Chebii v Republic (Criminal Appeal 43 of 2019)
[2023] KEHC 21280 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21280 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 43 OF 2019

RB NGETICH, J

JULY 27, 2023

BETWEEN

JULIUS CHEBII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both the conviction and sentence arising from sexual offences criminal case No. 520 of 2013 in the Chief Magistrate's court at Kabarnet by Hon. E. BETT (SRM).)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual offences Act* No 3 of 2006. The particulars of the offence being that the appellant on the June 15, 2013 in Kabartonjo division within Baringo county the accused intentionally and unlawfully caused his penis to penetrate the vagina of JY a child aged 14 years in contravention of the said Act.

2. The alternative charge is the offence of indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No 3 of 2006.Particulars of the charge being that on the June 15, 2013 in Kabartonjo division within Baringo county the accused unlawfully and indecently committed an indecent act by touching the breasts of JY a child aged 14 years.

3. The appellant denied both the main and alternative charge. The prosecution availed 5 witnesses during the trial in support of the charge. By judgment delivered on December 2, 2013 the appellant was convicted and sentenced to 25 years imprisonment.

4. The appellant being aggrieved and dissatisfied judgment filed this appeal challenging both conviction and sentence on the following grounds:-

    i. That the charge sheet as to the evidence tendered was fatally defective beyond salvage.

ii. That the learned trial magistrate failed to conduct voire dire examination on the complainant to justify the reception of her trial testimonies as required by section 19(1) of the *Oaths And Statutory Declarations Act* cap 15 and section 125 of the *Evidence Act*.

iii. That the evidence of the victim was not consistent or corroborated by the other material evidence.

iv. That the prosecution case was not proved beyond required standards since the medical report did not connect the appellant with the victim the same required the DNA analysis to size the contention bearing in mind that the complainant was pregnant at the time.

v. That the trial magistrate convicted and sentenced the appellant without considering that prosecution failed to avail some of the mentioned witnesses to prove its case.

vi. That there was no investigations at the scene of crime done to establish the truth of the matter.

vii. That the appellants rights under sections 170 of the CPC and article 50(2) of the *Constitution* to have the witness statements to prepare his defence was violated.

viii. That the appellants defence as stipulated under section 169(1) was not regarded.

5. The appellant filed supplementary grounds of appeal under section 350(2) of the *CPC* the grounds being as hereunder:-

i. That the charge sheet as to the evidence tendered was fatally defective beyond salvage.

ii. That the trial court erred in law and fact by failing to observe that the circumstances in which the identification by each witnesses came to be made was not conclusive to point at the appellant as the assailant.

iii. That the learned trial magistrate erred in law and in fact by failing to hold that penetration as an essential factor in prove of defilement was not conclusively established at the trial of this case.

iv. That the trial court erred in law and facts as it failed to hold that circumstantial evidence being often the best evidence of the surrounding events which by intensified examination is capable of providing the proposition with the accuracy of events did not point at the appellant as the perpetrator of the offence.

v. That the trial court erred in law and fact as it failed to observe that the prosecution evidence was so tenuous to be used to warrant for conviction of the appellant hence did not prove the case beyond any reasonable doubt.

vi. That the learned trial magistrate erred in law and fact as he failed to hold that the contradictions and inconsistent witness evidence should have been decided in favour of the appellant.

6. The appellant prays that this appeal be allowed, conviction and sentence be set aside and the appellant set at liberty. The appeal proceeded by way of written submissions.

Appellant's Submissions

7. The appellant submits that the prosecution did not establish a *prima facie* case against him and he still maintains his innocence; and 25 years imprisonment was such a harsh sentence.

8. The appellant further submits that the charge sheet was fatally defective. That it was alleged that the complainant aged 14 years was mentally retarded and he was therefore supposed to be charged under

section 7 of the *Sexual Offences Act* and since the prosecution failed to amend the charge sheet, it should be declared defective.

9. The appellant further argue that the charges against him were fabricated and if Pw 3 informed three women who are neighbors to complainant's family, failure to avail them show that he was not positively identified.

10. The appellant further submit that treatment documents indicates that the complainant was defiled by three people known to her and according to P3 form, the earlier documented allegations in the treatment notes were changed to show that she was defiled by one person; further that there is variance on date of treatment and date of the offence.

11. The appellant submit that the complainant was pregnant and it was total negligence and abdication of responsibility by the medic to refuse to collect samples for DNA and other tests to ascertain the right perpetrator of the offence. Further that the doctor's evidence did not establish proof of penetration as an essential factor in the offence of defilement.

Respondent's Submissions

12. The respondent submits that facts in this case were explicitly clear and had sufficient information to enable the appellant understand the same and the facts were perfectly in line with the charge.

13. On the issue of voire dire examination, the respondent argues that voire dire examination is dependent on the age of the witness and according to the learned trial magistrate, the complainant mentally retarded had fair understanding.

14. On whether complainant's evidence was corroborated, Pw 4, Benjamin Kendagor a clinical officer at Kabarnet District Hospital who filled p3 produced the p3 which corroborated the complainant's evidence.

15. The respondent submits that DNA test was not essential in prove of fact that the complainant was defiled. That the complainant's evidence alone coupled with well explained medical evidence would suffice.

16. On argument that some witnesses were not called, the prosecution submits that there is no legal requirement on the part of the prosecution to call a particular number of witnesses to prove a charge against the accused in order to succeed. That if the evidence adduced credible, the court can convict on the basis of such evidence.

17. On whether the rights of appellant under section 170 of the *Criminal Procedure Code* and article 50(2) of the *Constitution* were violated, the respondent submits that none of the above provisions of the law were violated; and on fair trial under article 50 (2) of the *Constitution* of Kenya 2010 the state counsel submit that the appellant was accorded sufficient time to prepare his defence and in compliance with article 50(2)(j), he was duly informed in advance of the evidence the prosecution intended to rely on and had reasonable access to the same.

18. As to whether the appellant's evidence was duly considered, the respondent submits that the appellant's defence was duly considered and weighed against prosecution evidence and the appellant did not rebut otherwise credible evidence of the prosecution and defence was a mere denial.

Analysis And Determination

19. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity

to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *Okeno v Republic*[1972] EA 32 where it was stated as follows: -

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v Republic* [1957] EA 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] EA 424)"

20. Further in the case of *Mark Oiruri Mose v Republic*[2013] e KLR criminal appeal No 295 of 2012 the Court of Appeal stated:

> " It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

21. In view of the above, I have considered evidence adduced before the trial court together with the submissions herein and find the following as issues for determination:-

    i. Whether the charge sheet was defective.

    ii. Whether the ingredients for the offence of defilement have been proved beyond reasonable doubt.

    iii. Whether sentence imposed was harsh and excessive.

i Whether the ingredients for the offence of defilement have been proved beyond reasonable doubt

22. The ingredients for the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant.

23. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

24. In the present case Pw 4 Doctor Benjamin Kendagor a Clinical Officer at Kabarnet District Hospital testified that he received the complainant aged 14 years old brought by his father on allegation that she had been defiled. He produced the P3 Form which indicated the age of the minor as 14 years and the Treatment chit from Kabartonjo District Hospital which also indicated the age of the complainant as 14 years. There is therefore evidence that the minor was 14 years.

25. The second ingredient is penetration. Penetration is defined under section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

26. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine that penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

27. Section 124 of the *Evidence Act*, cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

28. In the present case, the victim testified that she was on the forest fetching firewood in the forest when the accused came and grabbed her, removed her under garments and started "akaanza kazi" which he did for a while. She stated that she reported the issue to her mother.

29. Further, Pw3 Japheth Kipkenei Chemjor testified that on June 15, 2013 at 5:00 p.m, he was from his home when he heard people speaking in a bush and on moving closely, he saw the accused who had lowered down his trouser to a knee level with the complainant who had her skirt lowered too. He said the accused was on top of the complainant and Pw2 asked him if he was defiling the girl and accused told him he had always wanted her.

30. Medical evidence by (Pw4) who was the clinical officer confirmed that the complainant was defiled and was then 22 weeks pregnant on July 1, 2013. Upon examining the complainant, that her hymen was long broken and the pregnancy was there even prior. He concluded that there was penetration. There is no doubt that penetration was proved. In my view even without DNA analysis in view of the fact that the accused was found red-handedly defiling the complainant, there was prove of penetration.

31. On whether accused was positively identified as the person who defiled the minor, Pw2 found the appellant redhandedly defiling the minor. The incident occurred at 5.00p.m; in broad day light and was known to both pw2 and the complainant. The complainant knew the appellant as Julius and he was a neighbour to both Pw2 and complainant's family. From the foregoing, there is no doubt that the 3 ingredients for the offence of defilement were proved beyond reasonable doubt.

32. On whether voire dire examination was done in respect to the complainant, I have perused the record and note that the trial magistrate observed that the complainant although it is alleged,

she is mentally retarded, appears not to comprehend issues. The court proceeded to record that she may not understand the nature or significance of an oath but she can testify without being sworn. In the case of *Maripett Loonkomok v Republic* [2016] eKLR, the Court of Appeal sitting at Mombasa held that:

> "It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;
>
> "In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

33. From the foregoing voire dire examination ought to be conducted in respect to children of tender but failure to do so does not per se vitiate the entire prosecution case. I however note that the child was not of tender ager she was 14 years old and on issue of mental challenge, I note that the trial magistrate recorded that she may not understand nature and significance of oath but could testify unsworn. In the case of *Athumani Ali Mwinyi v R* Cr Appeal No 11 of 2015 the Court of Appeal stated as follows:-

> "In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

34. In the instant case, there was independent evidence of pw2 who found the appellant in the act; defiling the complainant. There is therefore no doubt as to identification or credibility of complainant's evidence. Pw2 who found the complainant and appellant never saw any other persons and appellant's allegation that the complainant was defiled by 3 people is without proof.

35. On whether the evidence adduced was contradictory the court in the case of *Twehangane Alfred v Uganda* Crim App No 139 of 2001, [2003] UGCA, 6 stated as follows;_

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

36. In my view minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.

37. Upon perusing evidence adduced before trial court, there is no material inconsistency or contradiction that raises doubt in the mind of the court. Evidence adduced ought to be considered holistically.

38. I also note that at page 16 of the proceedings, the trial magistrate took into consideration the accused defense by stating as follows:-

> " The accused denied the incident and maintained that he went straight home after work, however the evidence of Pw 1 and Pw 3 clearly show he was at the scene and did commit the offence".

39. From the foregoing, there is no doubt that appellant's defence was considered. From his statement he is merely denying the charge as observed by the trial magistrate. The defence did not cast any doubts on the prosecution case.

ii Whether sentence imposed was harsh and excessive

40. Section 8(3) of the *Sexual Offences Act* provides that 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.

41. The trail magistrate-imposed sentence of 25 years imprisonment. The supreme court declared mandatory minimum sentences unconstitutional in Muratetu I but clarified in Muruatetu II that it applies to murder cases only. The sentence of 25 years imposed by the trial curt was therefore legal and I will not interfere.

42. Final orders

    1. Appeal on both conviction and sentence is hereby dismissed.
    2. The period from date of arrest to be taken into consideration.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET

This 27th Day of July 2023.

.....

RACHEL NGETICH

JUDGE

In the presence of

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Appellant present.