DOO v Republic (Criminal Appeal E180 of 2023)
[2024] KEHC 4020 (KLR) (Crim) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4020 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E180 OF 2023

LN MUTENDE, J

APRIL 23, 2024

BETWEEN

DOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Sexual Offences Case No. 116 of 2016 at the Chief Magistrates' Court Makadara, by Hon. M. Thibaru (RM) on 22nd August 2022)

JUDGMENT

1. DOO, the appellant, was charged with the offence of Defilement contrary to Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 14th August,2016 within Nairobi County, intentionally caused his penis to penetrate the vagina of NAI a child aged 11 years.

2. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act* , the particulars being that on the 14th August 2016, within Nairobi County he intentionally and unlawfully touched the vagina os NAI a child aged 11 year with his penis..

3. Having been taken through full trial the appellant was convicted on the main charge and sentenced to serve 30 years imprisonment.

4. Briefly facts of the case were that on the 14th August,2016, PW1 the complainant, and victim went to look for her sister R who was said to be playing around the appellant's house. She encountered the appellant who made her enter his house where he molested her. On accomplishing the act he took her to an Mpesa shop and withdrew Ksh 150 /= then gave her Ksh 50 /= and told her not to tell anyone.

5. The complainant went and told her mother, PW2 EAM what befell her as she felt pain while urinating. She was taken to hospital for examination and treatment. The matter was reported to the police who arrested the appellant and caused him to be charged.

6. Upon being placed on his defence the appellant opted to give unsworn evidence and testified as to how he was arrested. He stated that he heard a knock on his door on 23rd August,2016 at 9:00pm and upon opening it was alleged that he had defiled a child. He was slapped at the police station and asked to get ksh 80,000/= that he did not have. He denied the allegations and said that he first saw the complainant on 24th at the police station. Further that on 14th August,2016 he had visited his friend John Odhiambo at Kibera, who died in 2018.

7. The court considered evidence and found all ingredients of the offence having been proved beyond reasonable doubt hence the conviction.

8. Aggrieved, the appellant appeals on grounds that:-The magistrate erred in fact and law as the prosecution did not establish a primafacie case.-The magistrate erred in law and fact as the charge sheet was Defective.-The prosecution witnesses gave conflicting testimonies.-The magistrate erred in not considering the prejudice caused to the appellant in the border line case.-That the magistrate erred by not considering the weight of theappellant's defense which was not rebutted and his mitigation-The magistrate erred in law and fact in awarding a disproportionate sentence.

9. I have considered rival arguments and authorities cited.

   This being a first appellate court, I must examine and analyse evidence at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of *Okeno vs. Republic* (1972) EA 32, it was held that:

   An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya Vs. Republic (1957] EA 336] and to the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala Vs. Republic* [1957] EA 570). It is not the function of a first Appellate Court; merely to scrutinize the evidence to see if thee was some evidence to support the Lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peter Vs. Sunday Post*, [1958] EA 424)."

10. The duty of this court was also enunciated in the case of *Erick Onyango Ondeng' -vs- Republic* (2014) eKLR where the court stated as follows with regards to the duty of a court when considering contradictory evidence.

> " The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno vs Republic* (1972) EA 32)."

11. The ingredients of defilement were set out in the case *Charles Wamukoya Karani vs Republic*,Criminal Appeal No.504 of 2010, where the court stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

12. The appellant has contested the prosecution's evidence on the victim's age. Section 8 (1) of the *Sexual Offences Act* provides that:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

13. In the case of *Francis Omuroni –vs- Uganda*, the Court of Appeal in Criminal Appeal No.2 of 2000 observed as follows:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....."

14. To prove the age, the prosecution adduced in evidence a birth certificate which was proof beyond doubt that the victim was born on 14th February 2005. PW2 her mother testified that the victim was 12 years in 2016 , the complainant testified that she was 13 years as she responded to voire dire examination.

15. Proof of the actual age is reserved for purpose of sentencing under Section 8 (2), (3) or (4) of the Act In the case of *Martin Nyongesa Wanyonyi vs. Republic* Criminal Appeal No. 661 of 2010 , the court of appeal cited and applied the case of *Kaingu Elias Kasomo vs. Republic* Criminal Appeal No. 504 of 2010 in which the court had observed that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

16. The appellant argues that the birth notification form was necessary to confirm details of the birth certificate. As afore stated, the age of the victim was already found to be below 18 years and this is not contested by the appellant. Further there are other means of proving age and the court is not limited to the birth certificate as was held in the case of *Fappyton Mutuku Ngui vs. Republic* [2012]eKLR where the court delivered itself thus:

> " ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases. The prosecution has discretion to bring all nature of evidence, however the evidence necessary to prove the charges is what is essential.'

17. In a nutshell the birth certificate, evidence of the victim who was intelligent per the finding of the court following voire dire examination and further testimony of the victim's mother all proved that the victim was below 18 years.

18. The issue to be addressed is then whether there was proof of Penetration? The act of penetration is defined by Section 2 of the *Sexual Offences Act* as:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;".

19. PW1 the victim testified that the assailant inserted his fingers into her vagina an act that was followed by inserting his 'dudu' into her 'susu' and there was some discharge. The description given of the genital organs was in a language that the victim understood and she demonstrated what she meant by pointing at the region.

20. The medical evidence adduced proved that the child's hymen had a tear at 6 O'clock, evidence that corroborated the particulars of the charge sheet and the victim's evidence.

21. The accused contends that the cash amount of Ksh 50 given to the child after defilement ought to have been produced in evidence. He does not advice how that piece of evidence aids in proving defilement.

22. On identification, the appellant was known to the victim. The incident occurred at 1:00 pm therefore it was during the day. She also testified that she was playing outside when the appellant called her to his house, PW2 testified that her daughter R used to play with the appellant's child. The mother further testified that they confronted the appellant. Evidence adduced was sufficient. It did prove that the child positively identified the assailant. The appellant was known to her and her family and there was no issue of mistaken identity.

23. Whether the charge sheet was defective and whether the accused was served with witness statement. In the case of Yongo vs Republic [1983] KLR, 319 it was held that a charge that is not disclosed by evidence is defective It was stated as follows in this regard:

> " In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:
>
> it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> (b) It does not, for such reasons, accord with the evidence given at the trial; or
>
> (c) it gives a misdescription of the alleged offence in its particulars."

24. Further, a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. (See the case of *Sigilani v. Republic* [2004] 2KLR).

25. In this case, the appellant has cited contradictions between the charge sheet and the evidence on the victim's age and date of the offence. PW1 testified that she was 13 years, PW2 testified that the complainant was 12 years. This was indeed a contradiction which however was not fatal to the charge since the child's age was proved by the birth certificate and evidence which corroborated the fact that she was still 11 years when she was defiled. The contradiction on the date of the offence did not go to the root of the case. There is no doubt that the offence was committed and the dates were only 2 days apart and therefore not remote to lead to a finding that the appellant was prejudiced .The court should also give room for possibility of loss of memory and circumstances under which the witnesses testify where the same appear to be minor contradictions. In *Jackson Mwanzia Musembi vs Republic* [2017] eKLR

the court relied on the case of Uganda Court of Appeal in *Twehangane Alfred v Uganda*- Criminal Appeal No 139 of 2001, [2003] UGCA, 6, where the court noted that it is not every contradiction that warrants rejection of evidence. There the court stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

26. The contradiction is curable under Section 382 of the *Criminal Procedure Code* which provides:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

27. In the case of *JMA v. Republic* (2009) KLR 671, it was held inter alia that:

> "It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

28. Notably, PW1 did place the aappellant at the scene and identified him as the perpetrator and he did not raise the mix up in his defence or cross examination.

29. The appellant also claims that he was not given witness statements and was therefore prejudiced. The proceedings taken at the commencement of the trial and the date the evidence of PW1 was taken shows that the appellant told court that he did not have witness statement and he was furnished with the same after the matter was placed aside, which aided him in cross examining witnesses during the trial. And his contention that his right to fair trial in this appeal is also an afterthought.

30. The appellant was able to tender his defence and explain how he was not present on the said date, his defence also included evidence of how he was arrested and that he was framed. It is clear that the appellant understood the case having been served with all evidence against him and was able to participate in the entire trial.

31. Whether the defence was credible calls for consideration of what he stated. The appellant's defence was that he had visited a friend on 14th August 2016 who was dead at the time of his defence. The alibi defence ought to have been brought at the inception of the trial, the delay and manner which it was adduced proved it was an afterthought.

32. On sentence, the appellant argues that his mitigation was not considered and that the sentence was harsh and excessive. The court intervenes when a material factor was not considered.

33. In the case of *Macharia vs Republic*, [2003] KLR 115, it was stated that:

> " The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. The Court will not ordinarily interfere with the discretion exercised by a trial judge, unless, as was said in James v Republic [1950] EA 147, "it is evident that the judge has acted upon some wrong principle or overlooked material factors."

34. Section 8(2) provides for life imprisonment as the statutory sentence for defilement of a child below 11 years. Section 8(3) refers to 20 years as the sentence where the child is between 13 years and 15 years. Then 15 years where the victim is above 16 years. The totality of the evidence proves that the child had not celebrated her 12 th birthday on the date she was defiled.

35. In *Hadson Ali Mwachogo vs R* (2016) eKLR, the court of appeal at Mombasa held that:

> " .... a victim who is days or months above 11 years will be treated as 11years old so long as he or she has not attained 12 years of age. On he same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 years rather than 16 years old we have come to the conclusion that the trial court did not err in convicting and sentencing the appellant as it did and that the first Appellate Court did not err rather in upholding the conviction and sentence "

36. The sentence was within the provisions of Section 8(2) of the Act and therefore lawful. However, considering the facts of the case, the mitigating factors which included the fact that the accused was a first offender and further considering the emerging jurisprudence that has declared minimum sentences unconstitutional, 30 years imprisonment was excessive warranting intervention by the court.

37. From the date of conviction, the appellant has served 1-year imprisonment. This means that the court is not persuaded to exercise its discretion in his favour so as to ensure his early release. The appellant was also released on bond during trial, therefore Section 333 of the *Criminal Procedure Code* does not apply.

38. The end result is that the appeal on conviction is unmerited, the appeal on sentence however succeeds. The sentence of thirty (30) years imprisonment is set aside and substituted with fifteen (15) years imprisonment to be effective from the date of conviction.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 23RD DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE