Duba v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 13916 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13916 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E002 OF 2024

JN NJAGI, J

OCTOBER 30, 2024

BETWEEN

ABDUB WAQO DUBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between 1st September 2022 and 1st June 2023 at Sololo Sub-County within Marsabit County he intentionally and unlawfully caused his penis to penetrate the vagina of L.D.G. (herein referred to as the complainant), a child aged 16 years.

2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.

3. The grounds of appeal as per the appellant`s amended supplementary grounds of appeal dated 12th September 2024 are that:

    1. That the learned trial magistrate erred in law and fact by failing to note that the age of the complainant was not proved beyond reasonable doubt according to the law.

    2. That the learned trial magistrate erred in law and fact by failing to note that the age assessment report was produced by the investigation officer, contrary to section 77 and 48 of the *Evidence Act*.

    3. That the learned trial Magistrate erred in law by failing to consider that it is a defence under section 8 (5) of the *Sexual Offences Act* where the appellant believed that the complainant was over 18 years.

4. That learned trial magistrate failed to take into consideration the defense of the appellant.

Case for prosecution

4. The prosecution called three witnesses in the case. The complainant PW1 testified that she was at the material time aged 13 years. She was staying with her mother at [Particulars Withheld] village. That on a date she could not recall she was lured by her two women neighbours to be married to a certain man, the appellant. That she was carried by the appellant and another man to the home of the appellant`s mother where she stayed with the appellant in one house for a period of one month. They were engaging in sexual intercourse at the time. After that period they moved to the appellant`s home at Rawana where the appellant had a house and children. She lived there with the appellant as his wife for a period of 8 months. She differed with the appellant and she went to live with his mother. The villagers reported the matter to the police. She and the appellant were arrested and taken to the police station. She was taken to hospital where she was examined and found to be two months pregnant.

5. PC Brian PW2 of Sololo police station testified that the case was investigated by a PC woman Sofia who was unable to testify in court because she was on maternity leave. He testified on her behalf. It was his evidence that the police established that the appellant had married a minor. He was arrested. He and the minor were taken to Sololo Mission Hospital where a Post Rape Care Form was filled and a P3 form completed. The complainant was taken to Moyale Sub County Hospital where her age was assessed at 16 years. Investigations established that the appellant had paid dowry to the parents of complainant. The appellant was charged with the offence of defilement. During the hearing of the case in court, PC Brian produced the age assessment report as exhibit, P.Exh.3. He told the court that the parents of the girl were not found to record statements.

6. Ahmed Golo Sora PW3 testified that he is a Clinical Officer at Ramats Health Centre. That on 30/6/2023 he examined the complainant and found her with a normal external genitalia. That a pregnancy test was done that established that she was pregnant. The witness produced the Post Rape Care form and the P3 form in court as exhibits, P.Exhs. 2 and 3 respectively.

Defence Case

7. The appellant in his defence gave a sworn statement in which he stated that he was given the complainant in marriage by her mother and her uncle. He married her in a wedding ceremony on the 28/8/2023 in the presence of elders. He paid a cow and a donkey as dowry. He stayed with her for a period of 10 months. The area chief was aware of the marriage. He was then arrested on 2/6/2023 by policemen from Sololo police station. By then she was pregnant. He said that both the girl and her mother had told him at the time he married her that she was aged 18 years.

8. The appellant called two witnesses in the case, Haro Jattani, DW2 and Dulch Godana Duba DW3. It was the evidence of Haro Jattani that he is a resident of Funaqumi village. That the appellant talked to the parents of the complainant and they gave her in marriage to the appellant. He paid a cow, a donkey and clothes as dowry. The appellant invited him to a wedding in which the appellant was given the girl by her family. During the ceremony the family of the girl gave the appellant and the girl a goat as a gift. The appellant and the girl spent the first night after the marriage in his house. The witness said in cross-examination that he did not know the age of the girl.

9. Dulch Godana Duba DW3, testified that he lives at Funaqumbi village where he is an elder. That the appellant is his neighbour. That the accused negotiated with the mother of the complainant who gave him the complainant in marriage. He paid donkeys and married her in accordance with custom. He, DW3, said that it was not true that the appellant had eloped with the girl.

Submissions

10. The appeal was disposed of by way of written submissions of the appellant. The respondent did not file submissions.

11. The appellant submitted that the age of the complainant was not proved beyond reasonable doubt. That the age assessment report was not produced in court by its maker but was produced by a police officer PW2 who was not an expert in that area. That this was contrary to the provisions of section 77(3) of the *Evidence Act* which requires that before a document is produced in court by a person who is not its maker, a proper basis must be laid out as to why the maker cannot be called to produce the document. That in this case there was conflicting evidence on the age of the complainant. Therefore, that failure to call the maker of the report and in the absence of consent from the appellant, the report was prejudicial to him.

12. The appellant submitted that there is no scientific basis under which the conclusion in the assessment report was reached such as whether it was by way of radiology or dental observation. That this was important as the clinical officer PW3 told the court that the age assessment report was guesswork.

13. It was submitted that the trial court failed to consider the appellant`s defence that he believed that the girl was above the age of 18 years which is a defence under section 8(5) of the *Sexual Offences Act*.

14. It was submitted that it was the duty of the prosecution to proof the case beyond reasonable doubt which was not done in this case. It was submitted that Article 49(1) of the *Constitution* gives an accused person the right to remain silent which is also a defence.

Analysis and Determination

15. This being a first Appeal, the duty of the court is to analyse and re-examine afresh the evidence presented before the trial court and draw its own independent conclusions but at the same time bearing in mind that it did not see or hear the witnesses testify– see *Okeno v Republic* (1972) EA 32. In this respect the Court of Appeal in the case of *Kiilu & another v Republic* (2005)1 KLR 174 stated as follows:-

> " An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. 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 the advantage of hearing and seeing the witnesses."

16. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The section provides as follows:

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

    (2) .....

    (3) .....

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

17. In the case of *Dominic Kibet Mwareng v Republic* (2013) eKLR, it was held that the ingredients for the offence of defilement are: proof of the age of the victim, proof of penetration on the victim and positive identification of the assailant.

18. I have examined the evidence adduced before the trial court, the grounds of appeal and the submissions. The issues of penetration and identity of the offender are not contested as the appellant contends that he had married the girl. He admits that he was having sex with her for the period he stayed with her as his wife during which time he impregnated her. The issue for determination is whether the trial court was right in its finding that the girl was below the age of 18 years.

19. The importance of proving the age of the victim of sexual assault under the *Sexual Offences Act* was underpinned by the Court of Appeal in the case of *Kaingu Elias Kasomo v Republic*, Criminal Case No 504 of 2010, as cited in *NNC v Republic* [2018] eKLR where the Court stated that:-

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

20. The age of a person may be proved in various ways as long as the method of proof is credible and reliable. In the case of *Edwin Nyambaso Onsongo v Republic* (2016) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No 24 of 2015 (UR) where the Court of Appeal held that:-

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

21. The complainant in her evidence in court stated that she was aged 13 years. However, there were no documents produced to prove her age. It would appear that the complainant did not know her exact age as her apparent age as shown in the P3 form was 16 years. The trial court in convicting the appellant of the offence relied on the evidence contained in the age assessment report P.Exh.3 that indicated the estimated age of the girl as 16 years.

22. The officer who prepared the age assessment report did not testify in the case. The report was instead produced in court by the investigating officer PW2. Section 77 (1) of the *Evidence Act* allows the report of an expert to be produced in court by another person if a proper basis is laid out why the maker of the document cannot be found to produce the document in court. In this case no basis was laid out before the court as to why the officer who made the report could not be called to produce the assessment report in court. In the case of *Republic v Teresia Wairimu Thuo* (2019) 3KLR the court restated the holding in *Soki v R* (2004) 2 KLR 21 where the Court of Appeal held that where the maker of an expert report cannot be found to produce the report in court, the same can be produced by a police officer

under the provisions of section 77 (1) of the *Evidence Act* as long as the accused gives his consent for the report to be so produced. Said the court:

> " Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial Court and the superior Court. Section 77 (1) allows any document purporting to be report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished.

23. In this case, the appellant did not consent to the report being produced in court by a police officer who was not the maker of the document. He had no legal representation during the trial yet his right to have the report being produced by its maker was not explained to him. In the premises, I find that the report was not procedurally produced in court.

24. I have at the same time looked at the age assessment report, P.Exh.3. The same is indicated to have been prepared by a dental officer called Safia Dida. The dental officer indicated in the report that the "estimated dental" age of the complainant was 16 years. The officer seems to have on that basis formed a conclusion that the estimated age of the girl was 16 years. However, the report does not give reasons as to why the dental officer arrived at the conclusion that the estimated dental age of the girl was 16 years. An expert in any field has to give reasons to back up his/her conclusion. A court of law cannot take as gospel truth a conclusion arrived at without giving reasons. The assessment report was, in my view, neither credible nor reliable. In view of the foregoing, I find that the trial court erred in relying on the assessment report to convict the appellant.

25. The other evidence tending to connect the appellant with the offence was from the clinical officer who completed the complainant`s P3 form, PW3, whose evidence was that he examined the complainant and estimated her age at 16 years, which he filled in part "C" of the P3 form. The Court of Appeal in the case *Safari Charo Koyo v Republic* [2017] eKLR stated that where actual age of a victim of defilement is not established, the court can go by the apparent age of the victim as established by the doctor who examined the victim. Said the court:

We cannot help but note that PK's actual age was not established. Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu v R* [2016] eKLR, observed that -

> "As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific

age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

26. The clinical officer, PW3, told the court that his estimated age has an error of plus or minus one year, which meant that the complainant could have been 15 years on the lower side or 17 years on the upper side. There is no guarantee that the error spoken of by the clinical officer cannot be one of plus or minus two years. In my view an estimated age of 17 years is one that lingers on the borderline of 17 and 18 years. Without the benefit of proper medical assessment, one cannot say that such a person cannot be above the age of 18 years. The parents of the complainant were not available to shed light on the age of the complainant. I am of the view that a proper age assessment should have been conducted in this case to erase any doubts on the age of the complainant. In the absence of the same, there was no assurance that the complainant was aged below 18 years. The appellant's defence that he believed the girl was aged above the age of 18 years has not been discounted. The appellant ought to have been given the benefit. I find no sufficient evidence to proof that the complainant was a child under the age of 18 years.

27. The upshot is that the case against the appellant was not proved beyond reasonable doubt. I thereby find the appeal to be merited and allow the same. The conviction entered against the appellant is quashed and the sentence meted out on him set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 30TH OCTOBER, 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant – present in person

Court Assistant – Jarso

14 days R/A.