Wahito v Republic (Criminal Appeal E021 of 2021)
[2023] KEHC 21275 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E021 OF 2021

SC CHIRCHIR, J

JULY 28, 2023

BETWEEN

WILSON NDUNG'U WAHITO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the Judgment of Hon. V. Ochanda SRM delivered on 30th September 2021 in the chief Magistrate's court in Muranga on SO No. 26 of 2020)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) of the *sexual offences Act* No. 3 of 2006 (The Act).
2. The particulars of the offence were that on 2nd day of July 2020 at about 1400 hours in .....village, within ..... County he intentionally caused his penis to penetrate the vagina of I.M.G a child aged nine years.
3. He was faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. He was convicted of the main charge and sentenced to life imprisonment.
5. The Appellant was aggrieved by the outcome and proffered this Appeal.

Grounds of Appeal

6. The Appellant has set out the six grounds of Appeal which are hereby paraphrased as follows:
    a). That the *voir dire* Examination did not follow the laid down procedure.
    b). That the offence of defilement was not conclusively proved.

c). That very essential witnesses were not availed.

d). That the learned trial magistrate erred in matters of law and fact by failing to caution himself that suspicion however strong is not inference of guilt

e) That his defence was unfairly dismissed.

f). That the learned trial magistrate erred in matters of law and fact by failing to note that case at hand had some notable discrepancies

The Appellant's submissions.

7. The Appellant submitted that the complainant (PW1) and PW2, were allowed to give a sworn testimony without the court ascertaining whether the witnesses understood the purpose of an oath.

8. The Appellant further submits that the ingredients of defilement were not proved to warrant a conviction. On penetration, it is the Appellant's submission that the medical evidence did not prove penetration. On identification, it is his submission that he was never identified as the perpetrator of the crime.

9. The Appellant further contends that two crucial witnesses were not called and that this failure dealt a blow to the prosecution's case.

10. The Appellant argues that his conviction was based on mere suspicion, yet suspicion must never be the basis of conviction

11. The Appellant further submits that his defence of alibi though not contested by the prosecution, was not given due consideration.

12. It is the Appellant's final submission that the court should exercise its discretion in regard to sentence and reduce the sentence that has been meted out.

The Respondent's submissions

13. It is the Respondent's submission that the ingredients of defilement were proved. On the age of the victim, it is submitted that the age was provided by the mother (PW4) who told the court that the complainant was born on 13/12/2013

14. On penetration, it is submitted that the evidence of PW1 and PW2 as well as the medical evidence by the clinical officer proved penetration.

15. On positive identification, they submitted that PW1 identified the appellant as father since he was a cousin to her father while PW2 told her brother that the person who defiled them was "Ndungu" referring to the appellant. It is further submitted the incident happened during the day and that the identity of the appellant was therefore proved beyond reasonable doubt.

16. On the issue of the appellant's defence it is stated that though the appellant claimed he was working for DW2, there was no evidence that, on the date of the defilement, the appellant was on the site, working. It is further submitted that the minors had no reason to lie and there was no bad blood between the appellant and the families of PW1 and PW2 and that the evidence of the two minors was well corroborated.

17. On voir dire examination, the Respondent submits that the magistrate recorded both the questions and answers and therefore the examination was properly conducted.

18. On the calling of essential witness, the prosecution has relied on section on section 143 of the *evidence Act* as well as the decision in the case of *Bukenya & others v Uganda* (1972). The Respondent assert that the law only requires them to call such number of witnesses as are required to prove their case and that failure to call the two witnesses referred to by the Appellant did not dent their case.

19. On the issue of the sentencing, it is submitted that the victim is a minor and the sentence was adequate to serve as a deterrence to the crime.

Summary of the evidence.

20. PW1, was the complainant. After a voir dire examination, the court directed her to give a sworn evidence. She told the court that she was born on 13th July 2010. She testified that on 2/7/2020 about 2-3 pm they were home with PW2 playing. They were called by the Appellant and told to take his bicycle to the kitchen. When they wanted to get out, the Appellant locked the door. He did "tabai mbaya" to her. He did the same thing to her friend. Her grandfather came and opened the door. He called them to get out. They left and went to their home. she told her parents about 10 days later. They went to the police station then to muranga county hospital; that the Appellant is her uncle ("small father"); that their homes are near each other; that they are neighbours . she identified the accused in court.

21. In cross- examination, she told the court that her grandmother is the one who let them out; that the Appellant threatened that he will beat them if they reported and that he was drunk when he defiled them.

22. PW2 was the 10-year-old friend of the complainant. she told the court that on 2/7/2020, she was playing with PW1 at their home when the Appellant called them and told them to take his bike. He was holding their hands. He checked if any one was approaching and he then took them to his bed. He then did " tabia mbaya " to PW1. PW2 ran towards the door but the Appellant came after her and slapped her. He removed her clothes and did " tabai mbaya " to her also. He slept on her (the magistrate then records that the child points at her groin), that he removed the thing he uses to urinate, like a tree. she was crying: he told her to keep quiet or he will cane her. He threatened to kill them if they say anything. That the grandmother is the one who let them out. she told her brother about what had happened. Her mother came to know later. That the Appellant was their neighbour; she has known him since she was young.

23. On cross -examination, she told the court that the Appellant send them for a bike and when they were inside the Appellant came and locked the door; that when she ran to the door the Appellant went and slapped her , took her back to the bed and defiled her

24. PW3 was the 13- year old brother of PW2. He told the court that PW1 was their neighbour, while PW2 was his sister. He had noticed that his sister was having a problem, she had been sleeping, and had been like that for 3 days in a row. When he questioned her, she told her that she had been defiled. They both went to their mother who was then in the farm and told her. His mother went to report together with the mother of PW1. He knew the Appellant, identified him in court and told the court that the Appellant was the only "Ndungu" in the neighbourhood.

25. PW4, was the mother to PW1. She testified that a woman came with the two children and informed her that the children told her about the defilement which took place a week before: that they had been threatened with death. She then reported to Kambiriwa police station and was issued with documents at the hospital. She told the court that that the Appellant was her husband's cousin and a neighbour.

26. Pw5 was PW2's mother. She testified that she had gone to work on 2/7/2020 when PW3 called her and informed him that PW2 had been defiled. She then went to PW'S 1 home with PW2 and the minors narrated to them what had happened. They reported to Kambirwa police station.

27. PW6 was a Doctor from from Murang'a Level V hospital. He produced the medical records for PW1. She told the court that on examination, he found the hymen broken, there was vaginal discharge and she had bacterial infection. He produced the report on behalf of Dr. David Githinji whom he said was unwell.

28. Pw7, was the investigating officer. She stated that on 2/7/2020 she got a call informing her about two girls in the station who had been defiled. She interrogated them and they informed her that the accused had defiled them. She took them to the hospital and the results confirmed that they had been defiled. She produced the birth certificate for PW1.

29. The Appellant was put on his defence. He gave a sworn statement and called one witness. He told the court that on 17th, he was arrested on allegation of having defiled 2 minors. He testified that on the date of the alleged offence (25/6/2020) he woke up early and that 3 officers came and arrested him claiming that he had defiled the minors. He recalled that on 25/6/2020 when the said offence is alleged to have occurred, he was at mzee Kimani's, where he used to work and that he was there from 8a.m to 5pm.

30. DW2 told the court that at the time of the alleged offence, the Appellant was constructing a structure for holding a water -tank and that from mid-June to early August, the accused worked every day except for Sundays and that he worked consistently on a daily basis.

Analysis and determination

31. The duty of this court as the first appellate court is to review and re-evaluate the evidence on record and come to its own conclusions, but without ignoring the conclusions made by the lower court as was held in *Okeno v. Republic* 1972 EA 32) where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination (Pandya v R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

32. I have considered the grounds of Appeal, the parties' submissions and the evidence on record. In my view the following issues arise for determination:

    a). whether the *voir dire* examination was properly carried out

    b). whether an essential witness was left out

    c). whether the offence of defilement was proved beyond reasonable doubt

    d). whether the Appellant's defence was considered

    e). whether the sentence was excessive

whether voir dire Examination was properly carried out.

33. The Appellant's complain in this regard is that the court went ahead to allow PW1 and pw2 to give sworn testimonies without ascertaining whether they understood the significance of an oath. The record however shows that the Appellant is far from being truthful. The trial court not only carried out an extensive voir dire examination for the two minor witnesses but it was done in the "Question

and Answer" mode. At the end of each of those examinations the court arrived at the conclusion that each of the children was capable of giving a sworn evidence. This complain is without any merit and I dismiss it outrightly.

Whether an essential witness was not called.

34. Another issue raised by the Appellant is that the Prosecution failed to call the grandmother who had opened the door for the girls after the alleged incident. He also complains that the maker of the medical report was not called.

35. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides as follows:

> " Number of Witnesses
>
> 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".

36. Further it has been held that "the prosecution is not obliged to call superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond reasonable doubt". (see *Keter v Republic* [2007] EA 135).

37. PW1, PW2 and PW3 gave consistent account of what transpired and which testimonies remained unshaken under cross- examination.

38. On the grandmother, according to PW1 and PW2, the grandmother came after the act. Consequently, the relevance of her evidence would have been limited to telling the court if indeed she found PW1 and PW2 in the house in which they were defiled. She was not an eye witness to the defilement. Am satisfied that failure to call the grandmother did not water down the prosecution's case

39. On the prosecution's failure to call the maker of the medical report, a doctor from the same medical facility, as the maker of the document, produced the report . The Doctor who did the report was reported to be sick. The court admitted the document under section 35 and 77 of the *Evidence Act*. The appellant did not object to the production of the report at the initial trial stage and there was no prejudice suffered.

Whether the offence of defilement was proved beyond reasonable doubt.

40. Section 8 of the Act defines defilement as follows: -

> " Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence 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.

Section 2 of the Act defines penetration as follows:

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

41. The prosecution was required to prove, beyond reasonable doubt, the age of the child, the act of penetration and the identity of the perpetrator.

42. The age of the complainant was not an issue either at the trial Court or in this appeal. The complainant's birth certificate was produced showing that the she was born on 13/12/2013 and thus was 9 years at the time of the incident.

43. On penetration, the relevant portions of the testimonies of PW1 and PW2 are worth repeating: The relevant part of PW1's testimony went as follows: " As we tried to get out , he locked the door... he removed my clothes, he placed me on the bed.. he then did "tabia mbaya". He removed only his trouser; he slept on top of me, he touched the middle of my legs at the pelvic region using his thing for urinating... I felt pain. something was pricking me he pricked me once. I told him am feeling pain that's why he stopped."

PW2'testimony went as follows: "he said we take bike so that he can send us, we went, he held our hand, he checked if any one was watching, he then took us to his bed. he removed PW1's clothes and did " tabia mbaya" He removed his trouser, he did not remove his shirt, I saw him do " tabia mbaya", I then ran to the door. He came and slapped me and held me , removed my clothes and did tabai mbaya to me. He slept on PW1. We were with PW1 and the Appellant in the house"

44. What strike me about these two witnesses is that, despite their tender age, their testimonies are fairly consistent on what transpired inside the house. The testimonies also remained firm under cross-examination. It is evident that what the children were referring to when they talked of : "he did "tabai mbaya" " pricking me ", " he touched me on my thing for urinating using his thing for urinating" were all descriptions of penetrating sex.

45. It is immaterial whether penetration was complete or partial (see section 2 of the Act). The courts have also long accepted that such terminologies as " tabia mbaya and words of the same genre are words which children who have been subjected to sexual abuse often use to describe the act of sex. (see *Muganga Chilejo Saha v R*, Criminal Appeal No. 28 of 2016 [2017] eKLR)

46. The complainant was examined about 10 days later, according to the evidence of the clinical officer and treatment records produced, the complainant had no injuries on the genital area but her hymen was broken, she had bacterial infection and vaginal discharge.

47. I agree with the Appellant's submission that the medical records did not prove penetration. I will add that even the vaginal discharge or bacterial infection perse is not necessarily evidence of defilement.

48. However, section 124 of the *Evidence Act*, allow the court to rely on the sole evidence of a child of tender years to convict, as long as the court gives reasons for it. To restate, the consistency of the two minor witnesses and the fact that their testimonies remained unshaken in cross- examination make them believable. Am satisfied that penetration was proved beyond reasonable doubt. Further I find support in the case of *Bassita v Uganda* S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that: "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever 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 reasonable doubt."

49. On the matter of identification PW1 and PW2 had been with the Appellant before when the Appellant told them to go take (or go pick) the bike. Thus, they had been together, they were not strangers. The complainant described him as " Ndungu is my father, small father, not birth father. He is my father's brother, uncle" . She also told the court that they are neighbours, as their homes are very near each other. PW2 told the court that Ndungu was their neighbour, they live close by and she has known him

since she was a child". Finally, PW4, the mother of the complainant told the court that the Appellant was her husband's cousin. This was therefore a case of identification by way of recognition.

50. In the case of the case of *Peter Musau Mwanzia v the Republic* 2008 eKLR the Court of Appeal expressed itself as follows: -"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

51. The upshot of the foregoing is that this court finds that the prosecution proved the case of defilement against the appellant beyond reasonable doubt. The conviction of the Appellant was proper and it is hereby upheld.

Whether the Appellant's defence was considered

Whether the sentence preferred against the accused person was manifestly excessive, harsh and severe.

52. The Act provides for a minimum sentence of life imprisonment if one is convicted for the offence of defilement under the aforesaid section of the Act. However in the very recent decision of the court of Appeal at Malindi in *Julius Kitsao Manyeso v Republic* , Criminal Appeal No. 12 of 2021, life sentence was declared unconstitutional . Consequently, in line of the aforesaid decision, the life sentence is hereby set aside.

53. In mitigation the Appellant told the court that he had a wife and a child and still insisted that the charges were motivated by a grudge. There was no remorse on his part. The record is also silent on whether he had any previous conviction. I will treat the silence to mean there was none, and therefore treat him as a first offender. I have also considered the fact that the Appellant betrayed the trust of a child, who knew him well, as they were neighbours at home.

54. Considering both the mitigation and the aggravating factors as aforesaid, I hereby sentence the Appellant to 45 years imprisonment.

55. In conclusion,

    a). The Appellant's conviction is hereby upheld.

    b). The life sentence is hereby set aside.

    c) The Appellant is sentences to 45 years in prison, and the sentence will run from the date of his conviction at the trial court

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023

S. CHIRCHIR

JUDGE.

In the presence of:

Susan- Court Assistant

Ms. Muriu fro the Respondent

Appellant in person.