IMM v Republic (Criminal Appeal E051 of 2022) [2024] KEHC 15974 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15974 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E051 OF 2022

HI ONG'UDI, J

DECEMBER 18, 2024

BETWEEN

IMM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment in Nakuru Chief Magistrate's Court Criminal Case (Sexual Offences) No. 75 of 2018 delivered by Hon Y. I. Khatambi on 17th December, 2021)

JUDGMENT

1. IMM the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that the appellant on the 15th day of May, 2018 within Nyandarua county, intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of MNW a girl aged 11 years old which caused penetration.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
3. He denied both counts and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave a sworn statement of defence and called no witness. Thereafter the trial court found the appellant guilty, convicted and sentenced him to twenty (20) years imprisonment.
4. The appellant being aggrieved with the Judgment filed this appeal citing the following amended grounds:
   1. That the learned trial Magistrate erred in law and fact during the trial of this case when she relied on the evidence of PW1 which were total lies according to the trial record.

ii. That the learned trial Magistrate erred in law and fact during the trial of this case when she didn't note that the investigation of this case was poorly done according to the trial record.

iii. That the learned trial Magistrate erred in law and fact during the trial of this case where she relied on the evidence of the doctor without noting that the accused was not examined to prove his allegations.

iv. That the learned trial Magistrate erred in law and fact during the trial of this case when she rejected his defense evidence without giving a tangible reason why the defense was not acceptable.

5. A summary of the case before the trial court was that the victim (PW1) was in the appellant's house sweeping when he held her and defiled her. He had removed his clothes and hers before defiling her. He then threatened to kill her if she reported the incident. She left the house and went to the room to sleep. She lived with her grandfather and mum and she reported this incident to the grandfather.

6. The appellant was arrested by members of the public before his re-arrest by the police. PW2 – Peter Mutero a clinical officer from Ndundori Health Center examined the child on 29th May, 2018 and he found her to have been defiled. He placed PW1's age at 11 years.

7. The investigating officer (PW4 No. 255075 P. C. Michael Karani) testified that JM the grandfather of PW1 had on 13th May, 2018 sent PW1 to pick a battery. That on the way the appellant called her and took her to his home and defiled her. This was after interrogating her. He produced the age assessment report (P. EXB 2) dated 11th December, 2018 showing she was aged 12 years then.

8. In his sworn defence the appellant stated that on 13th May, 2018 at 5.00pm he had gone to look for trees when he met Peter Ndung'u with whom he was to go to work. While at the Bata Trading Center with Peter Ndung'u and Gakira having a meal, Mwangi and Gikonyo arrived and called Peter Ndungu and they spoke. Mwangi then called him and they spoke as he held his hand. He was first led to the club owned by Mama John, and then to her 'house'. While there, Mama John, asked him why he committed the offence against the child. The ladies and men present beat him and even poured water on him. He was rescued by the chief (Ruth). He was eventually arrested and taken to the police station. He admitted that PW1 is his sister's daughter.

9. The appeal was canvassed through written submissions.

Appellant's submissions

10. The appellant who acted in person filed submissions dated 11th March 2024. On the first ground he urged the court to ignore the evidence of PW1 which he said was not truthful. He based this on the claim that PW1 had been coached by a lady called Dorothy Onchume who did not testify.

11. Grounds 2, 3 and 4 were merged and argued together. He submitted that PW4 (the investigating officer) did not carry out proper investigations. He compared the evidence of PW1 and what PW4 told the court about what PW1's grand father had told him. He further submitted that the age of PW1 was never proved as no concrete evidence was adduced. On this point he relied on the case of Peter Maina V Republic [2016] eKLR.

12. The appellant wondered why PW1's grandfather never testified yet he is the one PW1 allegedly reported the incident of defilement to. He urged the court to ignore PW1's evidence, since he was never examined to prove it was him who had defiled the child. Finally, he submitted that his defence was never considered by the trial court.

Respondent's submissions

13. These were filed by Mrs Emma Okok the Principal prosecution counsel and are dated 15th October, 2024. Counsel submitted that all the three ingredients required for proof of an offence of defilement were met. On penetration she referred to the evidence of PW1 which was supported by that of the clinical officer (PW2).

14. On the element of age, she referred to the evidence of PW2 and the age assessment report (EXB 2). Its her contention that the appellant was identified by PW1 as her uncle. That the child was able to describe what the appellant wore though it was at night. Referring to the appellant's sworn defence counsel submitted that the appellant admitted to being PW1's uncle, and that the evidence against him was very tight. She urged the court to uphold the conviction.

15. On sentence she argued that the charge sheet showed the victim's age as 11 years hence the charge under section 8(1) as read with section 8(2) of *Sexual Offences Act*. Counsel thus submitted that this error is not a fatal defect and can be cured under section 382 of the Criminal Procedure Code. That the appellant was able to understand the charges facing him and he fully participated in the trial. She pointed out that the appellant had been in prison custody during the trial but this period was not considered by the trial court in meting out the sentence. She thus requested this court to invoke section 333(2) of the Criminal Procedure Code.

Analysis and determination

16. This is a first appeal and this court is called upon to re-examine and re-consider the evidence and make its own independent conclusion. The court has to bear in mind that it did not see nor hear the witnesses and so give an allowance for that. The Court of Appeal in Boru & another V Republic [2005] I KLR 649 held thus:

> " A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal".
>
> Also see: Okeno Vs Republic [1972] E.A 32, Simiyu & another V Republic [2005] I KLR 192 and Kiilu & another V Republic [2005] IKLR 174.

17. Upon careful consideration of the evidence on record, amended grounds of appeal, both submissions and the law, I find the main issue for determination to be whether the charge of defilement was proved against the appellant beyond reasonable doubt. Section 8(1) of the *Sexual Offences Act* defines defilement as follows:

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

Further section 2 of the same Act defines "penetration" as follows:

> " 'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

18. For a charge of defilement to be proved the following ingredients must be proved:

    i. Age of the victim showing she/he was a minor

ii. The act of penetration of the victim's genital organ.

iii. Identification of the accused as the culprit.

Age

19. The victim herein did not know her age, having been brought up by her grandparents who did not have any documents hence the age assessment. PW2 the Clinical Officer approximated the child's age to be 11 years. (P. EXB 1). The age assessment was ordered for by the court. The assessment report produced by PW4 as P. EXB 2 showed the minor was 12 years old, which is not what was indicated in the charge sheet. Is this error fatal? Mrs E. Okok prosecuting counsel submitted that it was not.

20. Section 382 of the Criminal Procedure Code which deals with such an issue provides:

> " subject to the provisions hereinbefore contained, no finding, sentence or order passed by the court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings, under this code unless the error, omission or irregularity has occasioned a failure of justice.
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

21. Considering the material on record and the above provision, I do not find any injustice occasioned to the appellant, since the issue of age only relates to sentence which can always be adjusted depending on whether the main element which in this case is the defilement is proved. I therefore find that the child's age was established to be twelve (12) years proving that she was a minor.

Penetration

22. In her evidence PW1 explained the incident in the following words at page 21 of the proceedings:

> " Uncle removed his clothes, he then removed my clothes. He told me to lie down. He did bad manners to me. He took his thing for urinating and put it here (points at her crotch). I cried."

23. PW2 the clinical officer who examined PW1 found her hymen to have been broken with rugged healing. The injury he said was caused by penetrative blunt force. In cross examination by the appellant he said he noted that the hymen had been broken by a big object, like a penile shaft. I am thus satisfied from the medical evidence that indeed there had been penetration of the minor's genital organ.

Identification

24. PW1 testified and identified the appellant as uncle I, and the person who defiled her. The appellant confirmed that he is a brother to PW1's mother hence an uncle to PW1. The appellant was arrested by members of the public and this was confirmed by Ruth Mwangi (PW3) the assistant chief. PW1 even described the clothes the uncle wore on that night as "A Tee-shirt and a trouser". Infact in cross-examination the appellant did not ask PW1 any question on the issue of the actual defilement. She referred to him as uncle M and uncle I. This confirms that she knew him very well.

25. The appellant in his submissions asked this court not to rely on PW1's evidence as it was not reliable. The reason he gave for this was that PW1 was allegedly coached by a lady called Dorothy, who never testified. The record shows that PW1 was not living with a parent or parents but with grandparents. It was noted in court on 18th October, 2018 that the grandfather who took care of PW1 and who was in court that day was very elderly. PW1 was placed in a children's home for obvious reasons (trauma and want of proper care)

26. Dorothy Onchoma was the care giver at Welcome to Community where PW1 had been placed. On 18th January, 2019 when Dorothy Onchoma appeared in court she informed the court that PW1 was undergoing psychological guidance and counselling. She gave a progress report to the court on 22nd October, 2019.

27. On 31st October, 2019 when PW1 started testifying she reached a point and stopped talking and had to be stood down to 21st November, 2019 when she picked up and explained to the court what the appellant did to her. She responded well in cross examination. On being examined by the court she said:

> " It was not the first time uncle defiled me".

The appellant never raised an issue with this response. The said answer resonates very well with the finding by the clinical officer (PW2) upon examination of PW1's genital organ.

28. The appellant in his defence denied the offence and explained his movements on the date of incident. He never called his alleged friends Peter Ndung'u and Gakira to come and support his story.

29. There was no eye witness to this incident. The court had to weigh PW1's evidence to see if it was reliable. Section 124 of the *Evidence Act* provides:

Corroboration required in criminal cases

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> 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".

30. The learned trial Magistrate in her Judgment referred to section 124 of the *Evidence Act* and gave reasons as to why she believed PW1's evidence. She found PW1 to be a truthful witness.

31. My finding is that PW1 and the appellant are well known to each other. The child was not coached to fix him. Dorothy's facility took up the child to assist her recover from the trauma she was going through. It's evident that PW1 revealed the appellant's name to those who arrested him soon after the incident. There was no evidence adduced revealing any grudges or enemity between PW1 and the appellant to make the minor lie against him.

32. I am satisfied that the trial Magistrate assessed the evidence well and arrived at the correct finding in convicting the appellant. I will therefore not interfere with the conviction.

33. On sentence section 8(3) of the *Sexual Offences Act* provides:

> " A person who commits an offence with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years".

The twenty (20) years sentence is the minimum sentence for defilement of a 12 year old and is not negotiable. The Supreme Court in Republic V Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amiecus Curiae) (Petition Bo. E018) of 2023 [2024] KESC 34 (KLR) recently spoke to this, and made the position very clear on minimum sentences. This court is bound by the said decision.

34. As rightly noted by the respondent's counsel the trial court in sentencing did not adhere to the provisions of section 333(2) of the Criminal Procedure Code. The Appeal succeeds on that point only.

35. I therefore find no merit in the Appeal which I hereby dismiss. The conviction and sentence are upheld with an order that the sentence of 20 years imprisonment runs from 17th May, 2018 when the appellant was first arraigned in court.

36. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF DECEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE