Abonyo v Republic (Criminal Appeal E026 of 2022)
[2023] KEHC 20934 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E026 OF 2022

MS SHARIFF, J

JULY 27, 2023

BETWEEN

LUKIYO OPIYO ABONYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence by Hon F. Rashid (R.M) in original Winam SPMC criminal Case No. 25/2020 delivered on 17/6/2022)

JUDGMENT

A. Case background

1. The appellant was charged with defilement contrary to section 8(1)(2) of the *Sexual Offences Act*, 2006. The particulars were that on 4th March, 2020 in Kisumu East Sub County within Kisumu County, intentionally caused his penis to penetrate the vagina of H.C.B, a child aged 2 years 11 months. He also faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Act.

2. The appellant pleaded not guilty and the matter was set down for hearing.

B. The evidence at the trial court.

3. PW-1 J.K.O stated that he was in his hotel on 4/3/2020 with other people preparing food for her child, the minor herein who was playing outside with another child. The children came into the hotel and asked for water and went back outside to resume their play. The children thereafter went to a bakery and soon thereafter, the minor came out of the bakery in crying and when this witness inquired as to what had happened the child stated that " Uncle wa dogi ameniwekea dudu kwa" while pointing at her private parts; her clothes were soiled. PW1 stated that she then decided to change the minor's clothes. However, before she could do so, she decided to wash her and in the process of washing her, the minor complained of pain in her vagina. She then checked the minor's genitalia. The same was reddish with

bruises and feces. The minor was visibly traumatized. She subsequently took the minor to hospital where at she was examined and a P3 form was filled in. PW1 stated that she was at all material times in the company of Mama D and her employee from her hotel.

4. The following morning, she went with others to the appellant's home and found him sitting on a chair. The appellant attempted to jump over the fence. He was arrested and taken to police station. She stated that she knew the appellant as he used to eat at her hotel.

5. PW-2 F.O, stated that he is a tuktuk driver in Nyamasaria area and on 4/3/2020, he was called by the minor's father and when he went to the hotel, he found they had gone to the hospital. He followed them to R Hotel. He later took them to Kasagam police station police station.

6. PW-3 was the minor and her testimony was that 'uncle wa dogi' put his 'dudu' into her private parts in his house and she cried. That she told mum who took her to hospital. She stated that she was with her friend A when she was defiled.

7. PW-4 Doctor Rukia Aksam stated that she examined approximately 21 hours and she found bruises on the inner thigh walls. The hymen was broken. She categorized the injury as grievous harm.

8. PW-5, Corporal Carolyn Kerbae, testified that she issued a P3 to the minor's father which was filled by a doctor. He also recorded witness statements and later arrested the appellant. She visited the scene.

9. PW-6 Calvin Okoth a clinical officer produced the PRC he filled on 4/3/2020.

10. The appellant was put on his defence and elected to give a sworn statement which was to the effect that on 4/3/2020 he started his work of selling doughnuts at 5.am up to 11.00 am. He was with Fredrick Omondi and Lydia Atieno. He went home after work he went home and stayed up to 6 pm. He stated that he didn't see the minor on that day. He denied defiling the minor.

11. DW-2 was Fredrick Omondi and his evidence was that he works in a bakery and the appellant, who is his cousin used to work with him at the bakery. It was his testimony that the appellant used to report to work at 6 am to do supplies up to 11 a.m. This witness stated that on 4/3/2020, the appellant had come from work at 11 am and was in his house when the incident allegedly happened. He stated that there was a lady who used to work with the complainant's mother who had complained that the children had been playing their bakery. Further that it is the same lady who said the minor herein had been defiled. The appellant came back to the bakery at 6 pm.

12. DW-3 Lydia Atieno also worked in the bakery with the appellant. The minor herein used to play with her daughter. That on the fateful day, a lady employed by the complainant's mother came asking about the children's whereabouts. She also asked her who had defiled the minor and put pepper on her eyes. She confirmed that she had seen the minor that day.

13. After reviewing the evidence, the trial magistrate convicted the appellant and sentenced him to 25 years imprisonment. The appellant was aggrieved.

C. The appeal.

14. The appellant filed a memorandum of appeal dated 30th June, 2022 raising the following grounds;

    a. The learned trial magistrate failed to observe that the investigation and the resultant evidence tendered was shoddy and not capable of sustaining a conviction.

b. The learned trial magistrate failed to consider that the prosecution's evidence was full of contradictions with so many gaps hence incapable of meeting the threshold of proving the case beyond reasonable doubt.

c. The learned trial magistrate erred by reaching a conviction of guilt against the appellant in circumstances where the evidence was against the weight of the evidence on record.

d. The learned trial magistrate erred in convicting the appellant without considering that the sentence meted on him was harsh, unfair, unjust, unconstitutional and un-proportional to the offence committed.

D. Submissions.

(i). The appellant's submissions.

15. On the element of age, the appellant submits that the same was proved by production of a birth certificate.

16. On the element of identification, it is submitted that the minor identified the appellant as uncle wa dogi. That the other witnesses testified that the appellant was pointed out by A who was allegedly presented when the defilement took place. That the said A was not called as a witness. That the failure to call the said A should lead to the conclusion that her evidence would be prejudicial to the prosecution's case.

17. In this regard, the authorities in Robin Koech V R (2022) eKLR and Oloro and Daltanyi v R (1956) 23 EACA 49 have been cited.

18. On the limb of penetration, it is submitted that the clinical officer after examining the minor could not conclude that the minor was defiled as absence of the hymen could not be contributed to defilement. Secondly, that the presence of pus cells in the minor's vagina could be due to defilement or infection. That it is therefore speculative as to whether the minor was defiled or not.

19. In support of the above argument, counsel cites the authorities in Omar Mohamed V Republic (2020) eKLR and MM V Republic (2020) eKLR

(ii). The respondent's submissions.

20. On the element of penetration, the state submits that the limb was proved by medical evidence and was corroborated by PW-3' evidence by stating that uncle wa dogi inserted his 'dudu' into her private parts. Further that the medical evidence revealed injuries on the genitalia. The case of Charles Wamukoya V Republic Criminal appeal 72 of 2013 has been cited.

21. On the perpetrator's identity, it is submitted that the minor positively identified the appellant as uncle wa dogi. She identified him as the person who defiled her and pointed at him in court as the perpetrator.

E. Analysis and determination.

22. My duty as first appellate court was stated in Okeno v Republic [1972] EA 32 at 36 where it was stated;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 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 has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

23. The appellant in his submissions abandoned the challenge on the sentence. He also admits that the minor's age was proved. This leaves with the two elements thus; the issue of penetration and that of the perpetrators' identity.

24. On penetration, the minor testified that the appellant whom she called uncle wa dogi was in his house and that he placed his dudu into her private parts. She cried. She narrated the incident to her mother immediately thereafter. She was then taken to hospital. She stated that A was with her when the appellant defiled her.

25. Dr Rukia examined the minor and noted inflammation of the labia minora and a missing hymen. She also noted whitish discharge. Her conclusion was that the hymen was caused by penetration. The clinical officer on his part upon examining the minor noted normal genital with inflamed labia minora. That the hymen was also absent.

26. The issue then is whether the evidence tendered in the trial court could support a finding of penetration. The authorities on the issue point that the victim's testimony of penetration and the medical evidence ought to corroborate each other.

27. Similarly, the use of the word dudu has also been put to perspective in several authorities from this court and the court of Appeal. An instance in mind is the Court of Appeal case of Muganga Chilejo Saha v Republic [2017] eKLR where the court stated that:

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

28. In the instant proceedings, the doctor approximated the injuries to be 21 hours old. This lays credence that the injuries were sustained in the recent past which accords with the date of the alleged incident.

29. In the circumstances and on the basis of the above cited authority, I find that the minor was indeed defiled.

30. On the issue of the appellant's identity, PW-1 stated that the minor was playing with her friend A near the bakery where the appellant worked. That shortly, the minor ran out of the bakery crying. She checked the minor with the intention of changing her soiled clothes when she noted injuries. They took the minor to hospital for examination. The minor pointed out the appellant in court and said that he is the one she referred to as uncle wa dogi.

31. DW-1 in his evidence confirmed that he knew the minor as her mother had a hotel near the bakery. DW-2 and DW-3 confirmed seeing the minor play with the said A.

32. The defence witnesses said that on the day of the incident, the appellant came to the bakery at about 11 am and went to his house and only came back at 6 pm to pack doughnuts. However, the appellant did not call any witness who conclusively proved that he was with them at the time of the alleged incident. The testimonies of his workmates who were with him from 6.a.m to 11a.m are of no probative value.

33. The appellant submits that the prosecution failed to prove the appellant's identity because the said minor A was not called to testify. The trial magistrate after considering the evidence tendered before her concluded that the offence was committed when the appellant was in his house.

34. The failure to call the said A was not fatal in any way to the prosecution's case since the other evidence conclusively pointed to the appellant's guilt. In any event, the prosecution need not call a superfluity of witnesses provided the evidence already adduced are sufficient to proof the offence to the required standard. This finding is supported by the holding in Keter V Republic [2007] 1 EA 135 where the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

35. In the circumstances, I find that the appellant was positively identified going by the evidence tendered.

36. The appellant having abandoned his challenge on the sentence, I find no point determining it. I thus find that the offence was proved as charged beyond reasonable doubt.

F. Conclusion

37. The upshot is that appeal herein lacks in merit and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 27TH DAY OF JULY 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:-

Appellant

Mr Sean Ogutu for the Respondent.