Bwire v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 19283 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19283 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E023 OF 2022

WM MUSYOKA, J

JUNE 30, 2023

BETWEEN

SYLVESTER BARASA BWIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. EC Serem, Resident Magistrate, RM, in Busia RMCSO No. 13 of 2019, of 26th May 2022)

JUDGMENT

1. The appellant, Sylvester Barasa Bwire, 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 diverse dates between 10th and January 18, 2019, in Nambototo location, within Busia county, he intentionally and unlawfully caused his penis to penetrate the vagina of FN , a child aged 9 years. The appellant denied the charges, on September 22, 2019, and a trial ensued, where 4 witnesses testified.

2. PW1, FN , was the complainant. She described how, on 2 occasions, the appellant took her to his house and had sexual intercourse with her, after which occasion he gave her money. PW2, BM, was the father of PW1. He received a report of the matter, and established from PW1 that she had been defiled. He reported to the police, and PW1 was taken to hospital. PW3, Edwin Imoo Emodo, was the clinician who attended to PW1, 2 or so days after the incident. He noted a broken hymen, slight bruises on the labia manora and the vaginal walls, and a whitish discharge. He concluded that there had been "forceful" penetration. PW4, No 9xxx1 Police Constable Immaculate Ogutu, was the investigating officer.

3. The appellant was put on his defence, *vide* a ruling that was delivered on November 25, 2021. He made an unsworn statement. He denied the charges.

4. In its judgment, the trial court found the appellant guilty. It found the defilement charge had been proved beyond reasonable doubt.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that there was medical evidence to support the conviction; section 200 of the *Criminal Procedure Code*, cap 75, Laws of Kenya, was not complied with; the conviction was not founded on the evidence adduced; the evidence of the minor complainant was not corroborated; the appellant was not medically examined; the defence was disregarded; and the defence submissions were not considered.

6. The appeal was canvassed by way of written submissions. The appellant submitted on the insufficiency of the evidence; the age of PW1 not being proven; lack of corroboration of the testimony of PW1; the competence of PW1 to testify on oath; contradictions and inconsistencies; proof of penetration; the alleged penetration not being linked to the appellant; non-compliance with section 200 of the *Criminal Procedure Code*; non-compliance with section 210 of the *Criminal Procedure Code*; court assistants being given mandate with respect to section 200; amendments to the charge sheet; and on the sentence. The respondent submitted around proof of the age of the complainant, penetration, whether penetration was by the appellant, compliance with section 200 of the *Criminal Procedure Code* and corroboration.

7. On insufficiency of the evidence to establish commission of the offence of defilement, it has to be considered whether the evidence tendered established all the elements for the offence: the age of the complainant, penetration and the perpetrator. On the age of PW1, the charge indicates her age as 9. PW1 put her own age at 9, having been born on December 25, 2009. Her father, PW2, said she was born on December 25, 2009. PW3, the clinician, put her age at 9. The treatment notes in the booklet placed on record, indicates her age at 9, and so does the P3 Form. The certificate of birth indicates her date of birth as December 25, 2009. December 25, 2009 is the date indicated in the PRC. The only document, on the record, which talks of a different age is the probation officers report, dated June 10, 2022, which indicates that she was 13, as at the date of the report.

8. The appellant submits that PW1 produced a baptismal card, where her date of birth is indicated as August 16, 2006. I have carefully perused the original trial record, and I have not seen any reference to a baptismal certificate or card. PW1 only referred to the certificate of birth and the treatment notes. PW2 referred to the treatment notes booklets for PW1 and the appellant, the P3 Form, and the post rape care form. PW3 referred to and produced the treatment notes booklets for both PW1 and the appellant, P3 Forms for both PW1 and the appellant and the post rape care form. He made no reference to a baptismal card. The only document that PW4 referred to and produced was the certificate of birth for PW1. The baptismal certificate referred to in the submissions was not referred to or mentioned in the prosecution's case, and is not part of the court record.

9. Even if the alleged baptismal certificate were part of the court record, and even if it contradicted the certificate of birth, its contents cannot possibly override those in the certificate of birth. The baptismal card or certificate is not issued to certify a birth, but the fact of a baptism. It cannot, therefore, be superior to a certificate of birth, which is issued specifically to certify a birth. In any case, the evidence of the father of PW1 is on record. He stated that she was born on December 25, 2009, which tallies with what is contained in the certificate of birth. Surely, the parent of a child would be the best authority with respect to the date of birth of their child.

10. On penetration, PW1 was the victim of the offence. She testified that her vagina was penetrated on 2 occasions. She thereafter made reports to her uncle, who then informed PW2, and the matter was escalated to the police, leading to the intervention of PW3. PW3 provided medical evidence, where it was concluded that there had been penetration. The appellant argues that that evidence was flimsy. The starting point is that PW1 was the victim. It happened to her. She gave a fairly clear and consistent testimony on what happened. PW3, the clinician, also gave clear evidence of what he found or established after he examined PW1. The only serious contest to it, by the appellant, is about a broken hymen not being adequate proof of penetration. I agree, but the fact of the broken hymen was not the only material upon which PW3 concluded that there had been penetration. PW3 noted bruising on the labia manora and the vaginal walls, and presence of epithelial cells, all of which pointed to penetration.

11. Related to that is the matter of corroboration. The starting point is that corroboration is no longer a mandatory requirement with respect to sexual offences. The court may convict, in the absence of corroboration, so long as it finds the testimony by the complainant credible and reliable. See section 124 of the *Evidence Act*, cap 80, Laws of Kenya; *Kassim Ali v Republic* [2006] eKLR (Omolo, Bosire & Githinji, JJA) and *AML v Republic* [2012] eKLR (Odero, J). Was there corroboration in this case? Yes, there was. The medical records corroborate the fact of penetration.

12. The next consideration is on who the perpetrator was. PW1 said it was the appellant. She asserted that he defiled her twice. She stated that he worked at a petrol station, where she often bought paraffin. The appellant confirmed that. The person who defiled her was, therefore, someone she knew. What had transpired was reported after lapse of sometime, and so when the appellant was medically examined, little evidence could be harvested. However, the failure to get medical evidence from him was not fatal. The collection of forensics from a suspect is provided for under section 36 of the *Sexual Offences Act*. The provision is very useful, for it helps in getting evidence that would connect the alleged perpetrator of the defilement to the crime, by having him also subjected to medical examination, to confirm whether or not he had engaged in recent sexual activity, and more crucially to harvest forensics from him, which would connect him to the offence charged. Section 36 is, however, not mandatory. See *Robert Mutungi Muumbi v Republic* [2015] eKLR (Makhandia, Ouko & M'Inoti, JJA). Its application is subject to a number of factors, such as how soon the alleged perpetrator is apprehended, after commission of the alleged offence. It would work best where the alleged perpetrator is caught in the act, or soon thereafter, for then it would be possible to get as much evidence as possible out of him. Where there is lapse of time, not much evidence could be available from him, and it would serve no purpose to subject him to any form of medical examination. The fact that the harvesting of forensic material from a suspect for testing, under section 36, is not mandatory, would mean that the failure to conduct the tests, or conducting tests which turn out negative, would not be fatal to the prosecution's case. Defilement can be proved by other evidence, in the absence of forensics, including the uncorroborated testimony of the victim, so long as the court finds it credible and reliable. In this case, the trial court found the testimony of the victim, PW1 believable.

13. On competence of PW1 to testify on oath, I note that the trial court conducted a *voire dire* examination of PW1, before deciding that she was intelligent enough to give a sworn statement. She was a child of tender years, however, that did not bar her from giving a sworn statement. Under the *Oaths and Statutory Declarations Act*, cap 15, Laws of Kenya, at section 19, child of tender years ought not give sworn statement, unless it was established that they were intelligent enough to understand the nature of an oath or the importance of telling the truth. At age 9, and in class 5, PW1 was nearly outgrowing tender age. The trial court quite properly did the *voire dire*, and was within its mandate and discretion to require that she testify on oath. I am not persuaded that anything turns on this.

14. The appellant has raised the issue of consistency of the evidence. I have noted that there are inconsistencies in the evidence recorded. This is to be expected, for no witness is expected to narrate the events in exactly the same way or manner as the other witness. People perceive and process happenings, and recollect and reconstruct them, differently. The same person may recollect or restate the same facts differently after lapse of time, for different reasons, without necessarily being untruthful. It is human nature. The mere presence of inconsistencies in the evidence should not be fatal to a prosecution. What would matter is whether the inconsistencies go to the core of the matter. See *John Cancio De SA v VN Amin* [1934] 1 EACA 13 (Abrahams CJ&Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ), *Joseph Maina Mwangi v Republic* [2000] eKLR (Tunoi, Lakha & Bosire JJA), Twehangane Alfred v Uganda [2003] UGCA 6 (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), *Dickson Elia Nsamba Shapwata & another v the Republic*, Cr App No 92 of 2007 (unreported), *Erick Onyango Ondeng v Republic* [2014] eKLR (Githinji, Musinga & M'Inoti, JJA), *Philip Nzaka Watu v Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA) and *Richard Munene v Republic* [2018] eKLR (Ouko, P, Sichale & Kantai, JJA). It has not been demonstrated that the inconsistencies herein go to the heart of the case, for despite them, the witnesses painted a coherent picture of what transpired.

15. On compliance with sections 200 and 211 of the *Criminal Procedure Code*, I note that the trial was handled by several magistrates. The evidence of PW1, PW2, PW3 and PW4 was taken and recorded by Hon R. Ng'ang'a, Resident Magistrate, who ruled that there was a *prima facie* case established, and put the appellant on his defence. The defence was handled by Hon Serem, RM. The matter was first placed before Hon Serem, RM, on February 22, 2022. The appellant was present, and so was his advocate, Mr Ashioya. The record reflects that sections 200 and 211 were read to the appellant, to which he indicated that the matter could proceed, and that he was going to make an unsworn statement in defence. The argument that he now raises is that the 2 provisions were not read and explained to him by the trial magistrate, but by the court assistant. I am not persuaded that much should turn on this. The requirement is that the essence of the 2 provisions is brought to the attention of the accused person, before the matter is progressed to the next stage. That was done. Whether it is done by the presiding judicial officer or it is delegated to the court assistant is neither here nor there. The court assistant is there to assist the court. There is nothing untoward about the judicial officer asking the court assistant to convey that information to the accused person in the language the accused person understands. It appears that that was what was done here, for in both occasions, the provisions were read to the appellant in Kiswahili. Furthermore, the appellant had the benefit of an advocate appearing for him, and the 2 provisions were read in the presence of that advocate. If there was anything amiss, it was the duty of the advocate to intervene. The fact that he is not recorded as protesting or raising issue with what had happened would mean that there was satisfaction.

16. On amendments to the charge sheet, I note that the original typed copy of the charge sheet referred to the offence having been committed in October 2019. That date was then crossed out by hand, and countersigned on January 22, 2019, and replaced with January 2019. January 22, 2019 is also the date the charge sheet was lodged in court. It is also the date when the appellant was arraigned, and took plea. Nothing can turn on this, as amendments were made on the date the charge was presented in court. The plea was taken in January 2019, and October 2091 was yet to come. It could not be that the appellant was being accused of committing a crime 9 months before the date of taking plea. It has not been established, by the appellant, that that amendment was made after plea was taken.

17. On sentence, the trial court noted that section 8(2) provided for a mandatory sentence of life imprisonment, and nevertheless awarded a lesser sentence of 15 years. The trial court cited *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR (Odunga, J), which states that the trial court is not bound to impose the mandatory sentences prescribed under the statute,

in the sense that there is discretion. I note that the complainant, PW1, was only 9 years, way way below the age of consent. In fact, at 9, PW1 was a child of tender years, and needed protection by the law. The fact that she was a child of tender years aggravated the offence of defilement, and I believe the appellant got away with a light sentence, of 15 years, in the circumstances. He was 40 years old, and sexually molested a child of just 9. He should have been given a much stiffer sentence. I shall accordingly set aside that sentence, and replace it with a sentence of 30 years imprisonment, where the time spent in custody, if at all, is reckoned..

18. Overall, I find no merit in the appeal. I accordingly dismiss it. I hereby affirm the conviction, but substitute the sentence of 15 years imprisonment with 30 years' imprisonment. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 30TH DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the respondent.