Nyamwaya v Republic (Criminal Appeal E006 of 2023) [2024] KEHC 16046 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16046 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E006 OF 2023

WA OKWANY, J

DECEMBER 18, 2024

BETWEEN

ERICK ATUTI NYAMWAYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Principal Magistrate's Court at Keroka, SO No. E18 of 2020 delivered by Hon. B.M. Kimtai, Principal Magistrate on 2nd December 2021)

JUDGMENT

1. The Appellant herein was convicted of the offence of defilement contrary to Section 8 (1) as read with 8 (3) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 18th April 2020 and 5th May 2020 in Masaba Sub-Location South Sub-County within Kisii county, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ, namely, vagina of DKM (particulars withheld) a child aged 13 years.

2. The Appellant was, upon conviction, sentenced to serve twenty (20) years' imprisonment thereby triggering the filing of the instant appeal. A perusal of the grounds of appeal, in the Petition of Appeal, however reveals that the Appellant mainly seeks a more lenient sentence. The Appellant states that he is from a poor family and is remorseful for his actions. He further states that he has gone through rehabilitation during his imprisonment period and therefore implores this court to consider reducing the 20 years imprisonment period in accordance with the provisions of Section 333 (2) of the Criminal Procedure Code.

3. As the first appellate court, this court is aware of its duty to reconsider and reanalyse the evidence tendered before the trial court in order to arrive at its own independent findings. In this case, the court's duty is even more heightened owing to the fact that the Appellant was not represented by a legal counsel

both before this court and at the trial court. In this regard, I find that it will be necessary to determine if the trial court arrived at the correct verdict on both the conviction and sentence. In Kariuki Karanja vs. R (1986) KLR 190 it was held thus: -

> "On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."

4. The Prosecution called a total of 5 witnesses before the trial court. A summary of the Prosecution's case was as follows: -

5. RB (particulars withheld) (PW1) the victim's mother testified that the victim disappeared from home for about two weeks and that she later learnt that the Appellant had hidden the victim in his house. She reported the matter to the Assistant Chief (PW2) and the Senior Chief (PW3). PW1, PW2 and PW3 went to the Appellant's house where they found the victim. They escorted the victim to the hospital. PW1 produced the victim's Birth Certificate as (P.Exh1).

6. PW4, Patricia Omari, was the Clinical Officer who examined and treated the victim at Nyamasibi Hospital on 5th May 2020. Her findings were that the victim's outer genitalia were intact with no bruises but that the hymen was missing. She produced the PRC Form (P.Exh2), Lab Request Form (P.Exh3a) and (b), the victim's P3 Form (P.Ex4) and the Appellant's P3 Form (P.Exh5).

7. PW5, No. 77xxx P.C. John Kinuthia, was the Investigating Officer. He received the defilement report from PW1 who claimed that she had found the victim in the Appellant's house. He produced the victim's items of clothing that were recovered from the Appellant's house.

8. When placed on his defence, the Appellant (DW1) denied the offence and explained that the area chief arrested him over allegations of being in possession of cannabis sativa (bhang). He also stated that the area chief taunted him over the fact that he was still a bachelor.

9. The appeal was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the offence herein was proved against the Appellant, beyond reasonable doubt.

10. Section 8 (1) and (3) of the *Sexual Offences Act* stipulates as follows: -

    8. 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.

11. In Dominic Kibet vs. R [2013] eKLR the court outlined the ingredients of the offence of defilement thus:

> "To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

12. PW1 testified that the victim was born on 13th July 2007. She produced the victim's Birth Certificate Serial No. (particulars withheld) which indicates that the victim was 14 years old at the time of the incident. I am satisfied that the ingredient of minority age of the victim was proved to the required standard.

13. Turning to proof of penetration, the Prosecution presented the evidence of PW4, the Clinical Officer, who testified that the victim's genitalia had no external bruises but that her hymen was not intact. Laboratory tests revealed that the presence of puss cells.

14. It is trite that mere absence of hymen is not conclusive proof of sexual penetration as there are instances when the hymen may be broken by factors other than sexual intercourse. This is the position that was taken by the Court of Appeal in PKW vs. Republic [2012] eKLR, where it was held thus: -

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen –vs- Manuel Vincent Quintanila (1999) AB QB 769.""

15. The most peculiar aspect of this case is the fact that the trial was conducted and concluded without the victim's testimony. The trial court's record is silent on the whereabouts of the victim save for a comment, made by the prosecuting counsel at the end of the case, to the effect that the victim was found to be mentally unstable. I however note that no material was placed before the trial court to show that that victim was mentally ill or was unable to testify. There was therefore no evidence from the complainant/victim to prove that she was defiled/penetrated.

16. The only evidence that appeared to link the Appellant to the offence is the claim that the victim was found in his house. The Appellant was however not found in the said house or in the act of defiling the victim who was reported to have been alone in the house at the time. The court was also not told if the Appellant lived alone in the said house. This court cannot therefore rule out the possibility that any other person could have defiled the victim, if indeed the victim was sexually assaulted. To my mind, the mere fact that the victim was found in the Appellant's house was only circumstantial evidence which did not connote that the Appellant took advantage of her.

17. In Kariuki Karanja vs. R (1986) KLR 190, the Court of Appeal considered circumstantial evidence and held that:

> " In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: Rex v. Kipkering Arap Koske, 16 EACA 135.

> An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence."

18. The trial court held as follows on penetration: -

> " From the examination she had no injuries on her genitalia therefore there was no evidence of any sexual activity……. I am convinced beyond doubt that the accused herein must have defiled the minor herein."

19. My finding is that the trial court erred in holding that the minor must have been defiled in the face of clear medical evidence to the contrary. This court is of the view that the failure, by the Prosecution, to present the evidence of the victim dealt a fatal blow to the Prosecution's case and resulted in a case that was fraught with grave danger of wrongful conviction based on inconclusive proof of penetration. It is my view that failure to present the victim's evidence meant that it was wholly unsafe to convict the Appellant.

20. On the issue of the identification of the Appellant as the perpetrator of the offence, I find that the failure to call the victim's evidence resulted in a trial that was merely founded on unsubstantiated circumstantial evidence. The circumstances of this case were such that only the victim could have identified the Appellant as her defiler.

21. Having regard to my findings on the failure, by the prosecution, to present the evidence of the victim and the glaring gaps in the prosecution's case, I find that the trial court's conviction was not safe.

22. Consequently, I find that the instant Appeal is merited and I therefore allow it by quashing the conviction and setting aside the trial court's sentence. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

23. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE