Mwenda v Republic (Criminal Appeal E138 of 2022)
[2024] KEHC 6566 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E138 OF 2022

LW GITARI, J

MAY 30, 2024

BETWEEN

TIMOTHY MWENDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the chief magistrate Court t Isiolo, Sexual Offences Case No. E023/2021 where the appellant was charged with the offence of defilement contrary to Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 5/12/2021 at Bula Pesa Village within Isiolo County intentionally caused his penis penetrate the virgina of V.M a child aged thirteen (13) years. The appellant pleaded not guilty and after a full trial, he was found guilty convicted and sentenced to serve ten (10) years imprisonment.

2. The appellant was dissatisfied with both the conviction sentence and filed this appeal which raises the following grounds:-

   Grounds of Appeal

   1. That, the learned trial magistrate erred in law and fact by failing to note that there was grudge between the appellant and the relatives of the complainant.

   2. That, the learned trial magistrate erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt as required by law.

   3. That, the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.

   4. That, the learned trial magistrate erred in matters of law and fact by failing to consider my pretrial period pursuant to section 333 (2) of *CPC*.

5. That, the grounds herein was laid down in the absence of the court judgment and proceeding, the same may be change when availed with the court judgment and proceeding.

6. That, I pray to be present during the hearing of this appeal.

3. The appellant prays the that the appeal be allowed, the sentence be set aside, the conviction be quashed and he be set at liberty.

4. The brief facts of the case are that the complainant at the time the offence was committed a girl aged thirteen years as per her mother's evidence, when was born on 8/3/2008. The complainant mother V.M (PW1) testified that on 6/12/2021 at about 2:00pm. She arrived home and found the appellant and the complainant on enquiring who the appellant was he informed her that he was the complainant lover. The appellant further informed the complainants mother that he wanted to marry the complainant.

5. The complainant' s mother would take none of that after the complainant herself confirmed that she has had sex with the appellant four times before. The complainant's mother reported the matter to the police. The complainant was issued with a P3 Form and was examined by Daudi Dabaso (PW3) a Clinical Officer at Isiolo Hospital. The Clinical Officer found that the complainant was aged thirteen (13) years and reported to have been defiled by a person who was well known to her. PW3 testified that he examined the complainant four (4) days after the date of defilement. According to him the complainant's hymen was broken, there was whitish virginal discharge and on urinalysis there was presence of whitish virginal discharge. He formed the opinion that the appellant had been defiled. It was the complaints testimony that eh appellant was her boyfriend and that the first time they had sexual intercourse was on 5/11/2021 then on 10/11/2011 and 5/12/2021.

6. It was the complainant's testimony that on 6/12/2021 the appellant went to tell her mother that he had an affair with her.

7. The prosecution called No. 8xxx9 Police Constable David Kaaria (PW4) who was the Investigating Officer. He confirmed that he received the report from the complainant and referred her to hospital for examination and for a P3 Form to be filled. The appellant was escorted to the police station by the members of the public and he re-arrested him and charged him with the offence of defilement and an alternative charge of indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act*. He was found guilty of the offence of defilement.

8. The appellant gave unsworn defence and stated that he never committed the offence as charged. He alleged that there was no eye witness and that she had differed with the complainant's mother about it. The appellant pleaded innocence.

9. The respondent opposed the appeal and prayed that it be dismissed. This appeal was canvassed by way of written submissions Appellants submissions. The appellant relies on the case of *Maina v Republic* (1970) EACA 370 where it was stated *inter alia* that in "Sexual Offences" it is really dangerous to convict on the evidence of woman or girl alone..."

10. It is the appellants contention that the respondent failed to prove their case beyond any reasonable doubts" The appellant has cited the following cases: -

    1. *Charles Wamamukoya Karani v Republic* CRA No. 22 of 2013

    2. *Sekitoliko v Uganda* (1967) EA 533

    3. *Pokon v Republic* (2012) eKLR

11. Based on these authorities he submits that the medical findings of broken hymen and the red vulva was not conclusive to prove that there was penetration.

12. The appellant further submits that the evidence relied on by the prosecution was contradictory and uncorroborated. He further faults the trial magistrate for rejecting his defence without giving cogent reasons.

The Respondents Case.

13. The respondent submits that this court is seized of the jurisdiction to hear and determine the validity of the sentence under Section 8(1) (3) of the *Sexual Offences Act* which prescribes the sentence to be meted out on all accused person convicted of defilement which involve minors. He urges the court to find that the sentence is provided for statutorily and is fair as it does not deprive the court the power to exercise judicial discretion and pass appropriate sentence after receiving the evidence. The respondent has urged the court to find that the case was proved beyond any reasonable doubts and dismiss the appeal.

Issues For Determination

1. Whether the offence of defilement was proven to the required standards

2. Whether the sentence imposed was appropriate

Analysis & Determination

14. This is a 1st appeal. It is the duty of the first appellant court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellants court own decision on the evidence. The leading authority on this subject is *Okeno v Republic* (1972)EA32 where this duty was discussed. This was buttressed in the case of *Kiilu & another v Republic* (2005) KLR 174 where the Court of Appeal stated " An appellant on a first appeal is entitled to expect evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court' own decision on the evidence. The first appellant court must itself weight conflicting evidence and draw its own conclusions. It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses".

15. The offence of defilement is rooted on three main ingredients which include:-

    i. Age of the victim

    ii. Penetration

    iii. The identity of the perpetrator.

16. These are the three critical ingredients forming the offence of defilement as provided under Section 8(1) (2) & (3) of the *Sexual Offences Act* which provides as follows:-

    8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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.

(3) 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.

17. On the first element of the offence, the prosecution has the burden to prove the age of the victim of defilement. The court of appeal in the case of *Edwin Nyambogo Onsongo v Republic* 2016 eKLR while addressing the issue of proof of the age of the victim stated as follows:-

> "…. the question of proof of age has finally been settled by recent decision of this court the effect that it can be proved by documents, evidence such as a birth certificate or by oral evidence of the parents or guardian or medical evidence among other audible forms of proof. We think that what ought to be addressed is that whatever the nature of the evidence preferred in proof of victims age it has to be credible and reliable".

18. In *Joseph Kibet v Republic* (2014) eKLR. The court stated "It is trite law that the age of victim can be determined by medical evidence and other cogent evidence.

19. In this case the V.M (PW1) complainants mother testified that the complainant was born on 3/3/2008 on her part the complainant who testified in court on 14/4/2022, she informed the court that she was fourteen (14) years old. The offence was committed on 5/12/2021. No birth certificate or birth notification was produced in court. The trial magistrate while relying on the case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 and considering the evidence of the victim (PW2) and her mother (PW1) as well as the medical documents presented by the clinical officer (PW3) which indicated that the age of the complainant was thirteen years, concluded that the age of the complainant was proved beyond reasonable doubts.

20. As held in the above decisions, the age of the victim is a critical ingredient of eh offence defilement which must be proved to the required standard in order to sustain a conviction. It is proved by documentary evidence like a birth certificate, birth notification, baptism card or any other cogent evidence which may be adduced by the parent(s) of the victim or her guardian.

21. In this case the mother of the complainant gave the date of birth of the victim as 3/3/2008. While PW3 the clinical officer who examined the complainant found that she was a girl aged thirteen years. I note from the record that the appellant did not challenge the evidence of PW1 & PW2 as well as PW3 on the fact of the age of the complainant. The appellant has not challenged the finding of the learned trial magistrate on the fact the age of the victim.

22. I find that the prosecution adduced cogent evidence which proved the age of the victim (PW2) beyond any reasonable doubts.

Penetration

23. 2nd essential ingredient of the offence of defilement. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person"

24. In the case of *Erick Onyango Ondengo v Republic* (2014)eKLR the court of Appeal stated as follows. In Sexual Offences the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence".

25. In this the complainant was the only eye witness to the fact of penetration. Her testimony was that she had engaged in sexual intercourse with the appellant on several occasions before the one had on 5/12/2021. The medical evidence adduced by PW3. The clinical officer corroborated the testimony of the complainant that there was penetration Daudi Dabaso (PW3) testified that the examined V.M aged 13 years and filed a Post Rape Care Form. She presented a case of defilement by a person well known to her. He saw her after four (4) days. Her hymen was broken. There was no lacerations. There was whitish viginal discharge. The P3 Form states Hymen broken old it means she the hymen was not freshly broken and could suggest consistency of the defilement allegation.

26. He produced the P3 Form as Exhibit 1a. The learned trial magistrate held that there was an element of penetration committed on the complainant. She based her finding on (PW2's) testimony and that of PW3.

27. In this case, I find that the evidence of the complainant was sufficient to base a conviction. It was corroborated by the testimony of PW1who told the court that the she found the appellant at her house on 6/12/2021 and on enquiring who he was the appellant said he was complainant's lover. The complainant informed PW4 that she had engaged in sex with him many times. This evidence was not challenged during cross-examination.

28. In his submission the appellant contends that penetration was not proved. That the clinical officer did not way what was used to cause the penetration. That no blood was seen. I find that firstly, in sexual offences, the fact of penetration can be proved by the testimony of the single witnesses Section 124 of eh *Evidence Act* provides as follows:

> 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 alleged victim 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.

29. The trial magistrate who saw the complainant stated in her judgment that she believed the complainant. Secondly the testimony was corroborated by PW1 and PW3. The Complainant's testimony proved that penetration was by male genital organ. PW3 observed that the broken hymen was old, not fresh and that is why there was no blood seen. I find that medical evidence was conclusive that that there was penetration. This ingredient was therefore proved to the required standard.

The Perpetrator.

30. The complainant testified that the appellant is the one who defiled her severally. Based on the testimony of the complainant (PW2) and that of her mother (PW1), there is sufficient prove that the appellant was the perpetrator. The allegation in his defence that the complainant's mother had asked for ksh.

5000 is not convincing as it was not put to her during cross-examination. The appellant said he suffered with the mother as she was not happy about it.

31. No mother would be happy if her thirteen (13) year old daughter is defiled severally. The learned trial magistrate found, and rightly so, that there was undisputed evidence that, the appellant and the complainant were known to each other. That the complainant said the appellant was her boyfriend and the appellant did not deny the fact. The complainant knew his name and that appellant confessed to PW1 that she had an affair with the complainant. The Learned trial magistrate concluded that the appellant was directly implicated by the complainant, PW4 her mother PW2 and PW3 as the perpetrator.

32. I find that the prosecution did discharge the burden to proof that the appellant was the perpetrator.

33. The appellant submits that the evidence tendered was contradictory. It is trite law that not all contradictions and inconsistencies unless satisfactorily explained will usually but not necessarily result in the evidence being rejected.

34. Minor contradictions which make the conviction unsafe are normally disregarded see the case of *Philip Nzaka Kwalu v Republic* (2016) eKLR. The Court of Appeal in the case of *Erick Onyango Odent v Republic* (2014) eKLR which cited with approval the case of Ugandan Court of Appeal in *Twehangana Alfred v Uganda* Criminal Appeal No. 139 of 2001 (2003) UGCA6 where it was held as follows:

> 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 man substance of the prosecution case"

35. The duty of the appellant court is to consider whether the contradictions and inconsistencies have prejudiced the appellant or has lead to a miscarriage of justice. The contradictions on the person name Ngabu is in my view not grave. The complainant identified the appellant in court as the perpetrator. The said person named as Ngabu is clarified at page 8 line 15 where the complainant stated

> On 6/12/2021 Ngabu came to see my mother about the accused. When accused came and told my mother that we had an affair"

36 The complainant was talking about the appellant one Ngabu. PW2 corroborates the fact that the appellant went to see her over the affair he had with PW2. Section 382 of the *Criminal Procedure Code* provides:-

382. 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.

37. The discrepancy has not caused any prejudice. I therefore treat it as minor and disregard it.

Appellants Defence

38. The appellant submits that his defence was rejected without any cogent reason. The submission on this ground is misplaced as he relied on the case of Republic Versus Sukha which dealt with the issue of defence of alibi. The appellant did not raise the defence of alibi in his defence. The defence of the appellant was a mere denial. The trial magistrate considered the defence at page 22 lines 34 – 36. The trial magistrate analysed the defence and determined that it was a sham and did not cause doubts in the prosecution's case. In the circumstances. I find that this ground must fail.

39. Failure to consider the time spent in custody

40. Section 333(2) of the *Criminal Procedure Code* provides in mandatory terms that where there was a pre—trial detention of an accused person before sentencing, the time spent in custody shall be taken into account. This is a requirement that the time spent in custody during trial must be taken into account and the trial magistrate must while passing sentence show that eh time was taken into account to reduce the sentence imposed.

41. Section 333(2) of the *Criminal Procedure Code* provides as follows:-

> (2) Subject to the provisions of Section 38 of the *Penal Code* (Cap 63) every sentence shall 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".

42. The Court of Appeal in the case of *Ahamed Abollfathi Mohammed and Another v Republic* (2018) eKLR held that this is time that has been spent as part of the and taking into account the period spent I custody while undergoing trial 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. The court finally held that sentences should then run from the date of arrest or when liberty was lost. Failure therefore to include the period amount to a violation of the rights of a fair trial".

43. The record shows that the appellant was arraigned in court on 9/12/2021 though he was granted bail he was unable to post bail and remained in custody up to 27/09/2022. This was a period of ten (10) months and 18 days. There is no indication by the trial magistrate that the period was taken into consideration to reduce the sentence that was imposed on the appellant. This ground must therefore succeed.

Conclusion

44. I have considered the grounds of appeal and the submissions. For the reasons stated, I find that the appeal lacks merits. The respondent did prove the charge against the appellant beyond any reasonable doubts. The decision of the trial court is sound and must be upheld. For these reasons. I order as follows:-

1. The appeal is dismissed.

2. The sentence imposed on the appellant shall be reduced by ten (10) months and eighteen (18) days.

3. The Deputy Registrar shall serve the order on the Officer in-charge of the prison where the appellant is serving sentence for compliance.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF MAY, 2024.

L.W. GITARI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of :-

Court Assistant: Tupet