Martin v Republic (Criminal Appeal E048 of 2021)
[2023] KEHC 18519 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18519 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E048 OF 2021

RE ABURILI, J

MAY 29, 2023

BETWEEN

WAFULA MARTIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction by the Hon. J. Mitey on the 18.6.2021 and sentence passed on the 25.6.2021 in the Principal Magistrate's Court at Winam in Sexual Offence Case No.13 of 2016)

JUDGMENT

Introduction

1. The appellant herein Wafula Martin was charged with the offence of defilement contrary to section 8(1) (2) as read with section 8 (3) of the *sexual Offences Act* No 3 of 2006.

2. The particulars of the charge were that on the 4th day of September 2016 at 1600hrs in Kisumu East County he intentionally caused his penis to penetrate the vagina of SAO, a child aged 8 years old.

3. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called six (6) witnesses. Placed on his defence, the appellant gave sworn testimony denying the charges brought against him. The appellant also called two witnesses who testified in his defence.

4. In the impugned judgement, the trial magistrate found the defence tendered by the appellant and his witnesses to be inconsistent and contradictory when weighed against the consistent and corroborated testimony presented by the prosecution. The trial court convicted the appellant and sentenced him to life imprisonment.

5. The appellant was dissatisfied by the trial court's conviction and sentence. He filed his Petition of Appeal dated November 4, 2021 on the November 9, 2021 although it is not clear whether he obtained leave of court to file the appeal out of time, raising the following grounds of appeal:

    i. That the learned trial magistrate erred in fact and law by placing too much emphasis on the evidence of PW1 as the same was not properly corroborated as required by law in respect of the other witnesses thus arriving at a wrong decision.

    ii. That the learned trial magistrate erred in law and fact by holding that the prosecution had proved the charge against the appellant beyond reasonable doubt whereas the medical documents produced could not clearly create a link or nexus between the appellant and PW1 and further the alleged offence.

    iii. That the learned trial magistrate erred in law and fact by disregarding the evidence adduced by DW2, DW3 and the appellant and this shifting the burden of proof on the appellant which is illegal in the circumstances.

    iv. That the learned trial magistrate erred in law and fact by failing to appreciate that these were inconsistency as regards the exact scene of crime as narrated by the witnesses of the prosecution contrary to that by defence witnesses.

    v. That the learned trial magistrate erred in law and fact to hold that the alleged charge had been established through penetration in regards to the medical report (P3) whereas it was expressly indicated that the genital examination was normal.

6. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that medical examination carried out on the victim was not conclusive and had obvious gaps and did not corroborate the victim's testimony as it revealed that there were no spermatozoa seen in the victim and thus penetration was not proved.

8. It was submitted that the appellant's defence was not considered by the trial court as the court failed to take into consideration the testimonies of DW2 and DW3 who were both present at the scene and testified that they did not see the appellant commit the alleged act.

9. The appellant submitted that the life imprisonment sentence imposed on him was unfair when the issues that point to the offence were unclear. Further the appellant citing the case of *S v Toms* 1990 (2) SA 802 (A) at 806 (h) – 807 (b), submitted that courts frown upon mandatory sentences. It was submitted by the appellant that the probation officer opined that he was reluctant to recommend that the appellant be released on a non-custodial sentence.

10. The appellant thus urged the court to allow his appeal and quash his conviction and further set aside the life imprisonment imposed on him and set him free.

The Respondent's Submissions

11. The respondent's counsel submitted that the age of the complainant was proved as 8 years as at the time she was defiled, evidence was further corroborated by the testimony of her mother, PW4 who stated that the minor was born on the 25.8.2007. The prosecution submitted that the age of the complainant

determines the minimum sentence to be passed. Reliance was placed on the case of *MW v Republic* [2020] eKLR where the court held that the age of the victim can be established by medical evidence, birth certificate, the victim herself, parents or guardian through their testimony before court.

12. On penetration, the respondent submitted that it was proved by medical evidence and corroborated by the evidence of the complainant and further corroborated by PW3 and PW5.

13. As to the perpetrator's identity it was submitted that from the complainant's testimony, the appellant was somebody well known to her and she could positively identify him and further that the appellant was identified by both PW2 and PW4 and accordingly the appellant was positively identified by recognition as the perpetrator.

14. The respondent submitted that the sentence meted out on the appellant was lawful taking into account the seriousness of the offence and the circumstances herein considering the life of an 8-year-old child had been changed by the offence as was held in the case of *Athanus Lijodi v Republic* [2021] eKLR.

The Role of the first appellate Court

15. As first appellate court; this court is expected to re-evaluate the evidence afresh and arrive at its own independent conclusions, bearing in mind that this court neither saw nor heard the witnesses and give due regard for that. See *Okeno v R.* (1972) E.A. 32.

Evidence before the Trial Court

16. Revisiting the evidence adduced before the trial court, PW1 the complainant gave an unsworn testimony that on the 4.9.2016, she went to repair her shoes with her father and that her father paid the fundi and left her with the said cobbler as he went to watch football. She testified that her father told her to go home once the cobbler was done.

17. It was the complainant's testimony that the fundi went to fetch water and left her to take care of his place of work. PW1 testified that the fundi then called her over to where he was fetching water where she saw a small building with a window, got inside and stood next to the window. She further testified that the fundi closed the door and a window leaving the other window open.

18. The complainant testified that the fundi started touching her around her waist and buttocks as he stood behind her. It was her testimony that the appellant asked her where she lived and she stated that she lived next to his place. It was her testimony that she knew him as he once went to the place where she stayed.

19. She testified that as they were inside the house it started raining when the appellant lifted her and placed her up on a thick water pipe in an elevated position and that though she wanted to leave, the appellant told her to wait until the rain had stopped. It was her testimony that the appellant asked her what she liked to eat most and she replied that she loved sweets after which he went ahead to pull her dress up, push her panty to one side then after removing his belt, inserted his penis into her vagina.

20. PW1 testified that she felt pain and started feeling a stomach ache and she moved away from him. She testified that the appellant gave her Kshs. 5 to buy whatever she liked so she bought Bajia and went home. It was her testimony that on reaching her home, she did not tell her mother as she would have been beaten but that she disclosed the same to her the following day after school. In cross-examination, the complainant reiterated her testimony in chief.

21. PW2 GOO, the complainant's father testified and corroborated the complainant's testimony about taking her to the fundi and further testified that he learnt about the incident on Tuesday. He testified

that he went to confront the appellant, who was a neighbour at his house, then proceeded to report the issue to Kondele Police Station. It was his testimony that the complainant informed him that the appellant was the one who defiled her.

22. PW3 Dr. Joyce Omondi testified and produced the P3 form for the complainant who was examined at Jaramogi Oginga Odinga Teaching and Referral Hospital on the September 6, 2016. It was her testimony that the examination revealed that the complainant had epigastric tenderness, an injury that was probably 2 days old. She further testified that the genital examination revealed normal external genitalia however remnants of hymen were seen with no lacerations. She testified that the vaginal swap showed epithelial cells.

23. PW4, the complainant's mother testified that she learned the day after the incident from the complainant that she had been defiled and that she informed her husband, PW2, who went and reported the matter to the police and the appellant was arrested. In re-examination, she stated that the complainant told other children about the incident the following Monday and that is when she also got to know about it.

24. PW5 Calvin Okoth Odhiambo, a clinical officer at Jootrh testified and produced a PRC form filled at the institution on the 5.9.2016 following the complainant's allegations that she had been raped. He testified that at the time of the examination, the complainant had already showered and changed clothes. The results of the examination were similar to those contained in the P3 form. He testified that there were remnants of hymen on genital examination

25. PW6, P.C. Rachael Lungatso Mwashi testified that she was present when the report of the complainant's defilement was made on the 5.9.2016 and that she received her statement. It was her testimony that she never arrested the appellant and that the complainant identified the appellant in the cells.

26. In his sworn defense, the appellant denied all the charges against him and stated that he only did shoe repair at the road and not inside a building and that concerning this case, he finished repairing the complainant's shoe and released her to go home. It was his testimony that he denied defiling the complainant when queried by her father but he could not listen.

27. DW2, Beatrice Akinyi Owach testified that she sells water at Kondele and that the appellant worked near her. It was her testimony that the complainant and her father went to the appellant's place to have her shoe repaired before the complainant's father left her there with the appellant. She testified that when it started raining, the appellant and the complainant entered inside the stall to shield from the rains but that the complainant left when the rains stopped. In cross-examination, she stated that she was inside the stall with the appellant and the complainant.

28. DW3, Judith Anyango, a fruit and vegetable vendor testified that on the material date, a girl who was alone took a shoe to be mend by the appellant and then she left. She testified that after the girl left, they remained with the appellant and DW2. She further testified that they were shocked to learn that the appellant had been accused of rape. In cross-examination, DW3 stated that the rains started when the child had left with her shoes. She further reiterated that the child came alone to the fundi and that she knew that the child and fundi came from the same plot.

Analysis and Determination

29. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.

    i. Whether the prosecution proved their case beyond reasonable doubt; and

ii. Whether the sentence imposed was manifestly harsh and excessive

Whether the prosecution proved its case against the appellant beyond reasonable doubt

30. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

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

8(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."

31. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt as stated in the case of *CWK v Republic*, Criminal Appeal No 72 of 2013) are:

i. Age of the complainant;

ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

iii. Positive identification of the assailant.

32. Regarding the age of the complainant, in a charge of defilement, the age of the victim is important for two reasons:

i. defilement is a sexual offence against a child; and

ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

33. A child is defined as a person under the age of eighteen years. Is the victim herein a child? PW1 testified that she was 8 years old and in class 3. At the time of the trial, PW2, the complainant's father testified that she was 9 years old while her mother testified that she was born on 25th August 2007. PW4, the investigating officer testified that the complainant was 8 years old at the time of the incident although she did not produce any birth certificate.

34. On this question of age, I rely on the case of *Fappyton Mutuku Ngui v Republic* [2012] e KLR is where it was held that:

> "... 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."

35. On the basis of the evidence adduced, I find that the age of the victim was proved to be 8 years as at the time of the incident.

36. As to whether the element of penetration was proved beyond reasonable doubt, penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

37. The complainant's testimony was that she was defiled. She told the court how the appellant "inserted his penis into her vagina" and how "he did not remove her panty but pushed it to the side" and further that she "felt pain and started feeling a stomachache." Her testimony was corroborated by the P3 form produced PEx1 and PRC produced a PEx 3 that show that there were remnants of hymen left on the complainant's genitalia, and presence of epithelial cells on examination.

38. In his defence, the appellant denied having committed the offence. He admitted that he mended the complainant's shoe then sent her home. He insisted that he did not go to the water stall with the complainant. DW2, his witness contradicted the appellant and stated that the complainant and the appellant sheltered in the water stall till it stopped raining before the complainant left for home. In a complete departure from the testimonies of both the appellant and DW2, DW3 testified that the complainant left the appellant's roadside place before the rains started after the appellant had finished mending her shoe.

39. The appellant had no duty to testify as he had the right to remain silent as explained to him on being placed on his defence. He had no duty to prove his innocence. He however had the right to adduce and challenge evidence adduced against him and in doing so, he was under no duty to give self-incriminating evidence. It is clear from the court record that the appellant's defence was full of material contradictions in the testimonies of the appellant's defense and the evidence of his witnesses in their attempt to protect the appellant from culpability.

40. On the other hand, the complainant's testimony was consistent as to how she found herself at the appellant's place escorted by her father who left her there and how the appellant called her to join him at the water stall lace only for him to defile her. That evidence was never shaken even during cross examination. The evidence of penetration was corroborated by the medical evidence adduced by PW3 and the testimony of PW5. To that extent, I find and hold that the complainant's testimony was well corroborated.

41. This is not withstanding the provisions of section 124 of the *Evidence Act*, which stipulates that a court of law can convict based on the evidence of the victim alone in sexual offences. The Court of Appeal in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR stated that:

> " with regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

42. The critical question is whether the complainant was indeed truthful. In my view and from the evidence on record, I find that the evidence adduced by the prosecution proved beyond reasonable doubt that penetration occurred and the defence offered by the appellant amounted to a mere denial.

43. As to whether the appellant was the perpetrator, the appellant was known to PW1. PW1 testified that they lived in the same plot with the appellant. When questioned by her father, PW2, and her mother, PW4, the complainant reiterated that it was the appellant who had defiled her. Even at the police station when questioned, the complainant stated that it was the appellant who had defiled her.

44. It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia, the offence having taken place in daylight.

45. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

46. In sum. I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 8 years. Therefore, the conviction of the appellant for the offence of defilement was sound and safe. Accordingly, I find and hold that the Appeal against conviction lacks merit and is hereby dismissed.

Whether the sentence imposed on the appellant was manifestly harsh and excessive

47. Under the *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual violation. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. For that reason, it is correct to conclude that age of the victim of sexual offence is an aggravating factor which the court should always consider amongst other factors, in sentencing.

48. In this case, the complainant was of the age of 8 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the *Act* which provides that:

> " 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."

49. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R*. and *Wilson Waitegei v Republic* [2021] e KLR)

50. Was there anything vitiating exercise of discretion by the trial court in imposing a sentence of life imprisonment? The appellant argued that he was a first offender and that the probation report cited and noted that the even the probation officer is reluctant to recommend a non-custodial sentence.

51. Of important consideration: first, the victim of the offence is a child of 8 years. Second; the traumatic experience will linger in her life forever- and as she grows older to know exactly the violation that she went through, she will live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Third, this is a serious offence of which extreme societal desire to get rid of society of such wickedness and sexual perversion has been expressed publicly and formally through the *Sexual Offences Act*. See *James Okumu Wasike* [2020] eKLR.

52. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 8 years. The Court considers the offence to be quite heinous, and it was committed against a minor. It bears repeating that the penalties enacted in the *Sexual Offences Act* reflect a deliberate intention by the legislature;

    (1) to protect the rights of the child; and

    (2) to signify the seriousness of the offence of defilement.

53. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. I have stated in various other decisions, not once that the assault leaves the innocent victim with eternal and time-explosive dent on the integrity and dignity of the person as a human being. The aggravating factors weigh heavy; against the mitigating factors of the appellant.

54. In the circumstances of this case, albeit there are no other reasons why the appellant should be given a term sentence, the fact that he is a first offender, brings in issue the matter of discretion of courts in sentencing, bearing in mind the recent juris prudence that frowns upon mandatory minimum sentences. See the recent Court of Appeal decision in *CD v Republic* [2023] e KLR. For the above reasons alone, I hereby set aside the life imprisonment imposed on the appellant and substitute it with a prison term of thirty (30) years imprisonment to be calculated taking into account the period that he spent in custody, pending his release on bond pending trial.

55. In the end, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated above.

56. This file is closed.

57. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MAY, 2023

R.E. ABURILI

JUDGE