Ali v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 14715 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14715 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E007 OF 2024

JN ONYIEGO, J

NOVEMBER 21, 2024

BETWEEN

MAULID MOHAMED ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. S. Otuke in Sexual Offences Case No. E019 of 2022 in the CM's Court at Garissa delivered on 07.02.2024)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. Particulars of the offence were that on 09.07.2022 at around 1700hrs, at [Particulars withheld] in Bangale Sub County within Tana River County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.I.A. a child aged 15 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. Particulars were that on 09.07.2022 at around 1700hrs at [Particulars withheld] in Bangale Sub County within Tana River County, he intentionally and unlawfully touched the vagina of F.I.A., a child aged 15 years with his penis.

3. He pleaded not guilty to both the main charge and its alternative count. A trial thereafter ensued in which the prosecution presented the evidence of five witnesses.

4. In the end, the trial court found the appellant guilty of the charge of defilement contrary to section 8 (1) as read with section 8(3) and sentenced him to 20 years' imprisonment.

5. Being dissatisfied with the finding of the trial court, he filed a petition of appeal on the following grounds:

i. That the trial magistrate erred in law and fact by convicting the appellant and yet the prosecution did not prove its case beyond any reasonable doubt.

ii. That the trial magistrate erred in law and fact by being biased towards the appellant.

iii. That the trial magistrate erred in law and fact by convicting the appellant and yet the prosecution's evidence was marred with contradictions and inconsistencies.

iv. That the trial magistrate erred in law and fact by rejecting the appellant's defence without giving any reason.

6. The court directed that parties file their written submissions. Nevertheless, they chose to argue the appeal orally.

7. The appellant in his submissions urged that the trial magistrate erred by convicting him yet the evidence by the prosecution was not to the required standard as provided by the law. That he was simply framed up as there existed a grudge between him and the complainant's family. In the end, he urged this court to quash the conviction and set aside his sentence.

8. The learned prosecutor opposed the appeal by stating that the prosecution proved it case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, the conviction of the appellant was regular. Learned counsel contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss the appeal in its entirety.

9. The duty of the first appellate court is to re-analyse and re-consider the evidence presented before the trial court with a view to arriving at its own conclusion and or finding while bearing in mind the fact that it neither heard nor saw the witnesses testify. [See Kiilu & Another vs Republic [2005]1 KLR 174].

10. PW1, F.I.A testified that prior to the occurrence of the impugned incident, she knew the appellant as he comes from her neighbourhood. She stated that on 09.07.2022, while taking their camels home from the grazing field, she met with the appellant. That suddenly, the appellant swept her feet thus making her to fall down. It was her evidence that the appellant firmly held her neck while strangling her and at the same time blocked her nose.

11. That the appellant stripped her clothes off and as she tried to resist, he hit her on the waist and chest before spreading her legs apart and inserting his penis into her vagina. It was her case that the appellant defiled her and consequently ejaculated inside her. It was her testimony that, after the appellant left her, she rushed home and informed her mother who later organized for her to be taken to the police station and thereafter to the hospital for medical treatment.

12. PW2, Fatuma Mohamed Hussein, mother to PW1 testified that prior to the defilement incident, she had sent PW1 to graze the camels in the bush. That the complainant went back home crying while saying that the appellant had defiled her. She examined the complainant's vagina and saw blood and whitish discharge flowing. She further stated that she called her husband who later came and helped her take the complainant to Bangale Police station and thereafter to the hospital.

13. PW3, Mohamed Abdul Said recalled that on the material day, he was called by PW2 who told him that PW1 had been defiled by the appellant. That it was at night and so he travelled the following day to Bangale where he met Miti Boma chairman who advised him to report the matter to the police. He thus took PW1 to Bangale police station and thereafter to Bangale hospital where PW1 was examined and then treated.

14. PW4, Exodus Duko, a clinical officer stated that she examined the complainant on 10.07.2021. That she presented with a history of defilement by a person known to her. That the victim had bruises on the left forearm and the neck besides complaining of backache pains. She further stated that the outer genitalia was normal but on inspection, she noted sperm discharge of the perineum (between vaginal outface and anus), palpation at 9 O'clock and a tender majora.

15. On digital vaginal examination, she noticed a whitish discharge plus sperm discharge. On management, she requested lab investigations and H.I.V. determination which turned negative. She concluded by stating that from her analysis, it was her finding that the complainant was defiled.

16. PW5, No. 77880 PC Wilfred Kipngetich, the investigating officer recalled that when this case was reported, he took it up and started investigations. That the appellant was brought to the station by the members of the public when he rearrested him. He recalled filling a P3 Form and further proceeded to record statements from the witnesses. He also filled up age assessment form and then took the complainant to the hospital for establishment of her age. He produced Pex 3 which established that the complainant was aged 15 years.

17. At the close of the prosecution's case, the trial court found that he had a case to answer thus placed him on his defence.

18. The appellant chose to remain silent despite being warned of the consequences of his decision and the nature of the offence he was facing. He instead stated that he would not defend himself because he did not commit the offence and shall thus wait for the determination of the court.

19. I have considered the grounds of appeal, the record herein and the oral submissions by the respective parties. The only issue for my determination is whether the prosecution proved its case beyond reasonable doubt.

20. The appellant was charged with the offence of defilement contrary to Section 8 of the *Sexual Offences Act* which stipulates as follows: -

> Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. ...
>
> 3. 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.

21. It is trite law that for the prosecution to establish the offence of defilement, three key elements of the offence have to be proved inter alia; age; penetration and; positive identification of the perpetrator. [See George Opondo Olunga vs Republic [2016] eKLR.]

22. On age, the complainant testified that she was aged 15 years at the time when the offence was allegedly perpetrated against her. PW2 in the same breadth corroborated the evidence of the complainant that indeed she was 15 years old. Similarly, the prosecution produced an age assessment report which was established to be 15 years. As such, I have no doubt that the first ingredient of the offence of defilement was proved to the required standard.

23. On the ingredient of penetration, the same is defined under Section 2 of the Act as follows: -The partial or complete insertion of the genital organ of a person into the genital organs of another person.

24. The above definition connotes that penetration need not be complete. Therefore, penetration can be proven by either the sole testimony of the victim in line with Section 124 of the *Evidence Act* or the victim's testimony corroborated by medical evidence.

25. The minor testified that as she grazed the camels, the appellant swept her feet thus making her fall and then held her neck firmly hence strangling her as he blocked her nose. That the appellant stripped her clothes off and proceeded to defile her. It was her case that the appellant defiled and consequently ejaculated inside her.PW2 in support of the evidence of PW1 testified that she examined the complainant's genitalia and saw blood and whitish discharge flowing from therein. PW4 also corroborated the evidence of the complainant that indeed there was evidence of penetration as there was evidence of spermatozoa discharge, vaginal discharge and tenderness. Besides, the victim had sustained injuries by way of bruises on the neck and left forearm suggestive of the struggle they engaged in as the appellant strangled her.

26. From the above, it is clear that indeed, the complainant was penetrated but the question that remains is by whom?

27. It is the identification that links an accused person to an alleged offence. In this regard, the prosecution was also required to prove the identity of the assailant. In the case herein, the appellant in his evidence denied responsibility of being the assailant in as much as he declined to give his defence.

28. PW2 and PW3 testified that the appellant was a person well known to them as he lived in their neighbourhood. In any event, the appellant from his cross examination purported to have had a grudge with the victim's family implying that they knew each other well as neighours. In my view therefore, identification was by way of recognition and as such, the prosecution fulfilled this requirement too.

29. Although the only direct evidence connecting the appellant with the offence is the evidence of the complainant alone, the trial court correctly cautioned itself on the dangers of relying on the evidence of a single witness alone and properly invoked section 124 of the *Evidence Act*. Indeed, under the said provision, a court can safely convict an accused person charged of a sexual offence without mandatorily requiring corroborative evidence as long as the court is satisfied of the truthfulness the witness. See Arthur Mushila Manga v Republic (2016)e KLR where the court held that;

> " From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

30. According to the assessment of the trial court, pw1 was truthful and believable. In the case of *Dennis Osoro Obiri v Republic (Criminal Appeal 279 of 2011)* [2014] KECA 598 (KLR) (Crim) (9 May 2014) (Judgment) the court of appeal held as follows;

> " The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence

of a child of tender years. In JACOB ODHIAMBO OMUMBO v REPUBLIC, Cr. App. No 80 of 2008 (Kisumu), this Court made the same point as follows:

"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, as amended by *Act No. 5 of 2003*."

Earlier in MOHAMED VS REPUBLIC (2006) 2 KLR 138, this Court asserted:

"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

31. Having satisfied myself that pw1 was truthful in her testimony, her evidence did not require corroboration to convict. In my view, the evidence of pw1 was not challenged and the victim having demonstrated her reliability as a believable witness, I have no reason to depart from the trial court's finding that indeed there was positive identification and that pw1 was defiled by the appellant on the material day.

32. The appellant argued that the prosecution's evidence was marred by inconsistencies and contradictions but from his submissions, nothing was demonstrated to this court to support such an allegation. To my view, the prosecution's evidence was flawless and to the point. In the same breadth, the appellant could not be heard alleging that his defence was not considered yet despite being given many chances to defend himself, he chose to remain silent. In view of the foregoing, all the grounds of appeal as listed in the petition are found to be bases less.

33. On sentence, it is trite that sentencing is an 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 vs R., and Wilson Waitegei v Republic [2021] eKLR].

34. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Act. The same provides that 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.

35. In this case, the appellant was sentenced to 20 years' imprisonment noting that the trial court considered the circumstances of the case. Before this court, nothing has been shown that the trial magistrate erred in any way and it is my view after re-evaluating the entire evidence that this appeal lacks merit and the same is hereby dismissed. I affirm both conviction and sentence.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE