Isaack v Republic (Criminal Appeal E207 of 2022)
[2023] KEHC 18167 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E207 OF 2022

LW GITARI, J

APRIL 27, 2023

BETWEEN

ELIUD MUNENE ISAACK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment in Nkubu Sexual Offences Case No E023 of 2022 where the appellant was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on March 28, 2022 in Imenti Sub-County within Meru County intentionally and unlawfully caused his penis to penetrate the vagina of SRA a minor aged fourteen (14) years. In the alternative, the appellant was charged with indecent act with a child in that on March 28, 2022 in Imenti Sub-county within Meru County intentionally and unlawfully touched the vagina of SRA a child aged 14 years using his penis.

2. The appellant pleaded not guilty and after a full trial he was found guilty on the charge of defilement, convicted and ordered to serve twenty (20) years imprisonment. The appellant was aggrieved by both the conviction and sentence of the learned trial Magistrate and has filed this appeal which is based on the following grounds:-

Appellants Grounds

1. That, the learned trial magistrate faulted in law and fact by founding a conviction on the appellant, without considering that the facts raised during the trial was not watertight to mete out a conviction upon the appellant.

2. That, learned trial magistrate erred in both law and fact by failing to note that the clinical examination report did not link the accused with the ordeal.

3. That, the learned trial magistrate erred in both matter of law and fact by failing to note that the sentence was harsh and excessive in the circumstances of this case.

4. That, the learned trial magistrate erred by law and fact by not invoking the time spent in custody while sentencing the appellant as stipulated in Section 33(2) of the *Criminal Procedure Code* Cap. 75 Laws of Kenya.

5. That, the learned trial magistrate erred in law and fact by dismissing the appellant's defense of alibi with no cogent reasons.

3. The appellant prays that the Appeal be allowed, sentence be set aside, conviction be quashed and he be set at liberty.

4. The state through the office of the Director of Public Prosecution opposed the Appeal. The court directed that the appeal be canvassed by way of written Submissions. Both parties filed their submissions.

The Prosecution's Case

5. The prosecution called five witnesses PW1 SRA is the complainant who testified that she was fifteen years old and a student at [Particulars Withheld] academy. That on the March 28, 2022 she was sent to Mutokiama market to purchase potatoes by her mother. That as she returned home, the appellant approached and convinced her to go to his home with him. That at home, they met the appellant's mother and brother. That they stayed with the appellant in his house and his mother served them food. That they then went to bed and had sexual intercourse. That she spent the night with the appellant in the house.

6. It was the complaint's further evidence that the next morning the appellant's mother asked them to go to the farm and work and that she stayed at the home for one week, and that all along she used to sleep with the appellant in his bed and that they had repeated sexual intercourse.

7. The complainant testified too that, one Sunday morning she was taken from the house by the area manager and escorted to Ntharene Police Post, and thereafter she was treated at Kanyakine Sub-county Hospital in which facility her P3 Form was also filed up.

8. The complainant's father, PR was PW2. He stated that on the March 28, 2022, the complainant went missing from home. That he made a report at Ntharene Police Post. That on April 3, 2022, the area chief called him and they proceeded to the appellant's house home where in his house they found the complainant. That the appellant who was in his mother's kitchen fled on spotting them.

9. Joshua Murerwa, Area Assistant Chief, Igokine Sub-location was called as PW3. He stated that on the April 3, 2022 he got a tip off that the complainant, a school girl who had gone missing was at the appellant's home. That with the Chief, Area Manager and PW2 went to the appellant's home in the appellant's house, they found the complainant. That the appellant then fled on seeing them.

10. Timothy Mberia, a Clinical Officer at Kanyakine Sub-County Hospital was PW4. He states that the complainant was examined at the facility and her P3 Form filled up. That on examination and laboratory tests, her hymen was found broken, she had a whitish vagina discharged, and epithelial cells were seen. The clinician attributed these findings to sexual intercourse.

11. The Investigating officer (IO), PC Stella Kathambi of Ntharene Police Post was called as the last prosecution witness PW5. She stated that the case was reported by the Area Assistant chief and father to the complainant. That she referred the complainant to hospital and thereafter issued her with a P3

Form. That interrogated witnesses and recorded statements. That the appellant fled went into hiding only to be arrested about three months later by area chief.

12. Upon being put on his defence, the appellant tendered a sworn statement. He called three (3) other witnesses. He vehemently denied the offence and stated that the case is a falsehood. That at the material time he was not at home. That on the date of arrest he had only visited home. That even the Assistant Chief did not know why he was being arrested but it was at the instructions of the chief. That even at the police station he was not told why he had been arrested. He also denied having a house at home.

13. The trial magistrate found that the evidence adduced by the prosecution established with certainty and beyond any reasonable doubts that he appellant defiled the complainant. He proceeded to convict and sentence the appellant.

Submissions.

14. The appellant submits that the evidence of the complainant was fabricated. The appellant relies on the case of *Maina v Republic* [1970] EACA 370 where it was held that it is dangerous to rely on the evidence of a woman or girl on cases of alleged sexual offences. The appellant submits that the evidence adduced was not water tight and relies on the case of *Sekutoliko v Uganda* [1976] EA 53 where it was held that, the prosecution has a duty to prove all the elements of the offence beyond any reasonable doubts and the conviction is depended on the strength of the prosecution case and not the weakness of the defence case. He submits that the three elements of the charge of defilement were not proved beyond any reasonable doubts. It is his contention that since the clinical officer did not indicate whether the broken hymen was old or fresh, the penetration was showered with un-certainty. The appellant further submits that there was no prove that he is the one who penetrated the minor. He relies on High Court Meru Criminal Appeal No E002 of 2020 where it was stated that the prosecution had a duty to prove that the complainant's hymen was torn by an act of defilement by the appellant. He has alluded, but wrongly so, that the prosecution relied on circumstantial evidence. While relying on the case of *Brown v Republic* [2012] EKLR and Peter Mwangi Muthenya v Republic to submit that the broken hymen and the red vulva were not conclusive prove that there was penetration of PW1's genital organ.

15. The appellant has raised issue with the sentence imposed and states that his defence was faulted without cogent reasons. He further faults the court for failing to comply with Section 333(2) of the *Criminal Procedure Code*.

Prosecution's Submissions

16. They have submitted that there are three elements which ought to be proved before a conviction can be arrived at in the offence of defilement, which are penetration, age of the victim and the identity of the perpetrator.

17. It is their submission that they discharged the burden to prove the charge beyond any reasonable doubts. They have relied on the case of *Moses Mwarimbo Dau v Republic* [2018] eKLR, *Edwin Nyambogo Osongo v Republic* [2016] eKLR and *Bukenya v Uganda* [1972].

18. The state has urged the court to find that the learned trial magistrate gave cogent reasons for rejecting the defence and held that the defence was an afterthought because the alibi defence was given during defence hearing and furthermore the defence witnesses gave contradicting evidence as to the whereabouts of the appellant before the incident.

19. Finally, the prosecution concedes that the trial magistrate ought to have complied with the Section 333(2) of the *Criminal Procedure Code*.

Analyses and determination

20. I have considered the proceedings before the learned trial magistrate, the grounds of appeal and the submissions by the parties. To start with, this is a first appeal and the law is now well settled by a line of authorities that the court has a duty to re-evaluate the evidence tendered before the trial magistrate, analyse and come up with its own independent finding. In *Okeno v Republic* [1972] EA 32 it was held "it was not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence support the lower court's finding and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court hold the advantage of hearing and seeing the witnesses".

21. The appellant was convicted of the offence of defilement contrary to Section 8(1)(3) of the *sexual Offences Act*. The Section provides - "(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".

22. Ingredients of the charge which the prosecution must prove beyond any reasonable doubts are-;

    (a) Age of the victim

    (b) Penetration

    (c) Identification of the perpetrator.

Proof of Age

23. In this appeal, the appellant has not disputed the age of the appellant. The age of the appellant was proved by the production of the Birth Certificate, Exhibit -3- which shows that the complainant was born on March 28, 2008. The offence was committed on her fourteenth birthday that is on March 28, 2022. The prosecution therefore discharged the burden of prove that the complainant was fourteen (14) years old on the date the offence was committed.

Penetration

24. Section 2 of the *Sexual Offences Act* defines Penetration as follows:-

    " Means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

25. The penetration in this case is by a male genital organ into the genital organs of a female.

26. The appellant has challenged the medical evidence adduced by PW4. On the basis that she did not state whether the broken hymen was freshly broken or not freshly broken. The broken hymen in this case was a result of Sexual intercourse. This is because penetration is first of all proved by the testimony of the victim. In this case the complainant PW1 testified that she went to the house of the appellant and stayed there for a week. She testified that on the first night the appellant forced her to have sex with him. That all along she used to sleep with the appellant on his bed and they repeatedly had sexual intercourse over the period. She testified that she was rescued from the home and taken to hospital where she was examined and a P.3 Form was filled. On being examined by the clinical officer, a part from the broken hymen, there was a whitish discharge and moderate epithelial cells, pus ells which according to the clinical officer were suggestive of being involved in penetrative sexual inter-course,

with the testimony of the complainant and the medical evidence, the prosecution proved that there was complete insertion of the male genital organ into the female genital organ of the complainant. There is therefore no dispute that the broken hymen occurred through sexual intercourse. The authorities cited by the appellant are not relevant as the prosecution established beyond any reasonable doubts that the complainant's broken hymen was torn by an act of defilement.

27. Courts rely on the testimony of the complainant in defilement and rape cases in order to find that there is prove of penetration. The evidence is usually corroborated by medical report produced by the medical officer. In this case the medical evidence tendered corroborated the evidence of the complainant that there was penetration. In Bascuta v Uganda S.C Criminal Appeal No 35 of 1995 it was held as follows:-

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by direct or circumstantial evidence usually the sexual intercourse is proved and corroborated by the medical evidence or other. Though desirable it is not hard and fast rule that victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Alternative evidence the prosecution may wish to adduce, to prove its case such evidence must be such that it is sufficient to prove the case beyond any reasonable doubt".

28. In this case the complainant is the only witness to the fact of defilement. Section 124 of the *Evidence act* (Cap 80 Laws of Kenya) provides:- 124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.

29. The trial magistrate in his Judgment stated as follows:-

> "I observed the complainant's demeanor throughout her testimony. She was eloquent and consistent. She was very specific in her narration of what transpired. I am convinced she told the court the truth. I believe in her testimony".

30. The trial magistrate gave reasons for believing the complainant. This being a sexual offence, the evidence of the complainant was sufficient and the court could rely on it even without corroboration. Having considered all the evidence, I find that it was sufficient to base a conviction.

Identity of the Perpetrator.

31. The appellant submits that there was a clear evidence that the appellant was the right person who penetrated the said minor, that there was no prove that the complainant was penetrated by the appellant

32. The complainant identified the appellant as the perpetrator. The complainant met the appellant in broad daylight and lured her to his house. They stayed together for one week. The complainant could not have failed to see him and know him during all that time. The testimony of the complainant was corroborated by the testimony of PW2 & 3 who removed her from the appellant's house. I find that the identity of the perpetrator was proved to the required standard.

33. The appellant raised a ground that critical witnesses were not called. However in his entire submissions he has not stated who the said witnesses are.

34. Be that as it may, Section 143 of the *Evidence Act* [supra] provides that:- 143. "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".

    In *Bukenya v Uganda* [1971] EA 549 it was held that-;

    > " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubts. I find that the five witnesses are sufficient and proved the charge beyond any reasonable doubts".

35. On the contention that the trial magistrate did not give cogent reasons for dismissing the defence, I find that this is not the case. The trial magistrate considered the defence and found that it was an afterthought as it was only raised at the defence stage. It is trite that the defence of alibi is supposed to be raised at the earliest possible stage so that the prosecution can enquire as to its credibility.

36. The defence witnesses gave contradicting evidence as to the whereabouts of the appellants at the material time when the offence was committed. The contradictions were an indication that the witnesses were not telling the truth. It follows that the learned trial magistrate acted properly in rejecting the defence.

37. Finally from the record, the learned trial magistrate did not comply with the mandatory provisions of Section 333(2) of the *Criminal Procedure Code*. The Appellant was arrested on June 27, 2022 and arraigned in court on 28/6/22 although he was granted bail, he did not post bail but remained in custody until December 21, 2022 when the sentence was passed on him. He was in custody for a period of five (5) months and Twenty Three (23) days awaiting trial. This period should have been taken into account to reduce the sentence.

Conclusion

38. For the reasons stated above, I find that the prosecution proved the charge against the appellant beyond any reasonable doubts. The appeal is without merits.

    I order that:

    1. The appeal is dismissed
    2. The sentence shall be reduced by five months and twenty three days. That is to say that the sentence shall start from June 27, 2022 to take into account the period he spent in the prison awaiting trial.
    3. The Deputy Registrar shall issue an amended committal warrant and serve it to the officer in-charge of the prison where the appellant is serving sentence.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF APRIL, 2023.

In the presence of:-

Prosecution Counsel: Ms. Kitoto

The appellant in person

HON. LADY JUSTICE L. GITARI

HIGH COURT - JUDGE