Nikoo v Republic (Criminal Appeal E026 of 2022)
[2024] KEHC 13151 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E026 OF 2022

SM GITHINJI, J

OCTOBER 29, 2024

BETWEEN

JUSTUS MUMO NIKOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision in respect of SO No.76 of 2020 before Hon. D.S.Sitati – Resident Magistrate delivered on 12th January, 2022))

JUDGMENT

1. Justus Mumo Nikoo faced in the lower court a charge of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of this offence are that on the 2nd day of September, 2020 within Ganze Sub-County, Kilifi County the appellant put his genital organ namely penis to the genital organ namely vagina of SRU, a child of 16 years.

3. The prosecution case is that the victim in this case who gave evidence as Pw-2 was born on 27/12/2003. She had a copy of her birth certificate which was marked MFI-2 though was not produced as an exhibit. She was a student at [Particulars Withheld] Secondary School in form two. She was living in [Particulars Withheld], Kilifi County in Ganze area. In July, 2020 she met the appellant who later became her boyfriend. On 31st August, 2020 she was sick. She had abdominal pains and when she told the appellant he took her to Jaribuni Dispensary for treatment. She was treated and visited his house in Beria. They had sex at the place and at 4.00Pm she was taken back home using a boda boda.

4. On 2/9/2020 she was working at [Particulars Withheld] in a quarry together with her sisters namely FR and EN. The two sisters sent her to the shop to buy cooking stuff. She went and bought and handed them to a Bodaboda rider to deliver at the quarry to her sisters. She took another motor cycle to the appellant's house. She stayed with him from 2/9/2020 to 4/9/2020 and they had sex. On 4/9/2020 her

uncle SN went looking for her. He knocked on the door to the appellant's house. The victim recognized his voice and did not open. He left and returned later in company of another uncle called V and the appellant. She opened the door and together with the appellant were taken to Jaribuni Police Station. She was issued with P-3 form and taken to Kilifi County Hospital. She was examined by Dr Zuma Bimba who filled the P-3 on 4/9/2020. The doctor noted that she had a broken hymen with no other injuries or discharge. Pregnancy and HIV tests were negative. The P-3 form was produced as exhibit.

5. The appellant in his defence stated that he was working at Jaribuni as a mechanic. On 4/9/2020, two strange men went to him and requested him to accompany them. He agreed as he thought they were calling him for a job. He was led to a house which was unknown to him. They opened it and a girl he knew got outside. The girl was a hotel attendant where the appellant used to eat. He had a debt and had disagreed with the girl on it. The two men asked him whether he knew the girl and urged him to accompany them to Jaribuni Police Station. They went and he was arrested. He was not informed the reason for the arrest. On 5/9/2020 he was taken to Bamba Police Station and on 7/9/2020 he was arraigned in court and charged with a strange offence. He denied it.

6. The trial court evaluated the evidence and found the appellant guilty of the offence. He was convicted and sentenced to serve 15 years in prison.

7. The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that; -

    1. Complainant's evidence was not substantiated.

    2. The two uncles who allegedly got complainant from the appellant's house were not called as witnesses.

    3. Contradictions between the evidence of Pw-1 and Pw-2 were not considered.

    4. The defence was not adequately weighed.

    5. Age of the victim was not proved beyond reasonable doubt.

    6. No police officer testified in the case.

    7. Appellant's mitigation was not considered.

    8. The sentence meted is harsh and excessive.

    9. Time spent in custody was not considered in the sentence meted.

8. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.

9. I have re-evaluated the charge, evidence adduced, judgment of the lower court and sentence meted; and considered grounds of the appeal and filed submissions.

10. The duty of the court in this matter is to establish whether the evidence on record establishes all the three ingredients for the offence of defilement under section 8 (1) (4) of the Sexual Offence Act, beyond reasonable doubt.

11. The three ingredients are; -

    1. The age of the victim who should be a minor, that is, below 18 years old.

    2. Penetration which is partial or complete insertion of the genital organs of a person into the genital organs of another person and

3. Recognition or identification of the accused/appellant as the real culprit.

12. In relation to the age, the complainant stated she was born on 27/12/2003. She had a copy of her birth certificate in Court which was marked for identification but given that the investigating officer was not called as a witness, was not produced as an exhibit. The offence was allegedly committed on 2/9/2020. The complainant going by her stated age would have celebrated her 17th year birthday on 27/12/2020. It therefore follows that on 2/9/2020 she was 16 years old. No evidence was adduced to challenge the given age by the appellant. In the case of Francis Omuroni-vs-Uganda, Criminal Appeal No.2 of 2000, the Court of Appeal held;

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....."

13. Further the Court of Appeal in Edwin Nyambogo Onsongo-vs-Republic [2016] eKLR stated in respect of proving the age of the victim 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."

14. In this case the victim stated her age and the year in which she was born, while armed with a copy of her birth certificate. In absence of any other evidence to the contrary, the evidence is credible and reliable to the effect that she was 16 years old on 2/9/2020.

15. As regarding penetration, I have noted of the uncommon word used in the particulars of the charge that the accused "put" his genital organ namely.....Though I do not consider this to be a grave error, it's always advisable to use the terms used in the Act to avoid possibility of a different meaning or expression. The Act uses the word "penetration" and "insertion" which should be the words to use. Likewise, the word vagina is misspelt to read "virgina". The investigating officer, prosecution and court have a duty to ensure the charge is correct in all it's particulars to avoid a situation where it may confuse on the offence the accused is charged with. Though the error is curable, it should be avoided or guarded against.

16. The complainant said they had sex. She disclosed no details of what that involved. She was aged 16 years then and was in form 2. In cross-examination she said it was not her first time to have sex. Given her age and level of education it's no doubt that she knew what sex involved. It can be rightly defined as insertion of the genital organs of a person into the genital organs of another person. In the *Sexual Offences Act*, it's what is termed as penetration. In the said respect, though the doctor's evidence is not conclusive on whether she had been penetrated as alleged, the evidence is convincing and safe to the effect that she was penetrated.

17. Is it the appellant who penetrated her? She knew the appellant well as she described him as her boyfriend. They have had sex before on 31st August, 2020 and later between 2nd and 4th of September, 2020. On 4/9/2020 she was got in appellant's house where she was allegedly living with him as a wife. She knew him well and he could not have been mistaken for the real culprit. It's apparent the

prosecution closed their case prematurely but I find the evidence on record sufficient and reliable to the effect that the appellant committed the offence charged with.

18. His defence was an afterthought. It was not covered in cross-examination of Pw-2. It was rightly dismissed by the trial court.

19. Section 8 (4) of the *Sexual Offences Act* is clear that the minimum sentence for the offence is 15 years' imprisonment. However, given that the appellant was arrested on 4/9/2020 and was in custody throughout the trial, the period needed be considered. The said sentence should therefore run from 4th September, 2020.

20. The bottom line is that conviction is upheld and sentence adjusted to run from 4th of September, 2020.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER, 2024

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Appellant in person

2. Ms Ochola for the Respondent