PNM v Republic (Criminal Appeal E065 of 2024)
[2024] KEHC 16263 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E065 OF 2024

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

PNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J. Githaiga, in the Magistrate's Court at Siakago Sexual Offence Case No. E020 of 2024 delivered on 29th August 2024)

JUDGMENT

1. The appellant faced 2 counts. The first one was the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No.3 of 2006. Particulars are that on 8th June 2024, at about 1730hrs in Mbeere North sub-count, Embu County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of YNM, a child aged 9 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 8th June 2024, in Mbeere North sub-count, Embu County, the appellant willfully and unlawfully caused his penis to touch the vagina of YNM, a child aged 9 years.

2. The second count was deliberate transmission of HIV contrary to section 26(1)(a) as read together with 26(1)(c) of the *Sexual Offences Act*, whose particulars are that on 8th June 2024, at about 1730hrs in Mbeere North sub-count, Embu County, the appellant intentionally, knowingly and willfully transmitted HIV to YNM, a child aged 9 years while having knowledge that he was infected with HIV.

3. The appellant pleaded not guilty to all the charges and he was heard, convicted and sentenced. The appellant was dissatisfied with the findings of the trial court and he filed a petition of appeal dated 05th August 2024 seeking that the appeal be allowed, the conviction be quashed, sentence be set aside and he be set at liberty. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

a. By convicting the appellant without the elements of the offences being proved;

b. By imposing a harsh and severe sentence;

c. By convicting the appellant on the second count yet no medical evidence was produced to prove;

d. By showing open bias in convicting the appellant on the second count which was not on the charge by the prosecution; and

e. By rejecting the appellant's defense which was enough to lead to an acquittal.

4. At the trial, PW1 was Joshua Ireri Njagi, a clinical officer who examined the victim. He stated that the minor's labia minora and majora were swollen and there were no signs of penetration or tears. That he conducted further tests for HIV, pregnancy VDRL and urinalysis they all returned negative results. That the minor was given PEP, contraceptives and antibiotics to prevent STI. He produced the P3 and PRC forms as evidence. He stated that the labia minora and majora were swollen but there was no sign of penetration and the child did not remember what had happened. That the injuries were a few hours old and they were soft tissue injuries. He also produced the test results for the appellant which were conducted at Siakago Level 4 hospital showing that he was HIV positive. On cross-examination, he stated that he did not examine the appellant and that he only examined the minor.

5. PW2 was the victim who stated that she was on the way to her uncle's place to pick up her brother when she met the appellant by the river. That the appellant grabbed her, removed her clothes and made her to lie down then he did bad manners to her while holding her mouth so that she would not scream. That the appellant put his penis on her vagina but he did not penetrate. That another girl passed by and when the appellant saw her, he ran away as the girl screamed and called for help.

6. That the appellant promised to give her Kshs.100/= if she did not tell anyone but he did not and he also threatened to kill her if she spoke about the incident. She stated that since she feared for her life, she did not tell anyone about it. That she felt pain a few days later and that is when her mother took her to the police station and then to the hospital. She identified the appellant as her assailant. On cross-examination, she stated that her mother did not tell her to lie to the court. That the appellant defiled her by the river and then promised to give her kshs. 100/=

7. PW3 was the victim's mother who stated that she was preparing PW2 to go to church but she refused and said that the appellant had done bad manners to her. That PW2 told her that she did not scream because the appellant was holding her mouth but another girl is the one who screamed. That she reported the matter to Ishiara Police Station and since the hospital was not operating that day, the OCS called PW1 to examine PW2. That PW2 was examined and treated. She stated that the appellant looked for her to apologize but she told him that the matter was in court. On cross-examination, she denied lying to the court and stated that the appellant was arrested while at her house where he had gone to charge her phone.

8. PW4 was PC Sabina Wanja, the investigating officer, who stated that the incident was reported the day after it occurred. That the victim was escorted to the hospital for examination and treatment and PW1 filled the P3 and PRC forms. The appellant was arrested in connection with the incident and he was charged after the age of the victim was ascertained from her birth certificate. That the appellant was examined and found to be HIV positive. On cross-examination, he stated that the appellant had been arrested by members of the public and then she re-arrested him afterwards. That the deceased was not bleeding at the time of the report and she had already changed her clothes.

9. At the close of the prosecution's case, the trial court put the appellant to his defense.

10. DW1 was the appellant who stated that on the day of the incident, he was working the whole day until 7pm and then he went home. That the following day, he went to take alcohol at the complainant's home and that is when he was arrested. That his uncle has faced defilement charges before and that there is bad blood between him and his uncle.

11. DW2 was Flora Wanjeru who stated that the appellant was being accused falsely. That on the day of the incident, she had hired the appellant to dig a pit latrine hole for her and he reported to work at 7am and left at 7pm. On cross-examination, she stated that the appellant left her house after taking supper and that he was escorted by her son. That her home and that of the appellant are not far.

12. DW3 was DK who stated that his son, the appellant, told him that he was going to work at the home of DW2 and he returned home at 7pm. She couldn't account for the other whereabouts of the appellant's day.

13. The trial court convicted the appellant of both counts and sentenced him to 50 years imprisonment on the first count and 15 years imprisonment on the second count.

14. The court directed the parties to file their written submissions but only the respondent complied.

15. The respondent relied on sections 2 of the *Sexual Offences Act* and the cases of AML v. Republic (2012) eKLR and Edwin Nyambogo Onsongo v. Republic (2016) eKLR. It argued that the prosecution evidence proved the elements of the first count. It also relied on section 26(1) of the *Sexual Offences Act* and argued that the second count had been proved beyond reasonable doubt. It stated that there is no legal basis for reviewing the sentences imposed by the trial court.

16. The issues for determination are as follows:

    a. Whether the offences were proved beyond reasonable doubt; and

    b. Whether the sentences meted out to the appellant are harsh and excessive.

17. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of Kiilu & Another v. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on 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 conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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."

18. As to whether the first charge was proved beyond reasonable doubt, section 8(1) and (2) of the *sexual Offences Act* provides:

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

19. Therefore, the elements of the offence are as follows:

a. The age of the complainant- that the complainant was a child;

b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;

c. The perpetrator was positively identified.

20. The age of the victim herein was determined through her birth certificate produced as evidence and it shows that she was born in December 2014. As at the time of the incident, she was 9 years old, a minor. This is sufficient proof of the complainant's age. In the case of Alfayo Gombe Okello v. Republic Cr App No 203 of 2009 (Kisumu), the court stated as follows;

> " In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

21. On the element of penetration, PW1 testified that when he examined the victim, there was no sign of penetration but the labia minora and majora were swollen. PW2 testified that the appellant accosted her, made her to lie down and then he tried to insert his penis into her vagina but he did not penetrate. From this evidence, the element of penetration was conspicuously absent.

22. PW2 identified the appellant as her aggressor. She stated that she was walking by the river to her uncle's place when the appellant grabbed her by the hand, removed her clothes and made her to lie down. That the appellant ran away when another girl who was passing by, saw him. Even though this other girl was not a witness in this case, the testimony of PW2 is sufficient to identify her attacker. The appellant was the complainant's neighbour and she knew him so well and when she was asked by her mother what had happened, she gave the name of the appellant that they used to refer him with. Further, the offence happened during the day. This testimony does not need to be corroborated because of section 124 of the *Evidence Act*, whose proviso provides:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

23. From the evidence, there is no doubt in the court's mind as to the identity of the appellant as the assailant. He definitely tried to defile the victim but he did not penetrate her. In my view, the first count was not proved beyond reasonable doubt. However, from the same evidence it is clear that the appellant attempted to defile the complainant and this explains why she had a swollen labia minora and majora. I find that though the offence of defilement was not proven, the evidence on record discloses the offence of attempted defilement and I hereby convict the appellant for the said offence. This

24. On the second count, PW1 testified that the victim was tested for HIV and the result was negative. He also produced the HIV test results for the appellant as conducted at Siakago Level 4 Hospital and the same were positive. He stated that he did not examine the appellant. From a perusal of the PRC form, the victim tested negative for HIV. Section 26(1) of *Sexual Offences Act* provides:

> " (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly an willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know-

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life."

It is my view that the second count was not proved beyond reasonable doubt.

25. Therefore, it is my finding that the appeal partially succeeds. The following orders shall issue:

a. The appellant is hereby convicted of the offence of attempted defilement and he is sentenced to 30 years imprisonment.

b. The trial court's finding convicting the appellant on the first and second counts is hereby set aside; and

c. The sentences passed by the trial court on both main counts are hereby set aside.

26. It is so ordered.

conclusions

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent