Kariuki v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 21041 (KLR) (27 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E022 OF 2022

WA OKWANY, J

JULY 27, 2023

BETWEEN

ALVIN OBASANJO KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa – RM Nyamira dated and delivered on the 1st day of November 2022 in the original Nyamira CMC Sexual Offence No. E079 of 2021)

JUDGMENT

1. The Appellant herein, Alvin Obasanjo Kariuki, 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.

2. The particulars of the offence were that on November 13, 2021 in Nyamira South Sub-county within Nyamira County intentionally and unlawfully caused genital organ, penis to penetrate the genital organ, anus of BK (particulars withheld) a child aged 9 years old.

3. In the alternative count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars being that on November 13, 2021 in Nyamira South Sub-county within Nyamira County intentionally and unlawfully touched the genital organ, anus of BK a child aged 9 years old with his genital organ, penis.

4. The Appellant pleaded not guilty to both the main charge and the alternative count after which the trial kicked off with the prosecution presenting the evidence of 5 witnesses as follows: -

5. PW1, PN (particulars withheld), the complainant's mother, testified that BK was aged 9 years having been born on August 2, 2011. She produced the complainant's Birth Certificate as P Exhibit 1. She stated that she left home for work on November 13, 2021 at around 2pm leaving behind the

complainant and her younger brother one M. On returning home, at about 3pm, she found that M was home alone. M informed her that BK had gone to get tomatoes from a male customer. She searched for BK and found her near the road. BK told her that the Appellant had taken her from the shop and defiled her in a nearby bush. She took the complainant to hospital and reported the incident to the police. She produced the P3 Form and Treatment Notes as P Exhibit 2 and 3 respectively. PW1 stated that she did not know the Appellant at the time but that the Appellant informed the complainant that he was called Dennis.

6. On cross examination, PW1 stated that the Appellant lied to the complainant that he was called Dennis. She added that BK identified the Appellant in the presence of seven boys.

7. PW2, was BK, the complainant. She testified that she knew the Appellant by appearance only as she had seen him along the road on two occasions prior to the day of her sexual assault. She narrated that she was on the material day in her mother's shop when the Appellant lured her to go with him to collect tomatoes only to turn around along the way and defile her in a bush. She went back home and informed her parents who took her to the hospital and later to the police.

8. On cross examination, she stated that the Appellant penetrated her anus.

9. PW3 was No xxxx Cpl Vanice Michira, a Police Officer attached at Nyamira Police Station. She testified that she received the defilement report from PW1 and PW2 on November 14, 2021. She issued them with a P3 Form and recorded their statements. She added that the Appellant was arrested by members of the public on November 15, 2021 and that PW2 identified the Appellant along the way to the police station. She visited the scene and collected the complainant's dress and panty which she produced as Exhibits 4 and 5 respectively.

10. On cross examination, she stated that PW2 explained to her that penetration was in the anus. She added that PW2 told her parents that the Appellant was a regular visitor at their shop.

11. PW4, Mr Mogesi Nyaanga, was the Clinical Officer who examined PW2 and found that the hymen was not intact. He noted that there were no bruises or bleeding in the complainant's vagina but that puss cells, yeast cells and spermatozoa were seen. He concluded that there was vaginal penetration. He formed the opinion that the complainant was not sodomized.

12. PW5, Dennis Mwangi, also a Clinical Officer, testified that the complainant came with a history that she was penetrated in the anus. He did not examine the patient.

13. At the close of the prosecution's case, the trial court found the Appellant had a case to answer. The Appellant opted to give a sworn testimony in which he stated that he did not know the complainant and did not commit the offence. He attributed his woes to mistaken identity.

14. The Appellant was, at the close of the trial found guilty of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. He was subsequently convicted and sentenced to life imprisonment thereby triggering the filing of the instant appeal in which the Appellant listed the following Grounds of Appeal: -

    1. 'The Learned Trial Magistrate erred in law and in fact in convicting the Appellant on evidence that was clearly inconsistent and contradictory.'

    2. The Learned Trial Magistrate erred in law and fact in disregarding that the identification of the Appellant was not properly done. For clarity, a critical witness one Morgan who was with PW2 was not called as a witness thus the identification of the Appellant as the perpetrator was shaky.

3. Having found that the evidence of PW2 and PW4 were contradicting and/or at variance, the Learned Trial Magistrate erred in law in finding that the Respondent had proved its case beyond reasonable doubt.

4. The Learned Trial Magistrate erred in law and fact in disregarding the evidence of PW4 which confirmed that genital organs were normal and no bruises nor blood were seen.

5. In finding and holding that PW2 was telling the truth with regards to penetration to her anus, the trial court misdirected itself by not warning itself on the danger of acting on the uncorroborated evidence of a single minor witness.

6. The Learned Trial Magistrate erred in law and in fact in failing to evaluate the testimony of the complainant and failed to give cogent and/or conclusive reasons for finding the complainant as a truthful witness.

7. In finding and holding that PW4 did not state whether or not he examined the anus of PW2, the Learned Trial Magistrate disregarded the evidence adduced by PW4 who categorically stated that he examined PW2's vagina and concluded there was vaginal penetration.

8. The Learned Trial Magistrate erred in law and fact in disregarding the evidence of PW4 who concluded that PW2 was not sodomized but however there was vaginal penetration which PW2 denied.

9. In finding and holding that the evidence of PW5 was of no probative value, the Learned Trial Magistrate ignored the evidence of a crucial witness who had interacted with PW2 during examination.

10. The Learned Trial Magistrate erred in law and fact in concluding that PW2 was a truthful witness without same proving penetration which is a requirement in proving a sexual offence.

11. In finding and holding that since PW2 stated that she was penetrated in the anus thus it was important for PW4 to equally examine PW2 in addition to examining her vagina, the Learned Trial Magistrate erred in law and fact in convicting the Appellant on a non-existence and/or slippery evidence.

12. The Learned Trial Magistrate erred in law and fact in interpreting and/or applying Section 124 of the *Evidence Act* in the case before him noting that various witnesses particularly PW4 and PW5 had concluded as experts that the PW2 was not sodomized.

13. The Learned Trial Magistrate erred in law and fact when the same failed to consider that the charge sheet thereof was defective.

14. The Sentence (Imprisonment of 30 years) meted out against the Appellant, (who was sic a first offender), was harsh, cruel and therefore unreasonable. In any event, the sentence was contrary to the set principles of the law.

15. The conviction and sentence are therefore manifestly unsafe and therefore warranting the intervention of the Honourable Court.

15. The Appellant filed a Supplementary Petition of Appeal on March 14, 2023 in which he listed the following Grounds of Appeal: -

    1. 'The Learned Trial Magistrate erred in law and in fact in disregarding the import and tenor of the production of P EXH 2 by PW4 who was not the Author.'

    2. The Learned Trial Magistrate failed to appreciate that the Appellant's Constitutional right as enshrined in Article 49 (1) (f) of the *Constitution* was infringed by the Respondent.

16. The Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence.

17. The appeal was canvassed by way of written submissions which I have considered. The main issue for determination is whether the prosecution proved the offence of defilement against the Appellant beyond reasonable doubt.

18. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify. This duty was succinctly espoused in the case of *Ramkrishna Pandya v Republic [1957] EA 336* as follows:-

    ' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence.'

    (See also *Okeno v Republic [1972] EA, 32*)

19. I have considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether the offence of defilement was proved to the required legal standard.

20. Section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006 stipulates thus: -

    8. 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.

21. The ingredients of defilement are age, penetration and positive identification of the perpetrator. (See the case of *Charles Wamukoya Karani vs Republic, Appeal No 72 of 2013*). In order to succeed in prosecuting the offence of defilement, the Prosecution must prove each of these ingredients to the required legal threshold, which is, beyond reasonable doubt.

Age

22. It was not disputed that the victim of defilement in this case was a child of tender years aged 9 years.

Penetration

23. The Appellant submitted that the ingredient of penetration was not proved because while PW2, the complainant, testified that the Appellant penetrated her 'from the back', PW1 testified that the complainant informed her that the Appellant removed his penis and inserted the same into her vagina.

24. PW3, on the other hand testified that PW2 told her that the Appellant inserted his penis into her vagina and that when he realized that he could not penetrate, he inserted his penis into the anus.

25. I have perused the Record of Appeal and I note that the complainant testified as follows on penetration: -

> ' He lay me on the grass. He pulled up my dress and got hold of my hands. He pulled up my dress and he inserted his private parts into mine. He did so from the back side. I had laid on my stomach. He penetrated me from the back side in the same. The accused slept on top of me. He inserted his penis into my anus. I do not know if he used a condom.'

26. On cross examination, the complainant stated: -

> ' The accused penetrated my anus.'

27. PW4, the Clinical Officer testified as follows on penetration: -

> ' I examined the patient on November 13, 2021. I examined the vagina. There was vaginal penetration.'

28. On cross examination, PW4 testified as follows: -

> ' In my opinion the patient was not sodomized there was vaginal penetration.'

29. I note that there was a contradiction between the testimony of the victim and that of the two Medical Officers (PW4) and (PW5) as concerns the issue of penetration. While the victim stated, in very clear terms that she was penetrated in the anus, the Medical Officer (PW4) was categorical that there was vaginal penetration and that the victim was not sodomized. PW5, on the other hand, testified that the patient told him that she was penetrated in the anus. It is also to be noted that PW2, the complainant's mother, testified that the victim told her that the assailant inserted his penis into her vagina. The question which arises is which evidence the court should rely on in the face of such a glaring contradictions. The appellant urged the Court to scrutinize the inconsistencies and contradictions between the testimonies of the complainant with that of the medical doctor. In my opinion, there are clear inconsistencies and contradiction in the evidence of the complainant with that of the medical doctors and her mother.

30. My finding is that the glaring contradiction in the evidence of the prosecution witnesses regarding where exactly the victim was penetrated has the effect of casting doubts, in the mind of this court, on whether penetration was proved to the required standards. It is trite that such doubts, on the prosecution's case should be interpreted in favour of the Appellant with the result that penetration was not proved to the required standards.

31. This court is alive to the provisions of Section 124 of the *Evidence Act* which stipulates as follows: -

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is 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.

32. My finding is that the above provision deals with instances where the only evidence in a sexual offence is that of the alleged victim and empowers the court to convict on such evidence if the court is satisfied that the victim is telling the truth. In the instant case, the circumstances are quite different from those envisaged under Section 124 of the *Evidence Act* as besides the victim's evidence, there was the medical evidence which turns out to be at variance with the victim's evidence thus casting doubt on the prosecution's case.

33. Furthermore, while the Clinical Officer testified that laboratory results on the victim's specimens revealed that there were spermatozoa as he stated, 'the sperms were seen', the P3 Form that was filed and produced by the same witness indicates that 'no spermatozoa were seen.' This court is at a loss as to whether the Clinical Officer was really referring to the same case. The court cannot ignore the glaring gaps in the prosecution's case. I find guidance in the decision in *John Mutua Munyoki v Republic [2017] eKLR* where the Court of Appeal held: -

> ' Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt. Did the prosecution discharge this task' According to the appellant the prosecution failed in this undertaking, whereas the respondent is of a different view. Apart from the testimony of the complainant, there was no other evidence linking the appellant to the crime. The only reason why the appellant was the prime suspect was because he was the last person to be seen with the complainant. Much reliance was placed on the evidence of the complainant despite having been discredited by the evidence of the clinical officer. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:
>
> 'But did the medical evidence on record establish that JM was defiled' We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI'

The Court proceeded and stated that:

> ' From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, J never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
>
> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.'

Identification

34. On identification, the victim testified that she was able to identify the Appellant as the perpetrator of the offence as she had seen him along the road on two occasions prior to the incident in question. PW2 testified as follows on identification: -

> ' I know the accused by face only. I had seen him twice prior to that day. I used to see him along the road to and from N Primary School. The accused told me that he was called Dennis.'

35. PW3, the Investigating Officer testified as follows on identification and arrest: -

> ' The father asked her where she was. She said that she was with someone called Dennis. The person told her that he was called Dennis.
>
> On November 15, 2021, members of the public arrested the accused and the child identified him along the way to the station at Nyamira. The child came and identified him as the one who defiled her.'

36. PW1 testified as follows on cross examination: -

> ' My daughter identified the accused in the presence of 7 boys.'

37. Several questions linger in the mind of this court on the issue of identification; firstly, the victim's testimony was she only knew her assailant by appearance and that he told her that he was called Dennis.

38. PW1 testified that she did not know the accused at the time while PW3 testified as follows: -

> ' The child told the parents that the culprit was a regular visitor at the shop. The minor later identified him when he was arrested by members of the public. The father was among those who escorted the accused to the police station.'

39. From the evidence of PW3, it is clear that the victim was not at the scene to identify her attacker before his arrest and was only able to identify him after his arrest on his way to the police station and later at the police station. The question which then arises is who identified the Appellant to the members of the public at the time of the arrest?

    Did the police carry out an identification parade to enable the victim identify her attacker?

40. I note that there are no answers to the above questions from the evidence presented by the prosecution. Furthermore, one M, the victim's younger brother who was allegedly with her at the time the Appellant went to the shop to lure the victim to go with him was not called to testify. To my mind, M was a crucial witness whose evidence could have corroborated the victim's alleged identification of the culprit considering that she stated that she only knew him by appearance. I find that failure to call the said M as a witness, without any explanation, can only be construed to mean that his evidence could have been adverse to the prosecution's case. I am guided by the decision in *Bukenya v Uganda [1972] EA 549* where it was held that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution's case.

41. The gaps in the identification of the Appellant lead me to conclude that his identification was not full proof thus lending credence to his defence that his arrest, prosecution and conviction could be an unfortunate case of mistaken identity. This is however not to say that the victim was not defiled as it may as well be that the defilement did occur. I however find that the evidence on record is too shaky to support a conviction.

42. Having regard to my findings on the shortfalls of the prosecution's case on the issues of penetration and identification, I find that the instant appeal is merited and I therefore allow it with the result that the Appellant's conviction is hereby quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

43. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE