ME v Republic (Criminal Appeal 85 of 2018)
[2023] KEHC 21172 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 85 OF 2018

DAS MAJANJA, J

JULY 26, 2023

BETWEEN

ME .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the original convictions and sentence dated 3rd July 2018 by Hon.L. Mutai, CM in Criminal (SO) Case No. 31 of 2017 at the Magistrate's Court at Nanyuki)

JUDGMENT

1. The Appellant was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* by the Subordinate Court. The particulars of the charge were that on diverse dates between the year 2012 and 24th June 2017 at Laikipia East District in Laikipia County, he intentionally and unlawfully caused his male genital organ to penetrate into the vagina of CL, a girl aged 12 years old. He was sentenced to 20 years' imprisonment and now appeals against the conviction and sentence based on the Petition of Appeal dated 10th July 2017 and amended memorandum ground of appeal. The Appellant also relies on his written submissions.

2. As this is the first appeal, I am required to review all the evidence and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demenour (see *Okeno v Republic* [1972] EA 32). In order to carry out this task it is appropriate to outline the evidence on record.

3. After a voire dire, the court directed that the complainant (PW 1) give unsworn testimony in which she stated the she knew the Appellant as her father and that he defiled her on several occasions. The first incident was when he grabbed her by her skirt and dragged her into a bush. When she refused to remove her clothes and lie down, he forced her to lie down and after removing his trousers, he blocked her mouth with a cloth and then, "pushed his thing for urinating into my thing for urinating." He warned

her not reveal her ordeal to anyone. Although she told her mother that the Appellant has sexually assaulted her, nothing happened.

4. The second incident was when the Appellant called her to the house. He blocked her mouth with a handkerchief and forced her onto the bed, removed his clothes and forced proceeded to insert his penis into her vagina. He warned not tell anyone but when she told her mother, he mother did not do anything.

5. The third incident she narrated was when her mother left for the market and the Appellant called her to his bed. Even though she refuse, she told the court that the Appellant forced her to the room, undressed her and pushed his penis into her vagina. She stated that this time she did not report to her mother as she had been ignored in the past. She however, report the incident to the teacher who in turn informed the headmaster and who in turn informed the police.

6. PW 1's teacher, PW 2, recalled that in January 2017, she noticed that PW 1 had become withdrawn. The other children complained to her about the odour she was emitting. She requested PW 1 to call her parents but they did not come. When the smell became too much, she asked PW 1 what happened. PW 1 narrated to her ordeal in the hand of the Appellant whereupon she alerted the headmaster. A police officer, PW 3, confirmed that on 27th June 2019, PW 2 reported to her that PW 1 had been subjected to defilement. She proceeded to the home of the Appellant in the company of PW 1 and PW 2 whereupon the Appellant was arrested.

7. PW 1 was examined by a Clinical Officer, PW 5, who recalled that he examined her on 28th June 2017. He filled the P3 medical form and the PRC form which he produced in evidence. From the examination he noted that there was evidence of penetration due to the absence of the hymen. He also examined the Appellant but concluded that there was nothing remarkable.

8. In his sworn defence, the Appellant denied the offence and gave an account of his arrest. He stated the PW 1 was his step –daughter. He pointed out that PW 1's father never made any complaint against him.

9. Based on the above evidence, the Appellant raises procedural and substantive ground of appeal against the conviction. The Appellant complains that the trial magistrate failed to conduct a proper voire dire examination of PW 1 in order to ascertain the two critical elements in voire dire examination which he contends was a serious miscarriage of justice.

10. The key evidence implicating the Appellant was that of PW 1 who said to be aged 12 years old. The law governing reception of the evidence of a child of tender years is to be found at section 19 of the *Oaths and Statutory Declarations Act* (Chapter 15 of the Laws of Kenya) which provides:

> 19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

11. The procedural requirements before reception of evidence of child of tender years under section 19 of the Act has been considered by the Court of Appeal in several cased among them *Johnson Muiruri v Republic* [1983] KLR 445 and *Kinyua v Republic* [2002] 1 KLR 256. The authorities show that if,

after the voire dire examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed of sufficient intelligence and understands the duty of speaking the truth.

12. As to whether the trial court complied with the requirements, the proceedings show the following:

> 14.8.2017
>
> Court to Witness in Kiswahili
>
> I am [States name] aged 12 years. I come from L. I am a pupil at [Particulars withheld] Primary School Class 4. I go to Church in Sundays. I know I am in a Court of Law but I don't know what goes on there. Today is Friday but I don't know the date. I don't know the meaning of taking an oath.
>
> Court
>
> On examining the witness. I am satisfied that she isn't presumed of sufficient knowledge to understand the meaning of oath. To therefore give unsworn evidence.
>
> Magistrate

13. While it is not necessary to set out the questions and answers in voire dire verbatim, it must be clear from the substance of proceedings that the essential elements of section 19 of the *Oaths and Statutory Declarations Act* have been complied with (see *Johnson Muiruri v Republi*c (Supra)). From the examination conducted by the trial magistrate and which I have set out above, it is clear that trial magistrate did not deal with the requirement whether the child was intelligent and could tell the truth based on the answers but for ruled on the second requirement whether the child understood the meaning and nature of the oath. In this sense therefore, the voire dire examination conducted was defective. The trial magistrate however came to the correct conclusion that the child ought to give unsworn testimony.

14. The consequence of whether testimony is sworn or unsworn is important. Ordinarily sworn evidence does not need corroboration. Section 19 of the *Oaths and Statutory Declaration Act* had a proviso which stated:

> Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

That section was amended and that proviso re-enacted as section 124 of that *Evidence Act* (Chapter 80 of the Laws of Kenya) and a further proviso added thereto as follows:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

15. As to the consequence an error committed in the manner the voire dire is conducted, the authorities establish that failure to follow the prescribed procedure does not necessarily vitiate the trial. In *Patrick*

Kathurima v Republic CA NYR CR App. No. 131 of 2014 [2015]eKLR, the Court of Appeal observed that;

> The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt.

16. Ultimately, the trial court came to the correct conclusion that the PW 1 should give unsworn testimony. The Appellant had the opportunity to cross-examine her on her comprehension of facts and events and from a reading of her testimony she was clear as to what had taken place. The trial magistrate commented on her testimony as follows, "The evidence of the child I found was clear, she was a candid witness, whose evidence was not challenged by the defence in cross examination." Thus, the trial court was entitled to accept PW 1's statement without corroboration in light of the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya).

17. Turning back to the substance of the appeal, the Appellant complains that the trial magistrate failed to appreciate the fact that the critical elements of defilement in penile penetration and identity of the alleged perpetrator were not proved to the required standards of proof. In order to prove the offence of defilement the prosecution must prove that the accused did an act which amounted to penetration to a child. "Penetration" under section 2 of the *Sexual Offences Act* means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

18. This was a case where PW 1 narrated that she was repeatedly defiled by the Appellant who was in a relationship with her mother. She gave clear evidence of what had transpired and despite her reporting her ordeal, her mother refused to intervene. She also did not report the various incidents to the police or any other authority as she had been threatened by the Appellant. In addition, the Investigating Officer, PW 4, testified that PW 1's mother had refused to testify no doubt due to the complicity and corroborating PW 1's testimony that her mother refused to intervene. It is only through intervention by PW 2 that the Appellant's felonious act came to light. Since the Appellant had a relationship with PW 1's mother and PW 1 was residing with him, the issue of identity was not in doubt.

19. Further corroborative evidence was led by the Clinical Officer, PW 5, who examined PW 1 on 28th June 2017 and produced the P3 medical form, the Post Rape Care (PRC) Form and treatment notes. PW 5 observed that genitalia was normal but she produced a foul smell and that the hymen was broke. He concluded that there had been penetration due to the absence of the hymen. This evidence of the absence of the hymen, was in view and taking into account the entirety of the evidence by PW 1 and her age corroborative of the fact of penetration.

20. In his defence, the Appellant's did not touch on or contest the various incidents of defilement raised by PW 1. He alluded to existing grudges or bad blood between him and PW 1 and his relationship with her biological father. These allegations when weighed against the totality of the prosecution testimony did not amount to much and neither did they negate the fact of defilement.

21. The final ingredient necessary to prove defilement is the fact that the victim is a child. In order to support the conviction, the prosecution need only prove that the victim is below the age of 18 years. Proof of age is a question of fact. That PW 1 was a child is not in doubt. She testified that she was 12 years and in class 4. PW 2 confirm that she was still in primary school while the Appellant referred to PW 1 as his step daughter. As to the real age of PW 1, PW 4 produced the Child Health Card which showed that she was born on 14th February 2004. The offences took place between the 2012 and June 2017 hence the PW1 was aged between 8 and 12 years when the Appellant defiled her.

22. The Appellant is entitled to the most favourable sentence hence under section 8(3) of the *Sexual Offences Act* 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. The trial court meted the minimum mandatory sentence provided by the law. It cannot be said that the sentence is harsh and excessive.

23. The Appellant was properly convicted and sentenced. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 26THDAY OF JULY 2023.

A.K. NDUNG'U

JUDGE