FAA v Republic (Criminal Appeal 46 of 2020)
[2023] KEHC 3484 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 46 OF 2020

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

FAA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. E Malesi, Senior Resident Magistrate, SRM, in Kakamega CMCSO No. 84 of 2018, of 13th November 2019)

JUDGMENT

1. The appellant, FAA, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(2), of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on unknown dates, at Mkango sub-location in Kakamega Central sub-county, within Kakamega county, he intentionally and unlawfully caused his penis to penetrate the anus of PSK , a child aged 6 years. The appellant denied the charges, on August 1, 2018, and a trial ensued, where 6 witnesses testified.

2. PW1, PSK , was the complainant. She said that she did not know her age, and she could not tell the date when it happened. She described how the appellant, who was her grandfather, took his penis and inserted it into her anus, three times. She informed her grandmother, who beat the appellant, and threatened to burn the house. She was thereafter taken to hospital. PW2, Peter Ayoyi, was the clinician who attended to PW1, on July 30, 2018. The history given was that the incident happened on July 28, 2018. PW1 walked with difficulty. The complaint was painful defecation. He found bruises on her anal orifice, with tenderness on palpation. He diagnosed anal penetration.

3. PW3, Meshack Luchendo, was the chair of the local community policing group. He heard screams from the home of PW1, a woman shouting that the appellant had infected her and a child with HIV.

He visited the home the following day, but the woman he found there refused to open for him. She only opened the door when he decided to go away. He did not turn back, despite her beckoning him and his colleagues to go back. He reported the matter to the local assistant chief, who subsequently retrieved PW1 from the home the following day, and arrested the appellant. PW4, Paul Imbenzi, had accompanied PW3 to the home on July 29, 2018, and was the one who retrieved the child from the home on July 30, 2018, and took her, together with the assistant chief, to the health centre. PW5, No 201701150 administration police constable Emmanuel Juma, was the one who arrested the appellant. PW6, No 106368 police constable Winfred Ikamati, was the investigating officer.

4. The appellant was put on his defence, *vide* a ruling that was delivered on May 15, 2019. He made a sworn statement. He denied the charges. He testified largely on how he was arrested, and blamed PW3 for his ordeal, saying that it had something to do with politics. He called 1 witness, DW2, his wife, MA. She said that he did not do it.

5. In its judgment, the trial court found the appellant guilty on the main charge. It found the testimony of PW1 compelling and reliable, and corroborated by PW3.

6. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the charge was defective; the evidence was flimsy; the case was not proved beyond reasonable doubt; the court relied on an allegation of HIV infection, which was not proved; the defence was not considered; the medical evidence had integrity questions around it; the evidence was uncorroborated, and the evidence by PW3 was hearsay; and PW3 and PW4 were politicians who were opposed to the appellant.

7. The appellant filed detailed written submissions. I have gone through the same and noted the arguments made.

8. The trial court had the benefit of seeing and hearing PW1. It believed her. I have looked at the record of her testimony. She gave a fairly straightforward statement. The appellant was her grandfather. Identification was not an issue. It was recognition. DW2 was away, and it was just the appellant and PW1. She screamed, but no one responded as there was no one who could, for no one else was present. The trial court noted that she kept pointing at her behind, as the region where the assault targeted. The child was only 6. I agree with the trial court, that it would be difficult to frame charges using a child of that age. The testimonies by PW2 and PW3 corroborate her story. PW2 noted injuries in her anus. PW3 heard the screams from DW2, that PW1 had testified about. I am persuaded that the prosecution established its case against the appellant, and that he was properly convicted. Regarding sentence, I note that the trial court imposed a jail term of 5 years. That was incredibly lenient, for a crime committed against a child of tender years, aged only 6 years.

9. I find no merit in the appeal, I accordingly dismiss it. I hereby affirm the conviction. The sentence is incredibly lenient. It does not match the offence committed. It is so lenient as to send the wrong message to perpetuators of such offenders. It affords not protection to minors of tender years. I accordingly enhance the same to 30 years imprisonment. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Mburu, instructed by Malalah & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.