Matete v Republic (Criminal Appeal E001 of 2021)
[2024] KEHC 8134 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E001 OF 2021

MS SHARIFF, J

JUNE 28, 2024

BETWEEN

ELKANA MATETE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the original conviction and sentence in Sexual Offences Case No 13B of 2019 in the Senior Principal Magistrate's Court at Nyando delivered on 24th December 2020 by Hon. S. O. Temu SPM)

JUDGMENT

A. Case Background

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the offence were that on diverse dates between December 2018 to 31st March 2019, at Kakola Ahero Sub location in Nyando sub county within Kisumu County, the appellant unlawfully caused his penis to penetrate the vagina of M.A.O. a girl child aged 16 years.

3. The particulars of the alternative charge were that on the date and place stated herein above, the appellant committed an act of indecency with M.A.O a child aged 16 years by touching her private parts namely buttocks, breasts and vagina.

B. Evidence

4. The appellant pleaded not guilty to the charges and evidence of 5 witnesses was tendered by the respondent.

5. PW1 M.A.O, the minor victim told the court that the appellant was her friend whom she had known since the month of December 2018 and that he resided at Kobura next to Lela Secondary School, wherein she had been a form one student.

6. It was the evidence of PW1 that she and the appellant had sexual intercourse in December 2018, in early and late January 2019. On the date of apprehension of the appellant, the later had summoned her to their usual meeting venue, which was a toilet situated behind baba Chantel's Chemist and the appellant had demanded for sex but the victim had declined. One Adhiambo could have spotted them and thereafter she informed the victim's mother of the incidence. The latter called the police, who then apprehended both the appellant and PW1. PW1 stated that she was taken to Ahero hospital whereat a medical examination revealed that she was expectant.

7. PW2, the mother of PW1 stated that 0n 31st March 2019 at 8p.m she had been in her residence preparing supper when Adhiambo called her and requested her to go to the market and witness what was happening between her daughter and the appellant. This witness complied and went to market whereat Adhiambo informed her that she had found the appellant having sex with the PW1. Pw2 stated that she found the appellant talking to PW1 while standing against a wall of a building. This witness stated that she then called the Deputy OCS who in turn sent Administration Police Officers. At that moment the appellant had taken the survivor inside the chemist/pharmacy.

8. PW3 Stephen Omuoyo the father of PW1 stated that he was in his house on the material day when his wife summoned him to the market and upon arrival at the market he learnt that the appellant who had habitually having sexual intercourse with his daughter had been caught in the act. Police officers arrived shortly thereafter and arrested the appellant. PW3 stated that he then took his daughter to Ahero hospital whereat she tested positive for pregnancy.

9. PW4 George Mwita clinical officer from Ahero sub county hospital examined the minor and he observed that she had a whitish discharge from her vagina, broken hymen and was pregnant. He produced the treatments notes as P Exhibit 1, laboratory test No 8059 as P Exhibit 2, P3 form as P Exhibit No 4 and PRC as P Exhibit No 5.

10. PW5 one Sergeant Pamela Ogolla was the investigating officer testified that the appellant and the minor were taken to the police station by members of the public, she then took them to hospital for medical examination. She later charged the appellant. She produced the certificate of birth of the minor as P Exhibit No 1. She confirmed that the DNA test of the child borne by the minor allegedly as a result of the defilement was not done.

11. Upon being put on his defence the appellant gave sworn testimony. He stated that on 31.3.2019 he was at his barber shop when he had a neighbour known as Adhiambo complaining that she was tired of sweeping hair and when he went out the establish what was going on Adhiambo threw a broom that she was holding at him and instructed him to sweep the hair that was apparently emanating from his barber shop. The appellant stated that he in turn threw back the broom at Adhiambo but the same hit a child and a disagreement ensued. He then threatened to beat up Adhiambo but their neighbours responded and he then went away.

12. The appellant stated that the disputed between Adhiambo and him was escalated by the former who reported the matter to the chief and the same was resolved thereat. That notwithstanding that settlement, on 31.3.2018 he was assaulted by police officers who were allegedly avenging his assault of Adhiambo. The appellant testified that upon being assaulted by the police officers, he was apprehended and taken to the police station where he found Adhiambo in the company of a minor. Further that upon interrogation, he confirmed that he was acquainted to both Adhiambo and the minor. He was

then taken to hospital for medical examination and was later arraigned in court. All along the appellant maintained his innocence.

13. Upon consideration of the evidence adduced by both sides of the case, the trial court convicted the appellant and entenced him to 15 years custodial term.

C. APPEAL

14. Being aggrieved by both the conviction and sentence the Appellant filed the appeal herein and premised it on the following grounds:-

    i. That the learned trial magistrate erred in fact and law in failing to find that no tangible evidence and(sic) was formed or presented to the court to link the appellant to the commission of the offence and the pregnancy of the complainant.

    ii. That the learned trial magistrate relied on speculations, probabilities and possibilities to convict the appellant.

    iii. That the learned trial magistrate erred in law and in fact in law (sic) by convicting the appellant when the prosecution had not proved their case against the appellant beyond reasonable doubt.

    iv. That the learned trial magistrate erred in fact and law by failing to resolve the apparent doubts in the prosecution case in favour of the appellant.

    v. That the learned trial magistrate erred in fact and law by failing to scrutinize and evaluate the prosecution evidence thereby arriving at an erroneous decision.

    vi. That the learned trial magistrate erred in fact and in law by failing to hold that burden of proof all times rested with the prosecution and could not shift to the appellant.

    vii. That the learned trial magistrate erred in fact and in law in failing to find that the prosecution's evidence was contradictory in material facts.

    viii. That the learned trial magistrate erred in fact and in law when he made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence.

    ix. That the learned trial magistrate erred in fact and in law by failing to find that the failure to call crucial witnesses fatally weakened the prosecution(sic) case.

    x. That the learned trial magistrate erred in fact and in law when he failed to find the prosecution did not prove the ingredients of the offence of defilement.

D. SUBMISSIONS

15. Whereas directions were given for parties to canvass the appeal through written submissions, the appellant did not comply with these directions.

Respondent's submissions.

16. The Respondent supports both the conviction and sentence and maintains that it had proved its case beyond any reasonable doubt.

E. ANALYSIS AND DETERMINATION

17. As a first appellate court, I am enjoined to re-evaluate, analyze and scrutinize the evidence afresh and make my own conclusion while taking into account that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify first hand. (See Okeno vs Republic (1972) EA 32, Pandya vs Republic (1975) EA 336 and Shantial M. Ruwal vs Republic (1957) EA 570.

18. I have considered the Appellant's appeal and the submissions of the respondent and I have re-evaluated, re-analyzed and re-scrutinized the evidence as a whole and I do find that indeed the respondent did prove the charge of defilement contrary to section 8(1) as read with (3) of the *Sexual Offences Act* No. 3 of 2006, against the Appellant beyond any reasonable doubt.

19. In the case of Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013, the Court of Appeal outlined three ingredients that the prosecution must prove for in a charge of defilement: minority age of the victim, positive identification of the perpetrator and proof of penetration.

20. On the ingredient of age, PW5 Sergeant Pamela Ogolla produced the minor's certificate of birth as P Exhibit No1 which revealed that the victim was born on 28.6.2003 wherefore she was 15 years old at the material time.

21. As regards the component of penetration PW1 was categorical that the appellant was her boyfriend and that they had had sex thrice in the latrine situated near the appellant's barber shop. Pw3 stated that upon receiving information from his wife (PW2) he summoned the police who went and arrested the appellant who was in the company of PW1. Later on he took his daughter to hospital whereat she was found to be pregnant.

22. The testimony of PW1 was corroborated by the medical evidence of PW4 George Mwita a clinical Officer from Ahero hospital, who examined PW1, who had presented a history of defilement by a known person who had a barber shop. This witness observed that the minor had a whitish discharge from her vagina, broken hymen and was pregnant. He produced the treatments notes as P Exhibit 1, laboratory test No 8059 as P Exhibit 2, P3 form as P Exhibit No 4 and PRC as P Exhibit No 5. Penetration was thus proved.

23. On the last ingredient of identification, the evidence presented before the trial court reveals that the appellant was identified by way of recognition. He was found in the act of defiling the victim. Pw1 stated categorically that the appellant was her boyfriend. PW2 knew the appellant as he operated his barber shop next to her own charcoal vending business, while PW3 used to see the appellant in the neighbourhood.

24. The defence put forth by the appellant that he had a dispute with a neighbour known as Adhiambo which escalated to the point that he got framed for defilement of PW1 who is unrelated to Adhiambo is nothing but a sham, and I therefore find it implausible; this defence did not shake the evidence of the prosecution in any way.

25. The trial court duly considered his mitigation and the aggravating circumstances when it passed sentence.

26. On the issue of sentence, I do find that the trial court meted the maximum sentence of 15 years and held as follows:

> " The minor herein was 15 years at the time of defilement and the act calls for 15 years imprisonment. I do not wish to deviate from the sentence."

27. It is evident that the trial court, while appreciating that it had the discretion in sentencing, opted to hand down what it termed as the mandatory statutory sentence. In light of the evidence presented by the PW5 by way of the certificate of birth P Exhibit 1, the minor was at the material time aged 15 years wherefore the operative statutory provisions in appeal are sections 8 (1) and 8 (3) of the *Sexual Offence Act* which provide as follows:

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

28. The trial court therefore erred in relying on section 8 (4) which section was the section cited in the charge sheet. The question that then begs an answer at this stage is whether that misapplication of the law prejudiced the appellant. The answer to that question is a resounding no as the appellant benefit to a lesser sentence due to that error. I will not enhance the sentence to the statutory floor of 20 years given a plethora of recent judicial decisions that have castigated the implementation of mandatory sentences as they an abrogation of the principle of separation of powers and judicial independence as enshrined under article 160(1) of *the Constitution* of Kenya 2010 which prescribes that in exercise of judicial authority, the Judiciary is subject only to *the Constitution* and the law and not subject to the control or direction of any person or authority.

29. On the balance, I find that this appeal is devoid of merit and the same is dismissed. The conviction is hereby sustained and the sentence is upheld Any pre-trial term served by the appellant should be factored in in the computation of his term pursuant to the provisions of Section 333 (2) of the *Criminal Procedure Code*

30. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE 2024.

MWANAISHA S. SHARIFF

.....

JUDGE

I cerrtify that this is a true copy of the original

Signed

DEPUTY REGISTRAR