Mutethia v Republic (Criminal Appeal E087 of 2022)
[2024] KEHC 6589 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E087 OF 2022

LW GITARI, J

MAY 30, 2024

BETWEEN

SAMSON MUTETHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* and acquitted of the alternative count of committing an indecent act with a child contrary to section 11(1) of the said Act. He was sentenced to serve 15 years imprisonment.

2. Being dissatisfied with the said conviction and sentence, he appealed to this court vide a petition of appeal dated 13.06.2022 which was filed on 17.06.2022 by the appellant.

3. The grounds of Appeal are:

    i. That the learned trial magistrate erred in matters of Law and fact by failing to note that the case was frame up because of grudge that I had arises due to a land dispute.

    ii. That the learned trial magistrate failed to note that the clinical report was not clear to uphold the conviction.

    iii. That the learned trial magistrate failed to take into account that I was in custody since my arrest. Under Section 33 (2) of the Criminal Procedure Code.

    iv. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced by the prosecution witnesses was full of contradiction and inconsistency to sustain conviction.

v. That the learned trial magistrate erred in matters of law and also fact where he relied on evidence adduced by three witnesses who are also the victims in this case hence failed to note that the offence was committed in a day broad light hence no other witness who heard the commotion.

vi. That the learned trial magistrate erred in matters of law and also fact by failing to consider that the allegations were committed in different days hence none of them disclosed the allegations until when their mother discovered that they were molested.

vii. That the learned trial magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.

viii. That since I cannot recall all that transpired during the trial I now beg the honourable court to furnish me with the court proceedings and judgement to draft grounds that are more cogent during the hearing of this appeal.

ix. That I pray to be present during the hearing of this Appeal.

4. Directions were taken that the appeal be canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

B. Submissions by the parties

5. The appellant submitted on the factual background of the matter and amended his grounds of appeal:

i. That the learned trial magistrate erred in Law and fact by failing to note that the evidence of broken hymen is not proof of defilement.

ii. That the learned trial magistrate erred in law and fact by failing to find that the element of the offence of defilement i.e penetration was not proved beyond reasonable doubt as required by law.

iii. That the learned trial magistrate erred in law and fact by failing to note that PW2 the clinical officer examined another person by the name Sharon Kinyua, not Sharon Kianira the complainant herein.

iv. That the learned trial magistrate erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form the basis of a conviction.

v. That the learned trial magistrate erred in law and fact by failing to find that the clinical report does not support the allegation of defilement.

vi. That the learned trial magistrate erred in law and fact by convicting the appellant to serve 15 years imprisonment without supportive evidence.

vii. That the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (pre-trial) under section 333 (2) of the Criminal Procedure Code (CPC) was not considered.

viii. That the learned trial magistrate erred in law and fact by dismissing the appellant defense without cogent reasons of dismissing it.

6. The Appellant submitted on the evidence on penetration that it is trite law that for the prosecution to prove a case of defilement beyond reasonable doubt, the three elements of the offence must be proved beyond reasonable doubt. That it must be conclusively proved that the alleged victim is a minor, that

there is penetration of the victim's genital organ and finally and more importantly it must be proved that it is the accused person who caused the alleged penetration.

7. The Appellant further submitted that in this case the prosecution did not conclusively prove that there was penetration and that he had caused the alleged penetration to the minor. The Appellant relied in the case of Charles Wamukoya Karani vs Republic Criminal Appeal No.72 of 2013 the case of Sekitoliko vs Uganda (1976) EA 53.

8. The Appellant submitted that PW2 is an expert on the matter but he failed to connect the appellant with this offence since there was no evidence to prove that the appellant was infected by bacteria and further that the complainant hymen was totally broken a long time ago according to a clinical officer.

9. It is the Appellant submission that evidence of a broken hymen is not proof of defilement. The Appellant relied in the case of P.K.W V Rep.

10. The Appellant submitted that his case was based on suspicion since PW1 told the court that they had sex with the appellant which is proof she was defiled. The Appellant submitted that there was cogent evidence adduced by the prosecution to connect the appellant with the case. That the prosecution failed on their side to order the appellant to be taken to the hospital to connect him with the alleged bacteria found on the complainant during examination. The Appellant relied in the cases of Michael Mugo Musyoka vs Republic (2015)eKLR, John Chebichi Sawe vs Republic (2003)eKLR and Punjab vs Jagir Singh (1974)3CC 277.

11. The Appellant submitted that the trial court erred in law and fact by failing to note that PW2 the clinical officer examined another person by the name Sharon Kinyua and not Sharon Kianira the complainant herein.

12. The Appellant further relied in the case of R VS Lifchus 1997 3 SCR 320.

13. The Appellant further submitted that the trial court failed to faithfully, impartially, objectively, dispassionately and rationally analyse the evidence and determine his criminal culpability. The Appellant relied in the case of State vs Coetzee 1997 2 LRC 593.

14. It is the Appellant's case that the issue of defense ought to have been interrogated. The Appellant relied on the case of Mbugua Kariuki vs R (1979) KLR.

15. The Appellant submitted that the learned trial magistrate erred in both law and fact by failing to take into account the period spent in custody (pre trial according to section 333 (2).

16. It is the Appellant submission that, that period was not taken into consideration by the trial court when imposing his sentence. The Appellant relied on the case of Ahmad Abolfathi Mohammed & Another vs Republic (2018)eKLR.

17. The appellant submitted that he was produced in court on 8th March 2021 and he was sentenced on 23rd May 2022 and therefore he prayed that a period of 1 year,2months and 15 days to be deducted from his sentence.

18. The Appellant prayed for the Appeal to be allowed.

19. On behalf of the respondent, it was submitted on the brief background of the matter. The respondent submitted that the issue for determination was whether the charges were proved beyond reasonable doubt.

20. The respondent submitted that the Appellant was charged and convicted 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.

21. The respondent submitted that the prosecution was required to establish the following three ingredients. The age of the victim, the act of penetration and the perpetrator who was identified and linked to the offence.

22. It is the respondent's submission that from the evidence on record the incident occurred on 28th February 2018 and the health card produced in court by PW3 as Pex 4 shows that the complainant date of birth was 2nd September 2005 which confirms the age of the complainant when he was defiled.

23. The respondent submitted on the ingredient on penetration that it called PW1 who was the victim in the case and she confirmed that the defilement occurred on 28th February 2021 at about 4.00 pm. The victim told the court that on that material date she went to the home of the appellant to get shaved when the appellant removed her inner wear, pulled down her trouser pushed her to lie down on the carpet and he lay on top of her and defiled her.

24. The respondent further submitted that the appellant had defiled the victim and gave her a phone to silence her.

25. The respondent submitted on ground 1 that for the appellant to allege a frame up because of a grudge that he had due to a land dispute raises a lot of questions as to who he had a grudge with because he has not mentioned his name and for how long the grudge lasted.

26. The respondent further submitted inter alia that, that was a mere allegation and an afterthought because on cross examination all witnesses and even during his defence nothing of the sought was ever raised.

27. The respondent submitted that on ground 2 PW2 testified that on examination of the victim the hymen was broken and she had a bacterial infection which was treated with antibiotics' respondent further submitted that PW2 described the victim labia majora and labia minora to have been intact and an old broken hymen because the victim visited the hospital one week after the incident had occurred. He produced the treatment note marked PEXH3 and a P3 form as Pexh 2 to prove penetration and Pexh 4 and a child health card to prove the victim age.

28. The respondent submitted that PW2 evidence was corroborated by evidence of PW1.

29. The respondent submitted on ground 3 that the trial court was lenient in sentencing the accused to 15 years imprisonment because Section 8 (3)of the *sexual Offences Act* provides for a term of not less than twenty years.

30. The respondent submitted that the accused was in custody for two years and 2 months and the court considered his mitigation while sentencing him.

31. The respondent submitted on ground 4,5 and 6 that there was no contradiction amongst the prosecution witnesses since each gave an account of what role or part they did.

32. The respondent concluded that the evidence on record was enough to sustain a conviction for the offence charged. The respondent urged the court to find the prosecution proved its case beyond reasonable doubt.

Duty of first appellate court

33. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in Okeno v. Republic [1972] E.A. 32 and re-stated in Kiilu and another vs. R (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and

weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See Gunga Baya & another v Republic [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See Alex Nzalu Ndaka v Republic [2019] eKLR).

C. Analysis of the evidence before the trial court

34. In a summary, PW1 testified that he was going to be shaved by Mutethia who shaves people at his home. She testified that he found him there and he shaved her hair.PW1 testified further that the Appellant did a bad act to her. That he told her to remove her clothes and she did not do that.

35. PW1 stated that he insisted that she removes her pair of trouser. She refused. He then removed all his clothes and then asked her to lie down. She refused and he pushed her down and then lay himself on her and after the act he gave her a phone.

36. PW1 testified that she went wit it but hid it to avoid her grandmother from seeing it. The phone was found on Tuesday and it caused the arrest of the Appellant.

37. PW1 was escorted to Miathene hospital and a P3 form marked mfi.1 was filled together with treatment note lab requests MF1.3 and a child health card marked MFI.4

38. On cross examination PW1 reiterated that the Appellant defiled ger inside his house and no one was there. He had warned her that if she screams she will kill her.

39. PW2 testified as Geoffrey Murithi Muthomi a clinician at Miathene S.D Hospital. He testified that he had a P3 form of Sharon Kinyua aged 15 years. That she was brought to hospital in the company of her father and a police officer on 6th March 2021 with allegations of having been defiled on 28th February 2021 after one week. That on examination of her labia majora and labia minora were intact. That she had an old broken hymen.

40. PW2 testified that when laboratory investigations were done the pregnancy test was negative, HIV test was negative. That high vagina swab was taken out and no spermatozoa were seen. That there was evidence of bacterial infection.

41. PW2 testified that based on the bacterial infection and the broken hymen he made the opinion that there was evidence of defilement. That he filed the P3 form and she was treated with antibiotics.

42. PW2 produced a P3 form marked MF1.2 produced as exh.2 and treatment notes exh 3, laboratory request forms exh 3 and a child health card.

43. PW2 testified that PW1 was 15 years at that time he produced MF1.4 and further he confirmed he saw the girl one week after the incident.

44. PW3 testified as KM. He stated that he is the headteacher of (Particulars withheld) primary school. He testified that on 3rd March 2021 a class 7 pupil was found with a phone by her English teacher during the day.PW3 testified that the teacher took the phone and took it to the deputy. That the deputy headteacher brought the phone to him and he kept it.PW1 was questioned about the phone and she

narrated that she was given by the Appellant. The Appellant was summoned to school and he explained that he gave PW1 the phone to do her homework.

45. PW3 testified that the Appellant be presented to the police.

46. PW4 testified as BW . He stated that S.K was her grandchild.PW4 further stated that on an unknown date the chief called him. That at first her grandchild told her that the teacher wanted to see him. That he went to school where SK learns and he met the teachers.

47. PW4 testified that the teachers showed her the phone and said that PW1 had it. He narrated that he had not bought her the phone. The teacher scrolled the phone and showed him a photograph who he identified as the Appellant.

48. PW4 was told they will investigate the matter. That he went home and on 5th March the chief called him that they had arrested the Appellant. Thereafter he learned that PW1 had been defiled and was taken to hospital by a teacher.

49. PW5 testified as PC Lillian Santa Kausa of Tigania police station. That on 5th March 2021 at around 4.30 pm he was tasked to investigate a case of a child aged 15 years. She complained of having been defiled by the Appellant when she went to be shaved at his home. That it happened on 28th February 2021 at around 1600 hours.

50. PW5 testified that the child was found with a phone by her teacher who then forwarded to the headteacher and upon being questioned she revealed that the appellant defiled her.PW5 produced the phone as exhibit 1 and he took the girl to hospital for examination and a P3 form was filed and the accused was charged.

51. PW5 stated that the p3 form confirmed that the child was defiled and he was given the child's clinic card that established she was 15 years.PW5 further testified that she visited the scene where the offence was allegedly committed in the accused's barber shop at Mumui area.

52. The appellant was placed to his defense and his evidence was basically that he never committed the offence.

D. Issues for determination

53. I have considered the and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno -vs- Republic (supra) and re-stated in Kiilu and another -vs- R (supra)), the grounds of appeal as raised on the petition of appeal and the rival written submissions, it is my view that the issues this court ought to determine are whether the prosecution tendered sufficient evidence to prove its case to the required standards and whether the sentence meted on the appellant was excessive.

E. Determination

54. The issues for determination as I can deduce are:

    i. Whether the prosecution proved its case.

    ii. Whether there was contradiction amongst the prosecution witnesses.

    iii. Whether the trial magistrate erred in failing to note the period spent in custody pre-trial under Section 333 (2) of the Criminal Procedure Code was not considered.

iv. Whether the trial court considered the Appellant's defense without giving cogent reasons of dismissing it.

55. On whether the prosecution proved its case beyond reasonable doubt, under section 8(1) and (3) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of the offence, which are as follows:

a. The age of the complainant- that the complainant was a child;

b. Penetration occurred; and

c. The perpetrator was positively identified.

56. Regarding the age of the victim, The *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No 8 of 2001 which defines a "Child" as "……..any human being under the age of eighteen years." PW3 produced a health card in court marked PEXH4.

57. . In her testimony, PW1 stated that she was 15 years old at the time of occurrence of the incident. Both the trial court and this court are satisfied that the victim was indeed a minor within the meaning of the Children's Act.

58. In the case of In Edwin Nyambogo Onsongo Vs Republic (2016) eKLR the Court of Appeal held that:

> " ... 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."

59. As to whether penetration occurred, PW1 testified that the Appellant removed her clothes. He pushed her down and defiled her. Further PW2 testified that on examination of the complainant labia majora and labia minora they were intact. She had an old broken hymen and there was evidence of a bacteria infection. Based on the bacterial infection and the broken hymen. He made the opinion that there was evidence of defilement and he produced a P3 form marked mf1.2.There is proof that indeed there was penetration.

60. The last element is identity of the assailants.PW1 identified the Appellant as the one who had defiled her and gave her a phone to silence her. The act of defilement is corroborated by PW2.

61. Section 124 of the *Evidence Act* provides that evidence should be corroborated but this requirement can be waived in sexual offences where the only witness as to identification of the assailant is the victim. It states:

124. Corroboration required in criminal cases.

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and

proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

62. I find no reason to unsettle this finding as I do agree with the trial magistrate that the appellant was positively identified as the perpetrator.

Whether there was contradiction amongst the prosecution witnesses.

63. I have perused the record and am satisfied that there was no contradiction amongst the prosecution witnesses for reason that PW1 testified that the Appellant defiled her when she went to be shaved. It was her evidence that the Appellant shaves people at his home. She testified that he shaved her and defiled her.

64. PW2 testified as a clinician who confirmed that PW1 had indeed been defiled since she had an old broken hymen and there was evidence of bacterial infection.

65. PW3 testified as the headteacher of PW1'S school and he gave evidence that PW1 had gone to school with a phone which after investigation they realised that it was the Appellant's phone.

66. PW4 testified as PW1's guardian who they used to stay with and who was called to school when PW1 was found with a phone in school.

67. PW5 testified as the investigation officer who did investigations in PW1's matter. In my analysis of what the prosecution adduced, the case was water tight and there was no contradiction.

On the ground that the trial court considered the Appellant's defense without giving cogent reasons of dismissing it.

68. The trial court noted that

> " The appellant alleged that PW1 had stolen that phone after he left her with his children. That he explained that one of her children told him that PW1 had taken the phone and also that PW1 was the only one who had entered into his kiosk. He did not call his daughter as a witness so this is disregarded as being hearsay evidence. He explained how PW1 became evasive after she stole his phone yet it is clear that PW1 is his neighbourPW3 also informed the court that the accused approached him with an intention to get his phone back yet he did not report the matter to the police or tell the headteacher that PW1 had stolen it from him.

69. I am persuaded without an iota of doubt that the trial court took into consideration the appellant's defense and even proceeded to give reasons for dismissing it.

70. On the issue of whether the trial magistrate erred in failing to note the period spent in custody pre-trial under section 333 (2) of the Criminal procedure code was not considered.

71. In the present case, the Applicant was produced in court on the 8th of March,2021 charged, tried and convicted for defilement and he was sentenced on 23rd May 2022.In the Appellant submission he has submitted that he was in custody for 1 year and 2 months and 15 days. That the same was not factored by the trial court.

72. I am guided by the court of Appeal decision in Ahamad Abolfathi Mohammed [2018] eKLR, where the Court of Appeal held that: "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced.

Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

73. The same Court in Bethwel Wilson Kibor vs. Republic [2009] eKLR expressed itself as follows: "By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

74. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

75. The Judiciary Sentencing Policy Guidelines provides; "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."

76. It is not in contention that the Applicant was arrested on 8th, March,2021, sentenced and convicted on 23/05/2022. In my view the period between arrest and conviction should be taken into account as the appellant remained in custody throughout the trial.

77. It is evident from the record that the Applicant was in custody pending trial for a period of 1 year two (2) months and 15 days eight (8) months. This period was not considered during the sentencing.

78. This Court revises the said sentence to reflect the requirement that sentencing to consider the period the Applicant was taken into custody during the pendency of trial, Section 333(2) of the Criminal Procedure Code refers. The sentence of imprisonment will therefore run from 8/3/2021 to take into account the period spent in custody awaiting the trial.

79. Having said that, I have re-examined the evidence at trial and considered the petitions of appeal, written submissions and the relevant laws and I find that the appeal lacks merit and is dismissed.

80. It is so ordered.

DELIVERED, DATED AND SIGNED AT MERU THIS 30TH DAY OF MAY 2024.

L.W. GITARI

JUDGE