Otiwi v Republic (Criminal Appeal E009 of 2023)
[2024] KEHC 7854 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7854 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E009 OF 2023

JN KAMAU, J

JUNE 27, 2024

BETWEEN

WILLIAM OTIWI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No E024 of 2021 on 6th March 2023)

JUDGMENT

Introduction

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

2. He was convicted by the Learned Trial Magistrate, Hon S. O. Ongeri (SPM), on the charge of defilement and sentenced to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgement, on 2nd May 2023, he lodged the Appeal herein. His Petition of Appeal was dated 27th April 2023. He set out seven (7) grounds of appeal.

4. His Written Submissions were dated 8th November 2023 and filed on 22nd November 2023 while those of the Respondent were dated and filed on 7th March 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal were dealt with under this head as they were all related.

    1. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

    2. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga v Republic [2016] eKLR.

    3. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

13. The Appellant did not challenge the issue of age of the Complainant (hereinafter referred to as "PW 1"). The Respondent reproduced the evidence on trial and submitted that the ingredient of age had been proven.

14. Notably, she testified that she was thirteen (13) years old at the time that she was adducing evidence. Her mother, GAM (hereinafter referred to as "PW 3") confirmed that she was thirteen (13) years old having been born on 3rd December 2007 as was seen in the Certificate of Birth that No 9xxxx PC Cicilia Makaka (hereinafter referred to as "PW 4") produced as evidence. The Clinical officer, Evans Karega (hereinafter referred to as "PW 5") also re-affirmed that she was thirteen (13) years old.

15. Notably, the offence herein was committed on 25th February 2021. Having been born on 3rd December 2007, this put her age at (13) years two (2) months at the material time.

16. In this case, PW 1's age was proven by the Birth Certificate. As the Appellant did not rebut this evidence, this court was thus satisfied that the Prosecution had proved that PW 1 was a child at the material time.

B. Identification

17. The Appellant submitted that there were people who allegedly were mentioned to have been at the scene of crime but were not called upon by the Prosecution to give evidence. He stated that these included Irene, Kate, Erico and Triza. He submitted that their evidence was left out because it would have been fatal to the Prosecution's case.

18. He contended that PW 1 had only stayed in the subject plot for two (2) days and therefore it was impossible that she could know all detailed information about him. He questioned how she saw him at the material time yet it was dark and they had not had any previous contact. He asserted that even close relatives well known to people and friends could be confused in darkness.

19. In that regard, he relied on the case of Cleophas Otieno Wamunga v Republic [1989] eKLR 424 which advised caution of courts on matters of identification of suspects at night so as to avoid possible incidents of miscarriages of justice through mistaken identities and even unjust investigation of charges on record.

20. He further contended that the Prosecution evidence was full of contradictions and that the same ought not have been used to convict him.

21. On its part, the Respondent was emphatic that the ingredient of identification had been proven.

22. PW 1 testified that on the material day, 25th February 2021, at about 7.00 pm she went to the Appellant's house to borrow a matchbox and he pulled her and threw her on his bed and defiled her. She positively identified him as her perpetrator by pointing at him at the dock. She pointed out that she used to see him at their plot.

23. CA (hereinafter referred to as "PW 2") corroborated her evidence as she testified that on the material day and time, she went to borrow a matchbox from the Appellant who was her neighbour. She stated that he told her to wait when she knocked but she pushed the door. When she got inside, she found that he had covered PW 1 with a blanket. She and PW 1 then informed PW 3 of what had transpired when she came back from work.

24. The incident occurred at 7.00 pm when it was almost dark. PW 1 testified that darkness was approaching but that she saw the Appellant as his window curtain was open. PW 2 corroborated this evidence as she testified that the Appellant's house had penetrating light and hence, she was able to see him. She averred that the Appellant was their neighbour and that there were only three (3) rental houses on their plot.

25. The Appellant did not deny knowing PW 1 and PW 2 as they all stayed in the same plot. There was no possibility of a mistaken identity because they were all neighbours and hence were not strangers to each other. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

Penetration

26. The Appellant submitted that PW 3 did not explain to court how she confirmed that PW 1 had sperms on her private parts. He blamed the Clinical officer for using verbal information (sic) in filling the P3

form and Post Rape Care (PRC) Form by stating that PW 1's clothes were muddy. He pointed out that that was unbelievable.

27. He further added that the Trial Court failed to consider his sworn defence and urged the court to evaluate the entire evidence afresh as was held in the case of Okeno v Republic [1972] EA 32.

28. On its part, the Respondent submitted that the ingredient of penetration had been proven and that although the Appellant had tendered an alibi defense, he did not avail his employer and/or colleagues to corroborate his defense. It was its submission that the issues the Appellant had raised were well canvassed in the Trial Court's Judgment.

29. According to PW 1, the Appellant covered her mouth with his hands, removed her pant, removed his trouser and inserted his penis into her vagina which caused her a lot of pain. PW 2's evidence corroborated that of PW 1 as she stated that when she pushed open the door to the Appellant house, she found him pulling his trousers from the knees and tying his belt while PW 1 was covered with a blanket. PW 3 also confirmed that PW 1 had informed her that she had been defiled by the Appellant.

30. On his part, PW 5 opined that PW 1 had been defiled. He told the Trial Court that she had bruises on her vagina, her hymen was freshly torn and there was discharge from her private parts. He concluded that she had been injured by a male part of the body and classified it as harm. He produced Treatment Notes, P3 form and PRC form as exhibits in support of the Prosecution's case.

31. It was clear that PW 1's evidence was not only well corroborated by the oral evidence of PW 2 and PW 3, it was also confirmed by the scientific evidence that confirmed recent penetration.

32. The Appellant was obligated to have called a witness to corroborate his alibi defence that he was at work at the time of the incident, the burden of proof having shifted to him. His arguments that the Prosecution failed to call crucial witnesses and that the Trial Court gravely erred on points of law by convicting him on a case that had not been proven beyond reasonable doubt as prescribed by the law thus fell by the wayside. Indeed, the prosecution was only obligated to call those witnesses who could prove its case as envisaged in Section 143 of the *Evidence Act* Cap 80 (Laws of Kenya) in that no particular number of witnesses was required to prove a particular fact.

33. The Trial Court could not therefore have been faulted for having found that the Appellant did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.

34. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

35. The Appellant submitted that the Trial Court denied him the right to mitigate and meted upon him a compulsory sentence. He termed this as inhuman, discriminative, indignifying (sic) and against the principles of equity as enshrined in Article 27 of *the Constitution* of Kenya. He pointed out that his sentence was not in line with the principles of both *the constitution* and sentencing.

36. He asserted that by ignoring his mitigation, the Trial Court had sealed his fate. In this regard, he relied on the case of Julius Kitsao Manyeso Criminal Appeal No 12 of 2021 (eKLR citation not given) where it was held that a sentence that rendered mitigation invaluable was unjustifiable, discriminative, unfair and repugnant to the principles of equity under Article 27 of *the Constitution*.

37. He further cited the cases of Jared Koita Injiri vs Republic Criminal Appeal No 93 of 2014 and *Evans Wanjala Wanyonyi vs Republic Criminal Appeal No 312 of 2018* (eKLR citations not given) where the common thread was that minimum mandatory sentences under the *Sexual Offences Act* were

unconstitutional. He thus prayed that his sentence be set aside and he be given the least of it pursuant to Article 50(2)(p) of *the Constitution*.

38. He further urged this court to consider the time that he had spent in custody during trial as part of the sentence served as per Section 333(2) of the Criminal Procedure Code. In that regard, he placed reliance on the case of Paul Omondi Odipo & 4 Others vs Republic Miscellaneous Application No E049/21 (eKLR citations not given) where it was held that the sentence of imprisonment ought to run from the date of arrest.

39. On its part, the Respondent urged the court to uphold his sentence.

40. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows:-

> " 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"

41. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.

42. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

43. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

44. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake v Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

45. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

46. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic (Criminal Appeal 134 of 2016)* [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

47. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others vs Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

48. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible

for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

49. The principle of sentencing was fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing were retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya had added community protection and denunciation as sentencing objectives. The objectives were not mutually exclusive and could overlap.

50. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to a lower sentence than the twenty (20) years imprisonment that had been prescribed in Section 8(3) of the *Sexual Offences Act*. The above notwithstanding, it could also exercise its discretion to interfere with the decision of the lower court if there were aggravating circumstances.

51. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

52. Notably, as the Appellant correctly pointed out, the Trial Court erred in having failed to give him an opportunity to mitigate. It only looked at the Pre-Sentence Report and proceeded to sentence him. Ordinarily, this would have been sufficient ground to order a re-trial as failure to allow him to mitigate was a great travesty of justice. However, in the view of this court, the reduction of the sentence from twenty (20) to fifteen (15) years would override the injustice that he suffered when he was denied a chance to mitigate.

53. Going further, this court found it prudent to consider if he had spent time in custody while his trial was ongoing and if so, to take it into account and further direct that the same be taken into account while computing the sentence.

54. In this regard, Section 333(2) of the Criminal Procedure Code provides as follows:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) 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" (emphasis court).

55. This duty to take into account this period is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided that: -

> " 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."

56. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR.

57. A perusal of the proceedings of the lower court did not show if the Appellant herein was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 26th February 2021 and was sentenced on 17th April 2023. Notably, the Trial Court did not consider the said period while sentencing him. The same therefore ought to be taken into account while computing his sentence.

Disposition

58. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 2nd May 2023 was partly merited only on the aspect of sentence only. His conviction be and is hereby upheld as the same was safe.

59. It is hereby directed that the sentence of twenty (20) years imprisonment be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to fifteen (15) years imprisonment.

60. It is further directed that the period the Appellant spent in custody from 26th February 2021 until 16th April 2023 to be taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

61. It is so ordered.

DATED and DELIVERED at VIHIGA this 27th day of June 2024

J. KAMAU

JUDGE