Adorwa v Republic (Criminal Appeal 11 of 2018)
[2023] KEHC 21963 (KLR) (29 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 11 OF 2018

GL NZIOKA, J

AUGUST 29, 2023

BETWEEN

KENNEDY ADORWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in the decision of; Hon. S. M Githinji, Chief Magistrate, delivered on, 27th August, 2013, vide Criminal Case No. 177 of 2012, at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was charged in the Chief Magistrate's Court at Naivasha vide criminal case number 177 of 2012 with the offence of; defilement contrary to section 8 (I) as read with section 8(2) of the *sexual offences Act* No. 3 of 2006 (herein "the Act) in two counts.

2. The particulars of the offences are that, on the 16th day of January 2012 in Naivasha Municipality, within Nakuru county he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vaginal of JNL a child aged 9 years and on the same date and place, he also intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of SI, a girl aged 9 years.

3. He was charged with an alternative charge of committing an indecent act with a child, contrary to section 11 (I) of Act in two counts. The particulars of this offence are that, on the 16th day of January 2012 in Naivasha Municipality within Nakuru County, the accused intentionally and unlawfully did cause his genital organ namely penis to come into contact with genital organ namely vagina of JNL, a girl child aged 9 years and vagina of SI, a girl child aged 9 years.

4. He pleaded not guilty on all counts and the case proceeded to full hearing. The prosecution case is that, the complainants PW2 and PW3 were aged 9 years at the time of the offence and in class 3 at

[Particulars Withheld] Primary school. That they were staying in the same plot with the appellant as neighbours at [Particulars Withheld] village.

5. That on 16th day of January 2012, at 2.00pm the appellant lured them to his single room house with a bed and seats, and asked them whom he would start with and end with. He started with the 1st complainant as the 2nd complainant sat on the seat. He removed her shirt and pant, placed her on the bed, lowered the zip of his trouser and penetrated her vagina, using his penis. When he was through he told her not to tell anyone, and call the 2nd complainant.

6. That, the 2nd complainant was still in uniform and had worn a short inside. That the appellant removed her clothes, unzipped his long trouser, touched her genitalia using his penis but not penetrate her vagina, as her mother stormed into the appellant's house and found her undressed in the appellant's bed.

7. PW 1 WN, upon finding her daughter in the appellant's bed undressed and the appellant beside the bed with unzipped trouser, screamed asking him what he was doing with the girls in the room. The appellant allegedly told her not to scream, to enable them deliberate quietly. However, she continued screaming and her screams attracted neighbours, Assistant Chief and Administration Police Officers who lived nearby.

8. PW1 reported what had happened and the appellant who by then was outside his house was arrested. The Assistant Chief took the complainants to the hospital. Later PW 1 and the two girls recorded statements at Green Park Police Station and the appellant was charged.

9. At the close of the prosecution case, the appellant was placed on his defence. He gave unsworn testimony and stated that on the material day which was on a tuesday, he was off duty. That he was with his two children at home and at 4.00pm he went to buy charcoal. It is while buying charcoal that he met the complainant's mother. He had her debt. They quarrelled over it and went to the chief. They found no one in the Chief's office. They went back to the plot. Later on she went to the plot with the chief and he accompanied them to the chief's office. That PW 1 and the Chief deliberated in a separate room and the story changed. Later the children were brought and he was charged with the strange offences.

10. At the conclusion of the case the trial court vide a judgment delivered on August 27, 2013, held that, the prosecution had proved its case beyond reasonable doubt, on the main offence in count (1) while in count (2) the main count was not proved but the alternative count was proved and convicted him accordingly under section 215 of the *Criminal Procedure Code*.

11. The appellant was sentenced to serve life imprisonment on the charge of defilement and ten (10) years on the alternative count and sentences ordered to run concurrently.

12. However, he is aggrieved by the decision of the trial court and appeals on the following grounds: -

    a. That, I pleaded not guilty to the above charges.

    b. That, the learned trial court magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment in a case of defilement whereas penetration being a key ingredient of defilement was not proved to the required standards by the law to warrant conviction and subsequent life sentence.

    c. That, the learned trial court magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment in a case of defilement whereby age being a key ingredient of defilement was not properly proved to warrant conviction and the subsequent life sentence.

d. That, the learned trial court magistrate erred in law and fact by rejecting the appellant's plausible defence which was indeed the real truth and which would have overturned the prosecution evidence thus earning the appellant his liberty.

e. That, I pray the honourable court to supply me with proceedings and judgment of the trial court so as to adduce more relevant grounds of my appeal.

f. That, I wish to be present during hearing and determination of this appeal.

g. That, further grounds will be raised by the counsel during hearing.

13. In addition, the appellant filed amended grounds of appeal as follows: -

a. That, the learned trial magistrate erred in both law and fact when he convicted the appellant in this instant case yet failed to note that the trial was unfair.

b. 2. That, the learned trial magistrate erred in both law and fact when he convicted the appellant herein yet failed to note that the witnesses were incredible and their evidence unreliable

c. That, the learned trial magistrate erred in law and fact when he convicted and sentenced the appellant in this present case to life imprisonment yet failed to note that the case against him was not conclusively proved.

d. That, the learned trial magistrate erred in law and fact by convicting the appellant in this instant case yet failed to note that penetration as an element of defilement was not proved on count 2 against the appellant.

e. That, the learned trial magistrate erred in law and in fact by convicting the appellant in this instant case yet failed to consider his plausible defence which was not rebutted by the prosecution and also his mitigation was not put in to consideration to cause an impact on sentence.

f. That, any other additional ground may be orally submitted during the hearing of the appeal.

g. That, I pray to be present at the hearing of this appeal.

14. The respondent in opposing the appeal filed grounds of opposition which state as follows: -

a. That the sentence imposed on the appellant was as provided by law in line with the circumstances of the offence and the two counts of defilement against 9 year old complainants.

b. That all the ingredients of the two offences including age, identification and penetration were sufficiently proved beyond reasonable doubt.

c. That medical evidence was proper and corroborated the prosecution witnesses including P3 and PRC form.

d. That the appellants defence was duly considered by the trial court and dismissed.

e. That, the petition is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.

15. The appeal was disposed by filing submissions. The appellant in his submissions filed on June 6, 2022 submitted that the prosecution witnesses were not credible. That PW1 gave inconsistent and contradictory evidence on whether she found PW2 with her clothes on, and who informed her the

location of the complainants. Further, PW1 never witnessed the offence and she only screamed as she suspected that the appellant had defiled the complainants.

16. Furthermore, PW2 and PW3 were not truthful as they gave a bare description of what transpired probably based on pornographic material that they had accessed. That, the court should have used statement analysis a technique by French Psychologist Few, to assess the truthfulness of rape allegations, where a genuine account by a victim would include the amount of details given, willingness to blame themselves and they would include superfluous details while a false account would provide a bare account confining themselves to a description of the offence.

17. He faulted the trial magistrate for failing to record demeanour of the witnesses and therefore could not arrive at a cogent conclusion. He relied on the case of; *Omuroni vs Republic* (2002) 2 EA 508 where it was held that a court can decide a case based on the demeanour of a witness particularly where the credibility of the witness is decisive however, the court must point out the instances of demeanour that influenced the court to make a favourable or unfavourable impression about the credibility of the witness.

18. He also relied on the case of; *Jon Cardon Wagner vs Republic & 2 others* [2011] eKLR where it was stated that it is of paramount importance that the court indicates instances of demeanour noted and which it relies on as a basis for accepting a witness's evidence as truthful.

19. He argued that the complainants did not reveal the defilement to anyone and it is probable that they would not have done so if PW1 did not make a commotion when she screamed. He relied the case of; *Paul Kanja Gitari vs Republic* [2016] eKLR where the Court of Appeal stated that the complainant therein, JMK, did not make a complainant against the appellant on her own volition but her testimony was procured through threats by her aunt who beat her.

20. That the prosecution failed to prove either full or partial penetration as defined in section 2 of the subject Act, and that the medical evidence did not conclusively prove that the hymen tear was cause by penile penetration. That PW4 who produced the medical evidence confirmed in cross-examination that the hymen can be broken by other causes other than sexual intercourse. He placed reliance on the case of; *PKW vs Republic* (2012) eKLR where the court stated that it is an erroneous assumption that the absence of the hymen in the vagina of a girl child alleged to have been defiled proved the charge as scientific and medical evidence proved that some girls are not born with a hymen and that the hymen can be broken by other factors other than sexual intercourse.

21. He also relied on the case of; *David Mwingirwa vs Republic* (2017) eKLR where the Court of Appeal stated that the clinical officer observation that there was ongoing defilement was solely based on the broken hymen in the absence of any other injuries to the complainant's genitalia or spermatozoa was not correct. The court held that the learned judge erred in forming a firm conclusion of the defilement from the fact alone of the broken hymen.

22. Further, the medical evidence did not establish the age of the tear of the hymen and neither did it find any injuries or bleeding which is not possible taking into consideration the complainants were examined on the same day the offence is alleged to have occurred. He cited the case of; *Michael Odhiambo vs Republic* (2005) eKLR where the court noted the evidence of Dr. Kogutu that the hymen heals within two (2) days, and that in instances of defilement other injuries and he could not make a conclusion that the repute of the hymen was caused by defilement.

23. The appellant submitted that the age of the complainants was not conclusively proved as there was no documentary evidence produced to prove that they were nine (9) years old and in the circumstance the conviction against him should be quashed. He relied on the case of; *Kaingu Elias Kasono v Republic*

C.A. Malindi, Criminal Appeal No. 54 of 2010 where the Court of Appeal held that the age of a victim of sexual offence must be proved by credible evidence for the sentence to be imposed depends on the age.

24. Lastly, he argued that the trial magistrate failed to consider his defence that introduced doubt in the court's mind on whether he participated in the commission of the offence. That, the prosecution had the burden of proving the offence and that the trial court was required to weigh, evaluate and analyse the evidence before it before making its findings. However, the trial court fell into error as it relied on the uncorroborated evidence of PW3 without warning itself of the dangers of doing so.

25. The appellant relied on the case of; *Mwangi vs Republic* (1984) eKLR where the Court of Appeal stated that the judge should warn himself and the assessors on the danger of relying on uncorroborated testimony of the complainant and may convict where having done so and in the absence of corroboration is satisfied the complainant is truthful. However, where no such warning is given, the conviction will normally be set aside.

26. However, the respondent in its submissions dated; October 25, 2022, argued that ingredients to the offence of defilement and an indecent act were established. That, the age of both complainants was sufficiently proved through the P3 form that indicated both PW2 and PW3 were nine (9) years. Further, PW1, who is PW2's mother testified that PW2 was nine (9) years old.

27. That the appellant was identified by the complainants who identified him as the perpetrator, and that PW1 found the complainants in the appellant's house and that PW2 was on the bed while half naked. Furthermore, penetration was proved through the evidence of PW3 that was corroborated by the medical evidence by PW4. In addition, PW2 testified that the appellant placed his penis on her vagina and was corroborated by PW4.

28. It is submitted that the trial court considered the appellant's defence in great detail and found that it was flimsy and weak and did not shake the prosecution evidence. Further, the trial court properly analysed the evidence convicted the appellant and imposed an appropriate and lawful sentence considering the circumstances of the case.

29. Be that as it were, before delving in the matter herein, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

30. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a 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 (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"

31. Having considered the appeal in the light of the material placed before the court, I find that, the key question to answer is whether the prosecution proved the elements of defilement in this regard. It is settled law that, for the charge of defilement to be proved, the prosecution must prove: (i) the facts of

the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse as outlined in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of 2002, and *Bassita Hussein vs. Uganda* Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda

32. To revert back to the case, I find that as regard the issue of age, PW1 testified that Sarah Imani PW2, the complainant in count 2, is her child aged 9 years. She did not produce any documentary evidence in support of the age of the child. Similarly, PW2 testified but did not testify to her age.

33. In the same vein, when PW3 Jane Nasieku the complainant in the first count testified, she that she was nine (9) years old but no documentary evidence was adduced to prove the same. Her parents did not give evidence at all. The prosecution did not even make an effort to establish the date when the complainants were born nor inquire whether there was documentary evidence in support thereof.

34. The respondent argument that age was proved by P3 forms is not tenable as the doctor was not requested to conduct age assessment and therefore her age of the complainant was not proved or established. This being a critical element for the purpose of determining sentence under section 8 (2) of the Act, the conviction on defilement cannot stand or be sustained.

35. However PW2 and PW3 gave a corroborated version of evidence on how the appellant on 16th January 2012, lured them to his house and took each one of them to his bed, undressed them and/or did bad manners to them. Accordingly to PW2 when her mother stormed into the appellant's house he had already undressed her but had not defiled her yet. PW2 thus stated

> " He finished with Jane, and asked her to call me. I was called into bed. I went there. He did evil to me (tabia mbaya). I was in school uniform. I had put on a short. He removed it. He unzipped his trouser. I never felt pain. He did not penetrate me anywhere. When he opened his zip I did not see his body or part of it. He did evil to me at the front. It was at my urinating organ. He touched it with his urinating organ. He did not penetrate me. My mother came. I was in bed. I had not dressed. The suspect was also in bed when mum came he got out of bed".

36. Similarly, PW3 on her part stated as regards the events of the day that:

> " He asked who he will start with and ended up with. He started with me. He removed my skirt and pantie. Sarah was on the seat. He placed me on the bed. The door was slant back and not locked. He lowered his zip. He did something bad to my front. I felt pain as he did it. He used his urinating organ. He warned me not to tell anyone. After he was through, he told me to call Sarah. I called Sarah and I sat on the bed. He did likewise to Sarah. There was no curtain between the seat and bed".

37. Therefore there is corroborative evidence of how the appellant undressed the complainant and undressed himself and caused his male organ to come in contact with the female organ of the complainants, thus committing the offence of indecent act with the complainants.

38. It is the courts' opinion that, although age of the complainant was not proved, the court was able to observe the complainant were children of tender years and conducted voire dire examination. The appellant in his evidence confirm the complainant were children as he stated in his defence; "they went looking for children because they were not at home" I therefore find adequate evidence to support the alternative counts.

39. The prosecution witness PW1, PW2 and PW3 all pointed at the appellant as the perpetrator. In deed in cross examination, the complainant recanted the appellant's belated defence of a debt owed to PW1. The children PW2 and PW3 had no reason to point at him.

40. I have grounds of appeal and the submissions by the appellant and dismiss them especially in view of the fact that the conviction on defilement cannot be sustained, therefore the issue of failure to prove age and defilement does not arise.

41. Finally, I note that the trial court considered the defence advanced and stated that it did not cast a doubt on the truth of the prosecution case. That it was very weak. Therefore, the argument that the defence was not considered is not tenable.

42. The upshot is that the conviction on the count of defilement and the resultant sentence of life imprisonment is quashed and/or set aside and substituted with conviction on the alternative count and a sentence of ten (10) years imprisonment to run concurrently with the sentence on the other alternative count.

43. However, in view of the fact that there are two complainants and therefore the appellant should actually serve the sentences consecutively, it would not be in the interest of justice to invoke section 333(2) of the *Criminal Procedure Code* and therefore the appellant will serve sentence from the date of conviction by the trial court.

44. It is so ordered. Right of appeal 14 days explained.

DATED, DELIVERED AND SIGNED ON THIS 29TH DAY OF AUGUST 2023.

GRACE L NZIOKA

JUDGE

In the presence of:

The appellant present, virtually

Mr. Ndiema for the respondent

Ms Ogutu: court assistant