Jeffer v Republic (Criminal Appeal E025 of 2021)
[2023] KEHC 213 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E025 OF 2021

FA OCHIENG, J

JANUARY 24, 2023

BETWEEN

JOSEPHAT MOENGA JEFFER ALIAS SIKAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Josephat Moenga Jeffer alias Sikai, was convicted for the offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. Thereafter, the learned trial Magistrate sentenced him to 30 years imprisonment.

2. In his appeal, the appellant has submitted that it was not safe to convict him based upon the prosecution evidence which has been adduced by the members of one family.

3. He pointed out that the evidence was tendered by the grandmother, the mother and the cousin of the complainant.

4. In his view such evidence was not worthy to peg a fair and just decision upon.

5. Recounting the evidence of PW1, the appellant said that the complainant had been with her 2 cousins, together with her grandmother. As PW1 testified that she had left the house together with the appellant, with a view to getting alcohol from the house of the appellant; it was the opinion of the appellant that PW1 would have been expected to seek permission from her grandmother.

6. His said opinion is founded upon the fact that PW1 was allegedly going to get the alcohol for her grandmother.

7. Secondly, the appellant noted that there was a discrepancy in the evidence tendered about the place where the complainant's grandmother was, at the time when the complainant allegedly went with the

appellant to his house. He submitted that it was not clear whether the grandmother was inside her house or in the shamba.

8. It was the appellant's further submission that if the complainant's grandmother was inside her house, (preparing food), the grandmother would have immediately noticed when the complainant left the said house.

9. Thirdly, the appellant submitted that the testimony of PW3 and PW4 was hearsay, which ought not to be relied upon by the court.

10. He noted that it was the complainant who told those 2 witnesses about what had allegedly befallen her.

11. The appellant told this court that the complainant had been coached and compelled by PW2. He attributes the action of PW2 to the fact that;

> " ... since the accused person is related to the family of the complainant, then there must be a possibility of them having differences, of which gave birth to this fabricated allegation."

12. The appellant submitted that the case was "well planned, only to tarnish my name and destroy my life. The speed that was used to report to the police is questionable. And the person who reported the matter to police is not revealed; and why at all"?

13. He went on to say that the failure to call other witnesses such as a neighbor, was an indication of a failure by police to carry out proper investigations into the case.

14. In his view, that would explain why the investigating officer only commenced her work after the appellant was already in custody.

15. As far as the appellant was concerned, the only role played by the investigating officer was the recording of witness statements.

16. But the appellant also noted that the investigating officer testified about the complainant's grandmother overhearing the appellant telling the cousins of the said complainant, that he would buy chips for them. However, as the complainant did not mention anything about the alleged offer of chips, the appellant described the testimony of the investigating officer as hearsay.

17. The other issue raised by the appellant was that his right to a fair trial was violated. The said complaint stems from the failure of the trial court to provide interpretation to the appellant, concerning the "medical words".

18. It was the understanding of the appellant that section 198 of the *Criminal Procedure Code* imposed an obligation on the court to ensure that the P3 Form was interpreted to him, in a language which the appellant was conversant with.

19. In any event, the appellant believes that the conviction was based on nothing more than an; "... emotional and shared intention," which the trial court had with the prosecution.

20. He therefore invited this court to disregard "the doctored incrimination from the prosecution", and to proceed to quash the conviction and set aside the sentence.

21. Being the first appellate court, I am enjoined to re-evaluate the evidence on record, and to draw my own conclusions therefrom.

22. However, whilst drawing conclusions from the re-appraisal of the evidence, this court must not lose sight of the fact that it did not have the benefit of observing the witnesses when they were testifying.

23. In this case, the prosecution called 6 witnesses.

24. The complainant testified as PW1. She testified that the appellant had come to the house of her grandmother, where PW1 lived.

25. PW1 said that the appellant told her to accompany him to his grandmother's house, from where PW1 was to get some alcohol for her grandmother.

26. When PW1 reached the home of the appellant's grandmother, the appellant defiled her. After he had had his way with her, the appellant let PW1 go.

27. Whilst PW1 was on her way, she met her grandmother, who had been looking for her. PW1 promptly explained to her grandmother about what the appellant had done to her. PW1 also explained to her brother that the appellant had defiled her.

28. PW1 was taken to the hospital in Nyamira, where she was examined.

29. It is noteworthy that the appellant did not cross-examine the complainant. He told the trial court that he did not have any questions for the complainant.

30. PW2 is the grandmother of the complainant. She testified that on the material day, the appellant was at her house. PW2 said that the complainant and the appellant were no longer in the house. However, at some point PW2 noticed that both the complainant and the appellant were no longer in the house. She therefore set out to look for them.

31. When PW2 found the complainant, the latter was crying. The complainant informed PW2 that the appellant had defiled her inside his grandmother's house.

32. Whilst PW2 was holding the complainant, a brother of the complainant arrived at the scene, and the complainant told him about her ordeal, in the hands of the appellant.

33. During cross-examination, PW2 reiterated that the appellant and the complainant disappeared from her house, on the material day.

34. PW3 is the mother of the complainant. She testified that the complainant was 10 years old. PW3 produced the Birth Certificate of the complainant, which showed that the complainant was born on May 3, 2010.

35. PW4 is a brother of the complainant. He testified that when he heard that the complainant was lost, he set out to search for her. He found the complainant in the company of PW2; and both of them were crying.

35. PW4 testified that the complainant informed him that the appellant had defiled her, inside his grandmother's house.

36. PW4 rushed to the appellant's home and asked the appellant about what he had done. According to PW4, the appellant wanted to run away, but the witness struggled with him until a crowd formed. The appellant was then arrested by the police.

37. PW5 was the Investigating Officer. After getting information about an incident of defilement, PW5 interrogated the complainant.

38 PW5 testified that PW2 had overheard the appellant telling the cousins of the complainant that he would buy chips for them. According to PW5, the grandmother of the complainant stopped the appellant from making the offer for chips, a reality.

39. It was after that incident that the appellant left the house of PW2 together with the complainant.

40. The investigating officer corroborated the evidence tendered by the complainant, her grandmother and her brother.

41. After the appellant was arrested, PW5 advised PW2 to take the complainant to the hospital, for treatment.

42. Whilst she was conducting her investigations, PW5 interrogated the appellant but he refused to record a statement.

43. Tiberius, who is an uncle of the appellant, also declined to record a statement.

44. However, as the P3 Form confirmed that there had been penetration, the Investigation Officer charged the appellant with the offence of defilement.

45. PW6 is the Principal Clinical Officer at Nyamira County Teaching and Referral Hospital. He produced the P3 Form in evidence.

46. The P3 form showed the following;

Examination

Broken hymen. No blood (bleeding)

Lab
Pus cells with blood stainsYeast cells presentNo spermatozoa seen."

47. Based on the aforegoing results, from the examination of the complainant, the Clinical Officer concluded that there had been penetration.

48. After PW6 had testified, the prosecution closed its case.

49. When the appellant was put to his defence, he gave sworn testimony. He said that he lived with his grandmother, in Rangenyo.

50. He testified that he was arrested after he had fought with a witness over a footpath. He therefore expected to be faced with a land case.

51. He was surprised when he was charged with the offence of defilement. During cross-examination, the appellant said that he had fought with the complainant, over land. The said parcel of land was said to be adjacent to that of the appellant's grandmother.

52. When he was further cross-examined, the appellant said that he had fought with Tiberius.

53 After giving his evidence, the appellant closed his case. He told the trial court that he did not have any witnesses.

54. From the evidence, it is clear that the complainant and the appellant were not strangers. They were cousins; and even the appellant testified to that fact.

55. In the circumstances, this was a case of recognition.

56. The complainant gave a detailed account of how the appellant enticed her to accompany him to his grandmother's house, and how he defiled her. As noted earlier herein, the appellant made a choice not to cross-examine the evidence of the complainant.

57. In effect, the complainant's evidence is uncontroverted. I therefore find that the appellant defiled the complainant.

58. Secondly, the complainant's mother testified that her daughter was 10 years old. The said evidence, coupled with the Birth Certificate of the complainant, proved that the complainant was a minor. She was 10 years old.

59. The uncontroverted evidence of the complainant was corroborated by the evidence tendered by the Clinical Officer, (PW6). The medical evidence confirmed beyond any reasonable doubt, that the complainant had been defiled.

60. The Clinical Officer was not a relative of the complainant.

61. Similarly, the Investigating Officer was not a relative of the complainant.

62. Therefore, there is no merit in the appellant's contention, that all the prosecution witnesses were relatives of the complainant.

63. In any event, there is no legal requirement that conviction can only be founded from evidence which was adduced by persons who were not relatives of the complainant.

64. The offence herein was committed within a family set-up. The appellant visited the complainant's grandmother. He then persuaded the complainant to accompany him to his grandmother's house.

65. In those circumstances, it is perfectly understandable that the probable witnesses would be relatives. Provided that sufficient evidence was produced, to prove the case against the appellant, the conviction could not be vitiated just because the witnesses happen to have been relatives.

66. Although the appellant now submits that "there must be a possibility of them having differences, of which gave birth to this fabricated allegation;" I find that the appellant completely failed to cross-examine the witnesses with regard to that possibility. Accordingly, the alleged possibility is nothing more than a belated and unfounded speculation.

67. As regards the reference to section 198 of the *Criminal Procedure Code*, it is a requirement that;

> Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

68. The record of the proceedings on the March 5, 2021 shows that the Principal Clinical Officer (PW6) testified in English, and that his evidence was interpreted into Kiswahili.

69. In the circumstances, if the appellant had still not understood any aspect of the evidence, it was incumbent upon him to seek further clarity.

70. As the appellant did not inform the court that he needed further interpretation or clarification of the "medical words", there was no way that the learned trial Magistrate would have become aware of any such need. In the result, there is no merit in the contention that the trial court violated the appellant's rights, which are laid down in Section 198 of the Criminal Procedure Code.

71. In the final analysis, I find no merit in the appeal: it is therefore dismissed.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR