Fungicha v DPP (Criminal Appeal E089 of 2022)
[2023] KEHC 17688 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 17688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E089 OF 2022

LW GITARI, J

MARCH 30, 2023

BETWEEN

ABDIKADIR FUNGICHA ..... APPELLANT

AND

DPP ..... RESPONDENT

JUDGMENT

INTRODUCTION

1. The appellant Abdikadir Fugicha was before the chief Magistrate's court at Isiolo in Criminal case No 016/2021 with the offence of defilement contrary to section 8(3) as read with Section 8(2) of the *Sexual offences Act* No 3 of 2006. The particulars of the chare are that on July 14, 2021 in Isiolo County within Eastern region he intentionally caused his penis to penetrate the anus of AA a child aged eight (8) years.

2. The appellant pleaded not guilty to the charge and after a full trial he was found guilty, convicted and sentenced to serve thirty years imprisonment.

3. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on six grounds which are undated. He later filed an amended supplementary grounds and raised the following grounds-:

    1. That the learned trial magistrate erred in law and fact by failing to note that the medical report disproves the evidence of the complainant, since there was no evidence of penetration.

    2. That the learned trial magistrate erred in law and fact by failing to note that there was contradiction on the evidence adduced by the prosecution witnesses.

    3. That the learned trial magistrate erred in both law and fact by failing to note that the key witnesses were not called.

4. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts.

5. That the learned trial magistrate erred in both law and fact by failing to note that the Section 333 (2) of the *Criminal Procedure Code* was not considered (- pretrial detention period)

6. That the learned trial magistrate erred in both law and fact by failing to note that the investigations was shoddy.

7. That the learned trial magistrate erred in both law and fact by rejecting the alibi defense without giving cogent reasons.

4. The appeal was canvassed by way of written submissions.

5. The brief facts of the case are that the complainant RH (P.w 2) is a boy child who was aged nine years at the time the offence was committed. He testified that on July 14, 2021 the appellant went to their house and removed his (complainant) clothes. The appellant then applied oil on his penis and also applied the said oil on the complainant's anus. The appellant then penetrated the complainant by inserting his penis in his anus. The appellant then threatened to kill the complainant if he revealed the ordeal to anyone. The complainant revealed to the court that the appellant had defiled him several times before that date and would give him money ranging from kshs 5/= to Kshs 20/=. The appellant experienced some pain and he reported to FR (P.w 3 on July 16, 2021 who had on July 16, 2021 heard him crying while in the toilet and on enquiring from him he revealed that the appellant who is known as K was sodomising him. Upon receiving this report, P.w 2 informed the complainant's mother who in turn informed the complainant's mother (P.w 2). The matter was then reported to the police.

6. The complainant was referred to Isiolo County Hospital, where he was examined by Daudi Dabaso (P.w 4) a Clinical Officer who also filed a P.3 form. The Clinical Officer found that the appellant had tenderness on the lower abdomen. There was also redness to the anal region which appeared reddened and the muscles to the rectum were painful, tender on examination. There was no blood oozing from the anus and oral swab showed no signs of spermatozoa. HIV test was negative. The P.w 4 formed the opinion that owing to the redness on the anal region there was evidence of penetration and therefore defilement. He produced the P.3 form as exhibit 2 and lab results as exhibits 2 (a). The appellant was well known to P.w 1, 2 and 3. He was arrested by the members of the public and escorted to Isiolo Police station. He was then charged with this offence.

7. Upon being put on his defence, the appellant opted to give unsworn defence. He told the court that the complainant's mother wanted sex with him but he refused. He told the court that he never committed the offence.

The Evidence

8. PW1, HR testified that he is the complainant's mother. On July 16, 2021 it was reported to him that the complainant was experiencing some pains and he was crying. He rushed home and met the complainant who informed him that he had been defiled by K who is called by name K but his full name is A. He told the court that the complainant had complained of injuries and pains to his anus. He reported the matter to the police. P.w 1 told the court that at the time of this incident. The complainant was aged nine years as he was born on July 21, 2012. He produced the birth certificate in court as exhibit.

9. The P. W 1 testified that he had not differed with the appellant and that it is the complainant who reported to him that the appellant is the one who defiled him. P.W 2 was the complainant and he told the court that the appellant defiled him on the material day and threatened to kill him if he reported the

incident to any person. That he went to say that the appellant had defiled him severally and would give him money after the ordeal. He would give him Kshs 20 or 10 or 5. He told the court that the appellant applied oil on his anus then penetrated him. He informed his cousin F who is a minor. He told the court that the ordeal was painful. Later he was taken to hospital by his auntie and his mum. P.w 3 was FR who testified that the complainant was left with her by his mother. She realized that the complainant was crying while in the toilet and upon enquiring what the problem was he revealed to him that the appellant was sodomising him. She alerted the complainant's mother and they reported the matter to the police. They then took the complainant to hospital. She told the court that the appellant is her brother in law and had never differed with him. P.w 4 Daudi Dabaso a clinical officer based at Isiolo county hospital testified that he examined the complainant on allegation that he had been defiled by a person known to him. On examination he found that there was tenderness on the lower abdomen. There was redness to the anal region. The muscles to the rectum were tender and painful. He formed the opinion that based on the findings there was evidence of penetration and hence defilement. He filled a P.3 form, exhibit 2 and lab results exhibit 2(a). He confirmed that the penetration was done using a penis – penile penetration.

10. 5 N0 xxxx Pc Kichara Lamec of Isiolo police station testified that on July 16, 2021 he commenced investigations in this case. The complainant had been escorted in by the mother on allegation that he was defiled and had complications in his anus. He escorted the complainant to hospital. He testified that from the findings by the clinical officer there was a possibility that the complainant was defiled severally. The appellant was then charged. The appellant in his statutory statement of defence denied the charge. He alleged that he was framed by the complainant's mother who had demanded sex from him but he refused. The trial magistrate rendered her judgment and held that the prosecution proved its case against the appellant beyond any reasonable doubts. She proceeded to convict and sentence the accused to serve thirty years imprisonment.

11. The appeal was disposed off by way of written submissions. The appellant submits that the prosecution failed to proof the charge against him. He submits that evidence adduced did not prove penetration as required under Section 8 (1) of the *Sexual Offences Act*. His contention is that medical evidence was not conclusive that there was penetration. It is further his contention that the ingredients of the offence of defilement were not proved beyond any reasonable doubts. The appellant relied on the cases of *Charles Wamukoya Karani Vs Republic, CR Appeal No 72/20213*, *Sekitoliko Vs Uganda (1967) EA 53*, and Court of Appeal of Nigeria Vs in David Ojeabuo Vs Federal Republic of Nigeria (citation not given) and others. The appellant prays that the appeal be allowed and be set at liberty.

12. On its part, the respondent filed its written submissions and has urged the court to find that it proved its case beyond any reasonable doubts.

13. I have considered this appeal, the submissions and the proceedings and judgment before the lower court. I have also considered the submissions. The issue that arise is whether the prosecution discharged its burden to prove the charge against the accused beyond any reasonable doubts.

Analysis And Determination

14. This is a 1st appeal. The duty of the first appellate court has been laid in various authorities of this court and the Court of Appeal. Plainly stated, the first appellate court has a duty to exhaustively evaluate the evidence which was tendered before the trial court, itself consider it and come up with its own independent finding. The court has however to leave allowance for the fact that it did not have an

opportunity to see the witnesses and assess their demeanor and leave room for that. In *Okeno Vs Re (1972) EA 32* the precursor of the Court of Appeal stated as follows;

> ' A appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The 1st appellate court must itself weight 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 draw its own conclusion. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses 'see Peters V Sunday lost (1979) EA 424'

The appellant was charged with defilement contrary to Section 8 (3) and 8 (2). The section provides-;

1) A person who commits an act which causes penetration with a child is guilty of an office 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.

3) A person who commits an offence 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

From the wording of this section, three ingredients of the charge of defilement stand out. These are-;

1) The identification of the perpetrator

2) Penetration

3) Age of the victim

These have been held to be the ingredients of the charge of defilement which the prosecution must prove beyond any reasonable doubts. In *George Opondo Olunga vs Republic (2015) eKLR* the court stated that the ingredients of defilement are 'Identification or recognition of the perpetrator and the age of the victim.'

15. The appellant in his seven grounds of appeal has not challenged the issue of his identification. The complainant testified that he knew the appellant before as K. His testimony was not challenged. It follows that the appellant was recognized by the victim as the perpetrator. The trial magistrate in her judgment found that 'all evidence point to the accused as the perpetrator.'

16. It is my view that the appellant was well known to the victim and he was therefore recognized as the perpetrator.

17. I will proceed to consider the second ingredient which is penetration. The *Sexual Offences Act* defines penetration as follows;

> 'The partial or complete insertion of the genital organs of a person into the genital organs of another person.'

The Court of Appeal in *John Mutua Munyoki vs Republic (2017) eKLR* held that:

> 'Therefore in order for the offence of defilement to be committed, the prosecution must prove each of the ingredients beyond any reasonable doubts'.

The courts when determining whether or not there was penetration in cases of defilement, the key evidence relied is that of the victim. Indeed the law allows the court to convict on the evidence of the victim of a sexual offence. See Section 124 of the *Evidence Act* the proviso thereof gives the court power to convict on the sole evidence of the victim of a sexual offence. There is however a caution before the court can do so, it must be satisfied that the victim is telling the truth and it must record the reasons for believing the victim.

18. The appellant has challenged the prosecution's case on failure to prove that there was penetration. The appellant submits that the medical evidence did not corroborate the testimony of the complainant. The complainant submits that penetration was not proved. In this case, the complainant was a minor, corroboration was required unless the trial magistrate was satisfied that the victim was telling the truth. Short of that corroboration to the testimony of the complainant was required. In this case the Clinical Officer testified as P.w 4 contrary to the appellants submissions, it is my view that the testimony of the Clinical Officer corroborated that of the complainant. The Clinical Officer stated that "owing to the redness on anal region there was evidence of penetration and therefore defilement." He further testified that a penis was used to penetrate the minor. His further testimony was that the muscles of the rectum were tender and painful. The Clinical Officer did not by any chance state that the observation he made was due to the diarrhea which the complainant had at the time of examination. It was a pigment of the appellant's imagination that the redness and tenderness was due to diarrhea. Penetration in view of the above definition need not be the complete insertion of the genital organ of one person into that of the other, partial insertion also completes the offence. Be that as it may, the testimony of the complainant was clear that the appellant was in the habit of sodomising him and giving him money. He also testified that the appellant would threaten to kill him. This being the case failure to see cuts or even bleeding does not in any way discredit the testimony of the complainant. The absence of spermatozoa does not dispute the fact that there was penetration.

19. The trial magistrate found that 'there was an element of penetration committed on the complainant'

I find that testimony of the complainant and that of the Clinical Officer which the trial magistrate found was relevant in proving the charge was sufficient and proved beyond any reasonable doubts that there was penetration.

20. On the age of the victim, this was proved to the required standards with the production of the birth certificate as exhibit. The complainant was born July 21, 2012. The offence was committed on July 14, 2021. It proves that the complainant was nine years old when the offence was committed.

21. The appellant submits that the trial magistrate failed to consider that there were contradictions in the evidence adduced by the witnesses. This is on ground No. 2 of his petition of appeal. He cites contradictions in the testimony of the witnesses on the date the offence was committed. The courts will normally ignore minor contradictions which are not deliberate. The Court of appeal in *Erick Onyango Ondeng' – V – Republic 2014 eKLR* where the judges stated;

> ' Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The Trial court, after hearing all the evidence accepted that the offence was committed at: about 7 pm in accordance with the evidence of P.w 2. As note d by the Uganda court of appeal in Twehangane Alfred Vs Uganda Crim. appl No 139 of 2001 (2003) UGCA, 6 it is not very contradiction that warrants rejection of evidence as the court put it:
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> 'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not

necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court things that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.'

The appellant states that the complainant said the offence was committed on July 14, 2021 at noon. In deed there are two dates given by the complainant and P.w 2. The P.3 form shows that the date and time of the alleged offence is July 14, 2021. P.w 2 testified that the complainant reported to her on July 16, 2022. The P.3 form shows that the matter was reported on July 16, 2021. The appellant was arrested on July 17, 2021. The only evidence which is not in line with that is of P.w 5 – who gave the date of February 10, 2021 as the date the matter was reported. The witness gave evidence that the date the matter was reported is the same day he escorted the complainant to hospital. It is my view that the inconsistency was minor and not deliberate. It is most probably a typing error which this court must overlook. The appellant was not prejudiced in any way.

22. The inconsistencies on the date are not material. I will do good and ignore them.

23. The appellant has also raised as a ground in his petition that key witnesses were not called. He refers court to the testimony of the complainant who said he informed a witness Faiza who was not called. It is trite law that it is a party in a case who decides on the person he wishes to call as his witness. In this case the prosecution has the discretion to decide on who to call as its witness/es. The threshold to determining the witnesses to call and those not to call was considered in the case of *Bukenya Vs Uganda (1972) EA 549* where it was held:

' It is well established that the Director of Public prosecutions has discretion to decide who are the material witnesses and who to call but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were other witnesses who were not called. The court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.'

I have considered the evidence of the witnesses. I find that the witnesses called by the prosecution were sufficient to prove the charge. Section 143 of the *Evidence Act* provides that no particular number of witnesses shall be required to establish a fact. It provides –;

'No particular number of witnesses shall, in the absence of any provisions of the law to the contrary shall be required to the proof of any fact'.

The prosecution was required to call witnesses who were sufficient to prove their case. Failure to call the said witnesses was not fatal to the prosecution case nor did it prejudice the appellant in any way. This ground must therefore fail.

The appellant has urged the court to find that his defence was not considered. At page 26 of the record, the trial magistrate did consider the defence of the appellant. I note from the record that when P.w 1 testified the appellant did not cross-examine on the allegation that she had demanded sex from him. The defence was therefore an afterthought and was considered and rejected. His defence of alibi was dislodged by the witnesses who proved that he is the one who defiled the complainant on the material day. This ground must fail.

Finally the appellants faults the trial magistrate for failure to comply with Section 333 (2) of the Criminal Procedure Code which mandated her to take into account the period he had spent in custody while awaiting trial. It is indeed true that the trial magistrate had a duty to take into account the period spent in custody while awaiting trial to reduce the sentence eventually passed, this was not done.

I find that the prosecution did prove the guilt of the accused beyond any reasonable doubt. On the charge sheet which was presented, it is clear that it was defective as the appellant was charged with two distinct offences. This is because Section 8 (3) of the *Sexual offences Act* is to be preferred against an offender who defiles a child aged between twelve (12) and fifteen (15) while Section 8 (2) is to be preferred against an offender who defiles a child aged eleven years or less (termed as children of tender years). The two subsections cannot be used to charge an offender in one charge. The difference is in the age of the victim as the sentence imposed shall be determined by the age of the victim. In this case, the age of the victim was proved to be nine years and therefore the appellant should have been charged under Section 8 (1) & (2) of the *Sexual Offences Act*. The punishment under this section is life imprisonment. The question is whether the defect on the charge sheet is fatal. It is trite that an accused person must be charged with a distinct charge. Section 134 of the Criminal Procedure Code provides – Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. What the court has to consider is whether the defect prejudiced the appellant. The court of appeal in the case of *Peter Ngure Mwangi Vs Republic, 2014 eKLR*.

'It was stated – that a charge can be defective if it is at variance with the evidence and further that the question is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial. We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence.'

In this case the charge was read to appellant as well as the particulars. The complainant gave evidence and his age was proved with the birth certificate.

In my view the appellant did not suffer any prejudice. The effect was not raised before the trial court. Section 382 of the Criminal Procedure Code provides-:

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a 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.

I note from the record that the issue was not raised before the trial court. The appellant was not prejudiced. I also note that any attempt to amend the charge will prejudice the appellant as the offence disclosed in the evidence would mean that the sentence be enhanced to life imprisonment. The appellant was not warned of this before he decided to proceed with the appeal. In the circumstances, I will not interfere with the charge at this stage.

The accused was sentenced to a term of imprisonment. The sentence should have been reduced to the period he had remained in prison awaiting trial. I order that the sentence shall be reduced by eleven (11) months and eight (8) days the period he remained in custody awaiting trial.

Conclusion

The appeal lacks merit.

Order

1. The appeal is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF MARCH 2023

In the presence of

Ms. Nyambura S/C for respondent

Appellant – present

L. GITARI

JUDGE