Republic v Njiru (Criminal Appeal E062 of 2024)
[2024] KEHC 16176 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16176 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E062 OF 2024

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

GEOFFREY NJIRU ..... RESPONDENT

(Appeal arising from the decision of Hon. S. Ouko (SRM) in the Runyenjes MCSO No. E012 of 2023 delivered on 31st July 2024)

JUDGMENT

1. The appellant has filed a petition of appeal dated 14th August 2024 seeking the following orders:
    a. That the appeal be allowed;
    b. The order of acquittal of the respondent be set aside; and
    c. This honourable court finds the respondent guilty of the offence charged and convicts him accordingly under Article 165 of *the Constitution*.
2. The appeal is premised on grounds that:
    a. The trial magistrate erred in law and fact by failing to appreciate that the prosecution proved the ingredients of the offence to the required standard; and
    b. The trial magistrate erred in law and fact by disregarding the evidence adduced by PW1-PW4 regarding the circumstances of commission of the offence;
    c. The trial magistrate erred in law and fact by disregarding the independent evidence adduced by PW1-PW4 that directly linked the respondent to the offence;

d. The trial magistrate erred in law and fact by failing to consider the overwhelming evidence tendered and the evidence of the surrounding circumstances bearing in mind the complainant's mental disorder and her inability to communicate and testify;

e. The trial magistrate erred in law and fact by failing to note that the evidence adduced by the prosecution witnesses was corroborated and well supported by evidence;

f. The trial magistrate erred in law and fact by failing to consider the prosecution evidence in totality;

g. The trial magistrate erred in law and fact by considering irrelevant and extraneous factors in arriving at the decision to acquit the respondent; and;

h. The trial magistrate erred in law and fact in finding that the prosecution failed to prove the charges against the respondent beyond any reasonable doubt.

3. The respondent was charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that, on 06th July 2023, within Embu East sub-county in Embu County, the respondent intentionally and unlawfully caused his penis to penetrate the vagina of FKM a child aged 12 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 06th July 2023, within Embu East sub-county in Embu County, the respondent intentionally and unlawfully caused his penis to penetrate the vagina of FKM a child aged 12 years.

4. The respondent pleaded not guilty to the charge and the matter proceeded to hearing. PW1 was the victim's mother who stated that the victim was born in 2011 and shortly after her birth, she was diagnosed with autism thus she lives with a disability. That the respondent is their neighbor. That the victim's teacher told her the respondent usually defiles the victim and she bleeds afterwards. That the victim told her teacher that the respondent told her not to tell anyone about the defilement. She stated that she reported the matter to the police who escorted her to the hospital and the respondent was charged with the offence. That the victim told her that the respondent put his penis into her vagina after giving her food to eat at his home.

5. PW2 was Ann Githinji, a clinical officer at Runyenjes hospital who stated that upon examining the victim on 10th July 2023, she noted some signs of inflammation on the left labia manora but there were no tears or discharge and the hymen was broken. The lab tests were non-reactive and there were no spermatozoa cells present. She filled the P3 and PRC forms on the same date and produced them as evidence.

6. PW3 was PC Patriciah Kimwele of Runyenjes Police Station who stated that PW1 reported that her daughter had been defiled by the respondent who is their neighbor. That the victim had told her mother that the respondent had taken her to his house, gave her ugali and mboga and then defiled her. She stated that the victim was escorted to hospital and the respondent was arrested and charged. That the victim is mentally challenged and that she did not tell the police officer anything

7. PW4 was STM, the victim's teacher who stated that on 05th July 2023, she was distributing sanitary towels to the students when the other students told her that the victim had also started experiencing her periods. That when she engaged the victim, she told her that she had bled only once when she went to the respondent's home and ate ugali and mboga. After saying that, she refused to say anything else and that is when PW4 told PW1 the information. That PW1 was not aware of the victim's visit to the respondent.

8. After the close of the prosecution's case, the court found that the respondent had a case to answer and placed him on his defense.

9. In his defense, the respondent denied the allegations and stated that the victim used to go to his house but on that day, she did not go. That the alleged day of the incident, he was at home with his daughter and he did not have sex with the victim.

10. After close of the defense case, the trial court found reasonable doubt in the prosecution's case and acquitted the respondent of the charge. The trial court also noted that the respondent was mentally challenged and he pleaded this and proved it at some point during the trial.

11. The appeal herein was canvassed by way of written submissions.

12. The appellant placed reliance on section 2 of the *Sexual Offences Act* and the case of AML v. Republic (2012) eKLR and argued that the evidence was sufficient to convict the respondent. It also relied on the case of MM v. Republic [2023] KEHC 381 (KLR) and section 33 of the *Sexual offences Act* which allows the court to rely on the circumstances surrounding the offence given that the victim was mentally challenged and was unable to communicate to the court. That the age of the victim is not in question as the same was proved by PW1 and it cited the case of Edwin Nyambogo Onsongo v. Republic (2016) eKLR.

13. The respondent submitted that the entirety of the evidence did not point to the him as the perpetrator. He relied on the cases of Republic v. Elizabeth Anyango Ojwang (2018) eKLR and Republic v Annette Achieng (2019) eKLR and argued that where the prosecution seeks to rely on circumstantial evidence, it must prove motive on the part of the assailant. That circumstantial evidence must be firmly established, show definitely that the accused person committed the offence and should form a strong chain of evidence before an inference of guilt can be drawn. He argued that the prosecution's case is based on a suspicion which is not enough to convict him.

14. From the foregoing, the issue for determination is whether the trial court erred in acquitting the respondent given the circumstances.

15. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it held:

> " 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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

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

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

17. In this case, I do note that the victim is mentally challenged. She did not testify even though the trial court accommodated several attempts to hear her testimony even through an intermediary. The prosecution begrudgingly continued with its case without the testimony of the victim. The respondent also pleaded that she was mentally ill and produced a mental assessment from Embu Level 5 Hospital which states that he was diagnosed with mild schizophrenia and he had had the condition for 30 years. The trial court took note of this evidence.

18. On the element of the age of the victim, PW1, the victim's mother testified that at the time of the incident, the victim was 12 years old and she produced a birth certificate as proof. This was sufficient proof that the victim is indeed a minor.

19. Secondly, the prosecution had to prove that the respondent defiled the minor. PW1 stated that she was informed by PW4 that Njiru does bad manners with the victim. She told PW4 that she was not aware. PW2 testified that upon examination, there was proof of penetration since the hymen was broken and there were signs of inflammation on her private parts. That the inflammation was a few days old. PW4 testified that when she was distributing pads to students, they told her that the victim also needed them because she was experiencing her monthly periods. However, when she asked the victim about that, the victim told her that she had only bled once and then it stopped. That it was the time when Njiru took her to his house, gave her ugali and mboga and then inserted his penis into her vagina. PW4 testified that when she asked if the victim had told her mother, the victim coiled back and did not speak about that issue again.

20. The standard of proof in criminal cases is well established and it is beyond reasonable doubt. According to Duhaime's Criminal Law Dictionary, reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. In the case of Wamunge v. Republic, (1980) KLR 424 it was held;

> " It is trite law that where the only evidence against a defendant 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 favorable and free from possibility of error before it can safely make it a basis for conviction"

21. In sexual offences, the testimony of the victim may be held as proof to the required standard of the assailant's identity. Under Section 124 of the *Evidence Act* (proviso), the trial court is obligated to hear the victim regarding identification of the assailant and then record its reasons for believing that she/he is telling the truth. This means that the testimony of the victim would not need to be corroborated to prove the identity of the attacker. The provision states:

> " .....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."

22. As stated earlier, the testimony of the victim was not recorded owing to her mental incapacity. The court allowed several attempts but the victim did not cooperate. PW3 stated that when the incident was reported, the victim did not speak a word to her probably because of her mental incapacity. Without the key testimony of the victim, the trial court relied on section 33 of the *Sexual Offences Act* and was unable to piece together circumstances surrounding the offence that would point to the respondent as the assailant. The only evidence before the court on identification of the assailant is that of PW3

and PW4. The evidence is the version presented by the victim, without much detail. The witnesses, therefore, presented the same evidence which can be safely held as hearsay.

23. I do agree with the trial magistrate that even if the circumstances surrounding the matter were to be considered, they do not form a strong chain of evidence to infer guilt upon the respondent. This is one of the tenets of considering circumstantial evidence as guided by the Court of Appeal in the case of Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) where it held as follows:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

24. From examining this evidence, it is my view that the standard of proof was not satisfied as regards identification of the respondent as the assailant. The offence is indeed a serious one and if the respondent is to be convicted, then the proof must be beyond reasonable doubt. There is such a great suspicion that the respondent committed the offence, a suspicion that is appearing through the only available evidence. However, this suspicion is not enough to infer criminal liability upon the respondent without proving the matter to the required standard.

25. The trial court considered the evidence by the respondent that he had a long-standing mental condition and reasoned along those line. In my view, that is an extraneous factor that has no direct bearing to a finding of guilt or otherwise in this case. The only defenses available for sexual offences are found in the *Sexual Offences Act* and mental incapacity is not one of them. Moreover, the law empowers a court to make a special finding of guilty but insane if the circumstances demand it.

26. It is very unfortunate that the victim has been scarred by this heinous act but there is reasonable doubt as to the identification of the respondent as the victim's assailant. Be that as it may, I find that the trial court did not err in acquitting the respondent.

27. Therefore, the appeal lacks merit and the same is hereby dismissed.

28. It is so ordered.

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

L. NJUGUNA

JUDGE