventhly, the alibi defence was raised too late in the day. Eighthly, and finally, the time spent in remand custody was reckoned at sentencing.

7. On the charge being allegedly defective, for being framed as contrary to section 8(1)(3) of the *Sexual Offences Act*, instead of section 8(1) as read with 8(3), the conventional way to do it is in the former, not the latter, but framing it in the latter does not make it defective. To me, the issue is a storm in a tea cup. It does not matter, so long as the provision cited conveys both the definition or creation of the offence, and the sentence prescribed. Section 8(1) creates the offence, while section 8(3) prescribes the penalty. The idea is to inform the accused of the offence he is alleged to have committed, to establish that the offence exists, and to inform him of the sentence he is likely to face, upon conviction. Whether it is framed as section 8(1)(3), or section 8(1) as read with section 8(3), is neither here nor there. It does not prejudice the accused, for either way it informs him that the offence charged exists, and of the penalty for the offence. It is, to me, more about style in drafting or framing charges, and either approach would be appropriate or sufficient. See *Benard Ombuna v Republic* [2019] eKLR.

8. On the age of the complainant, PW3, not being proved, I note that PW1 was her father. He testified that she was born on 6th May 2005, and he produced a certificate of birth. PW2 was her mother, she testified on the same certificate of birth, but said that the date of birth was 6th April 2005. The certificate of birth indicates that PW3 was born on 6th April 2005. The date by PW1 must have been an error, but a minor one, for he made PW3 just 1 month younger. There can be no basis for the argument that the age of the complainant was not established.

9. On the identity of the perpetrator not being established, I note that PW1 and PW2 testified that they had employed the appellant at some point, and PW3 testified that the appellant was someone that she

knew. However, whether he perpetrated the defilement would depend on whether there was defilement at all. PW3 alleged that the appellant defiled her, and she got pregnant out of it.

10. Was the defilement proved? The charge alleges that the defilement happened between 20th July 2020 and 23rd July 2020. PW 3 testified that the appellant approached her on some day between 20th July 2020 and 23rd July 2020, and made advances, and that on 27th July 2020 she left with him. She said that she was found on 28th August 2020. She testified that on some undisclosed date, the appellant inserted his penis in her vagina, but there is vagueness as to when that happened. According to PW 1and PW2, PW3 disappeared from home on 27th August 2020. PW2 testified to have had seen the 2 together that night, but they disappeared. PW3 was subsequently allegedly found at Aloyete, alone. The exact date when she was found is not clear, for the witnesses gave contradictory dates. PW4, the clinician, testified that the history he was given was that PW3 was defiled in July, and he examined her in August. He found her to be carrying a 2-month old pregnancy. The foetus was subsequently aborted through miscarriage. The material on the alleged defilement is very sketchy and vague. Although the defilement is alleged to have happened between 20th July 2020 and 23rd July 2020, PW 3 testified that on those dates the appellant merely made advances, she then said that they left home together on 27th July 2020. However, her parents put the date at 27th August 2020, when she disappeared from home and was seen with the appellant at night. PW2 said she later found PW3 that morning of 27th August 2020, while PW3 herself talked of being found on 28th August 2020. She did not testify about being defiled on 27th August 2020, if that was the night that she was allegedly taken away by the appellant. The history given to PW4 did not refer to defilement on 27th August 2020, but sometime in July. He stated that defilement was allegedly in July, while he examined PW3 in August. In re-examination, PW 3 then said the defilement was between 20th July 2020 and 23rd July 2020. The pregnancy was terminated, and forensics were not done to connect it to the appellant.

11. Was the evidence adduced adequate? The testimony of PW3 was incredibly vague and inconsistent. She was not clear, in her examination-in-chief and cross-examination, on what transpired between 20th July 2020 and 23rd July 2020, and it was only on re-examination that she claimed that that was when the defilement happened. That did not give a chance to the appellant to test her through cross examination. It was unsafe to convict the appellant on testimony that was so vague and inconsistent. The testimonies of PW1 and PW2 did not help much for they did not testify on events between 20th July 2020 and 23rd July 2020.

12. The medical evidence did not quite corroborate the defilement claims. The same allegedly happened sometime in July 2020, according to the charge, and the history given to PW4. The medical examination happened on 27th August 2020, more than a month later. No wonder PW4 did not find anything untoward, except for the absence of the hymen and presence of the pregnancy. There was no proof that loss of the hymen had anything to do with the appellant, and that the appellant was responsible for the pregnancy.

13. On the sentence, I note that the trial court sentenced based on the *Sexual Offences Act*, and awarded the minimum prescribed under section 8(3). The sentencing was done after the decisions in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), which declared minimum sentences under the *Sexual Offences Act* unconstitutional. The trial court should have allowed itself discretion based on those decisions. On application of Section 333 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, I note that the sentence imposed was to run from the date of arrest, and, therefore, that provision was applied.

14. On the matter of having been tortured while in custody, not much evidence was led on this. The appellant gave an unsworn statement in defence, which is of very low probative value. In any case, if, indeed, there was such torture, the same would have little impact on the prosecution, for the same cannot vitiate of proper trial. Its value would lie in the law of torts, where damages are available for trespass to person. The appellant can recover damages in tort, through civil action, or compensation for violation of his constitutional rights, through a constitutional petition. Of course, if torture were to be properly proved, in the current trial, the same could go to the credibility of the prosecution evidence, but that is not the case here.

15. In view what I have stated in paragraphs 10 and 11, above, it is my finding and holding that the conviction of the appellant was not safe. I shall, accordingly, quash his conviction, and set aside the sentence imposed on him. He shall be set free from prison custody, unless he is otherwise lawfully held. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 26TH DAY OF APRIL 2024**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Moses Ekarot the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.