OKK v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 11313 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11313 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E030 OF 2023

AC MRIMA, J

SEPTEMBER 27, 2024

BETWEEN

OKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the judgment, conviction and sentence by Hon. T.O Omono (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E057 of 2022 delivered on 5th April 2023)

JUDGMENT

Background:

1. OKK, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the 8th day of March 2022 within Trans-Nzoia East Sub-County, Trans-Nzoia County unlawfully and intentionally caused his penis to penetrate the vagina of SJK, a child aged 7 years old.

3. The Appellant faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the alternative charge are that the 8th day of March 2022 within Trans-Nzoia East Sub-County, Trans-Nzoia County intentionally touched the vagina of SJK, a child aged 7 years with your penis.

5. Six witnesses testified for the Respondent. The Complainant, SJK testified as PW1, Jackson Kiptoo, the Assistant Chief for Topsirwa Sub-Location testified as PW2, PR, the complainant's grandmother testified as PW3, Kennedy Okango, a Clinical Officer at Cherangany Sub-County Hospital testified as

PW4, Phares Silali, a Dentist at Kitale County Referral Hospital testified as PW5 and No. 261947 PC Nancy Shirebo, the Investigating Officer from Geta Police Station testified as PW6.

6. At the close of the prosecution's case, the Appellant was placed on his defence. He testified as DW1 and called JKt who testified as DW2.

7. Upon considering the whole case, the Learned Trial Magistrate found the Appellant guilty of the main offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

8. He was sentenced to 30 years imprisonment.

The Appeal:

9. The Appellant was dissatisfied with the conviction and sentence. Through an Amended Petition of Appeal, the Appellant urged this Court to quash his conviction and to set aside his sentence on the following grounds: -

    1. That the learned trial magistrate erred in both law and fact by failing to note that the Appellant's absolute right were violated, infringed and contravened before being brought to court by holding him in police custody for more than 24 hours.

    2. That the learned trial magistrate erred in failing to find that the prosecution side failed to prove that the Appellant was not the perpetrator of the offence

    3. That the learned trial magistrate erred in both law and in fact by basing the conviction and sentence on evidence that is largely inconsistent and contradictory.

    4. That he learned trial magistrate erred in failing to note that penetration was not caused by the Appellant.

    5. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution case was not proved to the required standard/threshold.

    6. That he learned trial magistrate erred by failing to find that important key witnesses mentioned by prosecution were not availed to court.

    7. That the learned trial magistrate erred in both law and fact by failing to consider the defence of the Appellant.

10. In his written submissions in support of the appeal, the Appellant contended that there was gross violation of his rights for being held in custody on 8th March 2022 and taken to Court on 11th March 2022, a period beyond the constitutionally allowable time of 24 hours.

11. As regards the charge, it was his case that the evidence presented at the trial Court was not credible and did not place him at the scene of crime. He stated that the conviction was based on inconsistencies and contradictions.

12. He submitted that the evidence of PW2 and PW6 were contradictory and ought to have been resolved in his favour. It further was his case that the aspect of penetration was not proved.

13. The Appellant further submitted that the Investigating Officer, PW6 , did not visit the scene of crime in order to come up with a finding of occurrence of the crime. It was also his contention that crucial witnesses were not called and his credible defence was disregarded.

14. To that end, he submitted that DW3's evidence to the effect that he suffered from urethritis which can only be transmitted during sexual intercourse was not considered.

15. In conclusion, the Appellant maintained that the prosecution did not attain the required standard of proof in the case.

16. He prayed that he be set at liberty.

The Respondent's case:

17. The Respondent filed undated written submissions. It was its case that, based on the decision in Daniel Wambugu Maina -vs- Republic (2018) eKLR, it had proved penetration, age and identity of the perpetrator.

18. It urged that the Appeal be dismissed and the trial Court's conviction and sentence upheld.

Analysis:

19. This being a first appeal, this court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono v Republic [1972] EA 74).

20. While re-assessing the evidence, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

21. Having carefully perused the record, this Court is now called upon to determine whether the offences of defilement and/or committing an indecent assault with a child were committed, and if so, whether by the Appellant.

22. The offence of defilement carries three ingredients which are the age of the victim, penetration and proof of the assailant.

23. Before dealing with the ingredients, a preliminary issue that sticks out for immediate resolution was raised. It was the claim that there were constitutional infractions of his right to be produced in Court within 24 hours of arrest. It is his case that he was held longer than that prescribed timeline.

24. From the record, the issue was not raised before the trial Court. In such a case, the Appellant ought to contend through a constitutional Court.

25. The Court now turns to the ingredients of the offence of defilement.

Age of the complainant

26. This Court agrees with the rendition by the trial Court. The age of the victim was properly settled by way of an Age Assessment Report which was produced as an exhibit.

27. There was no challenge to the Certificate. The age was, hence, settled at slightly below 7 years old.

28. The complainant was, therefore, a child of tender age in law.

Penetration:

29. PW1, the complainant, testified that she was in Grade 3 and lived with PW3 [her maternal grandmother], Madam C and the Appellant.

30. She stated that in the evening of the 8th March 2022, she had gone to look for her sweater in her grandmother's house when she found the Appellant in the house.

31. It was her evidence that the Appellant grabbed her, placed her on bed, removed her trouser and took his 'thing' that he uses to urinate and out in in her 'thing' that she uses to urinate. She stated that she felt a lot of pain but could neither cry nor scream since the Appellant had covered her mouth with his hand.

32. She stated that she later screamed and the Appellant escaped through the window. It was her testimony that one 'Cherotich' found her in the house, told her what had happened she was taken to hospital and was given drugs.

33. PW3 testified that on 8th March 2022, she asked the complainant to go fetch drinking water from the house wherein the Appellant was eating some food. That, the Appellant, who was PW3's in-law's son, locked the door from inside and sexually assaulted the complainant.

34. PW4 examined the Complainant [PW1] on 9th March 2022. She observed that PW1 that had been treated at Kapcherop Hospital on the fateful day and later referred to Geta Police Station where she was advised to visit Cherangany Sub-County Hospital.

35. It was her evidence that upon examination, the complainant's hymen was freshly torn and her vagina had lacerations. He stated that he formed the opinion that the injuries were caused by a penis.

36. He produced treatment notes from Kapcherop and Kachibora as PExh-1 and the P3 form as PExh.2

37. On cross-examination, he clarified that the indication in the P3 Form that there was neither discharge nor lesions was in respect to the external genitalia. It was, otherwise, his evidence that he used a minor theatre light to know that the victim had a torn hymen which was approximately one day old.

38. Section 2 of the *Sexual Offences Act* defines penetration as follows.;

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

39. This position was fortified in Mark Oiruri Mose v R [2013] eKLR when the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

40. Later, the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v Republic [2014] eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

41. In this case the hymen was recently ruptured. That was conclusive proof of penetration and it was not necessary that the complainant was infected with urethritis for that ingredient to be proved.

42. This Court is, therefore, satisfied that penetration was proved beyond reasonable doubt.

Identification:

43. It was not disputed that PW1, PW3 and the Appellant lived in the same home. PW1, therefore, knew the Appellant quite well and readily recognized him when she found her inside PW3's house eating.

44. PW3 affirmed that the Appellant was inside her house at the time she sent PW1 to get her some water.

45. PW2 also confirmed that it was the Appellant who had been arrested by members of public on allegations of defiling PW1 and that he had been brutally beaten. The Appellant was later re-arrested by the police.

46. The evidence of PW1 was, therefore, that of a sole identifying witness. The Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi v Republic [1986] KLR 198:
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> 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
>
> 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
>
> 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
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> 14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the Court emphasized that:
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> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

47. In R v Turnbull & Others [1973] 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally,

had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

48. In Wamunga v Republic [1989] KLR 426 the Court of Appeal stated as under: -

> " .... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

49. In Anil Phukan v State of Assam [1993] AIR 1462 the Court held as follows: -

> " .... A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

50. The foregoing legal guidance buttresses the position in this case. PW1 testified on oath. She withstood cross-examination. The trial Court observed her demeanor and did not make any adverse findings on her. The Court believed her testimony.

51. The Appellant tendered his defence. He stated that he was owed money by PW2. That, on the material date, he had gone to claim his money, but PW2 refused to pay him. Upon the refusal, the Appellant took PW2's sheep as payment which action prompted PW2 to scream attracting members of the public including PW3.

52. DW2 affirmed that he found the Appellant being beaten up by members of the public for stealing a sheep. He stated that the sheep was at the scene.

53. PW2 answered the Appellant's contention. She stated that the issue of the sheep was a different case and that she never owed the Appellant any money. PW3 also confirmed that he was the one who had previously arrested the Appellant in respect of theft of PW2's sheep and that the instant case had no nexus with that of theft of PW2's sheep.

54. Without shifting the burden of proof to the Appellant, suffice to note that PW6 [the investigating officer] was not examined on the issue of the stolen sheep.

55. The upshot is that on juxtaposing the evidence of the prosecution against the defence, the scales of justice tilt, so heavily, in favour of the prosecution. The Court sees the defence as an afterthought aimed at misleading this Court. It is for rejection.

56. The Appellant was, therefore, properly identified by recognition by PW1 as the one who had sex with her. The identification was not in error.

57. The prosecution, hence, proved the three ingredients of the offence of defilement.

58. There were, however, two other grounds of appeal worth consideration. One of them was the contention that there were inconsistencies in the evidence. As this Court has previously and severally

stated, inconsistencies and discrepancies in the testimonies tendered by witnesses are bound to occur since people perceive things differently.

59. Therefore, unless the inconsistencies and discrepancies are so grave that they create doubt on the overall assessment of the evidence and that they cannot be reconciled, minor inconsistencies and discrepancies are not fatal to the prosecution's case.

60. The alleged inconsistencies and discrepancies in this matter were of minor character and the trial Court reconciled them well.

61. The other contention was that other crucial witnesses were not called to testify.

62. The prosecution has a discretion to call any witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See Bukenya & Others versus Uganda [1972] E.A. 594, Kingi v Republic [1972] E.A. 280 and Nguku versus Republic [1985] KLR 412).

63. The witnesses called in this case were sufficient to prove the offence. The ground, therefore, fails.

64. On the basis of the above discussion, this Court finds that the Appellant was properly convicted of the offence of defilement. The appeal against the conviction is, therefore, dismissed.

Sentence:

65. The Appellant was sentenced to 30 years' imprisonment. Being cognizant of the recent decision by the Supreme Court of Kenya in Petition *No. E018 of 2023* Republic -vs- Joshua Gichuki Mwangi, the Appellant was to be sentenced to life sentence as provided for in Section 8(2) of the *Sexual Offences Act*.

66. However, since the prosecution did not apply to enhance the sentence, this Court shall not venture into that arena.

67. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

68. Consequently, the following final Orders hereby issue: -

    a. The Appeal is wholly dismissed.

    b. The file is hereby marked as CLOSED.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

OKK, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.