Nasiali v Republic (Criminal Appeal E022 of 2022) [2023] KEHC 21937 (KLR) (16 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E022 OF 2022

GL NZIOKA, J

AUGUST 16, 2023

BETWEEN

PHILIP MEYA NASIALI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence in the decision of; Hon. Rawlings Liluma, (SRM), delivered on, 4th July, 2022, vide Criminal Case Sexual Offence No. E073 of 2021, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* criminal case S/0 no E073 of 2021 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 (herein the Act) and an alternative count of indecent act with a child contrary to section 11(1) of the Act.

2. The particulars of the offence are that, on the 7th day of October 2021, in Kipipiri Sub-County within Nyandarua County, intentionally caused his penis to penetrate and/or come into contact with the vagina of EWW a girl aged 3 years old.

3. He pleaded not guilty to both charges and the case proceeded to full hearing. The prosecution case was led by the evidence of (PW1) AWW, the grandmother of the complainant. She testified to the effect that, the complainant had visited her and on the 10th day of October 2021, while bathing her, she noticed that she had been "spoilt". That her private parts had been tampered with. That she was scratching her private parts.

4. PW1 informed her daughter, the minor's mother and took the child to hospital at Menerich. The child was treated and found to had been defiled. The matter was then reported at Miharati Police Station. That when the child was asked what had happened she said that her "baba" who is the appellant herein

had touched her with a stick but did not say what kind of stick it was. The appellant was held as a suspect, arrested and charged,

5. After considering the prosecution case and in particular the evidence of the complainant and Dr. Joseph Mburu, the trial court placed the appellant on his defence. He denied the offence and stated that, the complainant was not at his home on 7th October 2021. That he had requested the prosecutor to produce data to show she was not and when he did not, he gave up.

6. At the conclusion of the trial, the court held that the prosecution had proved the case beyond reasonable doubt, found the appellant guilty on the main count, convicted him and sentenced him to life imprisonment.

7. However, the appellant is aggrieved with the conviction and sentenced and appeals against both on the grounds that:

   a. That the trial court erred in law and in fact and misdirected itself by not warning itself on the danger of acting on the uncorroborated evidence of a single minor witness.

   b. That the Learned Magistrate erred in law and fact in failing to comply with the proviso to section 124 of the *Evidence Act*, Cap. 80 of the laws of Kenya by failing to record reasons for believing the complainant was a truthful witness.

   c. The trial court misdirected itself by concluding that the clinical findings were sufficient corroboration when such findings were devoid of any prove.

   d. That the Learned Magistrate erred in law and in fact in relying wholly on the medical evidence to convict the appellant whereas it is apparent that the medical examination was done three days after the alleged defilement and after the complainant had taken a shower.

   e. The trial court failed to appreciate that the medical findings were overwhelmingly inconsistent with the offence of defilement in that no injury were found on the libia areas of the complainant. The broken hymen could have been done either earlier or after the alleged incident and no laceration were noted.

   f. That the Learned Magistrate erred in law and fact finding that the offence of defilement had been established whereas there was no evidence of penetration with genital organs.

8. However, the appeal was opposed by the respondent *vide* grounds of opposition dated, 6th March 2023 which states: -

   a. That the minor gave credible circumstantial evidence that was corroborated by other prosecution witnesses. The minor was not the sole/single witness in the matter.

   b. That the ingredient of the offence that is penetration was sufficiently proved beyond reasonable doubt by the doctor corroborated by the ingredients of the identification of the perpetrator and age of the victim.

   c. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.

9. The appeal was disposed of by filing of submissions in which the appellant stated that the charge sheet as framed was defective as the facts did not support the charge of defilement.

10. That, the evidence adduced indicated the complainant was assaulted using a stick therefore he should have been charged with the offence of sexual assault contrary to section 5 (1) (a) (b) as read with section 5 (2) of the Act.

11. He argued that the age of the complainant was not proved as the complainant's birth certificate was never produced and neither did PW3 and PW1 give the complainant's age in their evidence. He relied on the decision in *Francis Omuroni v Uganda* Criminal appeal no 2 of 2000 where the Court of Appeal held that the age of a victim is proved through medical evidence, the birth certificate, the victim's parents or guardians and by observation and common sense.

12. Further, that the age assessment report was not produced by the maker without any tangible reason and which in turn denied him the opportunity to cross-examine the maker on the same.

13. The appellant submitted he was charged under the wrong section of the law and in the circumstances the sentence was excessive and unlawful. Furthermore, the court in *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) found that mandatory minimum sentences under the *Sexual Offences Act* were unconstitutional.

14. On its part the respondent submitted that the prosecution proved its case beyond reasonable doubt. That, the complainant gave credible circumstantial evidence which was corroborated by her grandmother PW1 and mother, PW3, who identified the appellant as the perpetrator of the offence.

15. Further, the doctor gave sufficient evidence that confirmed penetration and that the grounds raised in the appeal do not deter the medical evidence. That, the complainant positively identified the appellant who failed to give an account of the events of the date of the offence when he went with the minor.

16. The Court was urged to find that the sentence of life imprisonment was lawful in the circumstances of the case based on the age of the complainant and the fact that the complainant trusted the appellant.

17. Having considered the appeal I find that the grounds of appeal as summarized are that: the trial court relied on the evidence of a single witness without warning itself of the dangers thereof and/or adhering to the provisions of section 124 of the Act. That, the trial court relied on a medical report that was not reliable and/or conclusive. Basically, whether the prosecution proved its case beyond reasonable doubt.

18. In considering the aforesaid issues the court is aware of the fact that, the role of 1st appellate court, is to re-evaluate the evidence adduced afresh and/or arrive at its own conclusion, taking into account the fact that, it did not benefit from the demeanour of the witnessesas held in the case of; *Okeno v Republic* (1972) EA 32., where the court stated: -

> " 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".

19. Be that as it were, to prove the offence of defilement, the prosecution has to establish the following ingredients: the age of the complainant, that indeed the complainant was a minor, that there was penetration and the accused was the perpetrator.

20. In the instant matter, the issue of age was supported by the evidence of the complainant who testified that she was three (3) years old at the time of the offence and her mother corroborated her. But more importantly, the age assessment report was produced as prosecution exhibit number 4, indicating that, the complainant was aged three (3) years at the time of the offence.

21. The appellant did not object to the production of that report and cannot therefore urge at the appeal stage that it was inconclusive or produced by a person who was not the maker. Therefore the particulars of the charge as it relates to age was adequately proved.

22. As regards penetration, the complainant stated that her "baba" "touched her with a stick". Apparently, no one else witnessed the defilement. It is therefore the evidence of the complainant as against the appellant, who has denied the offence. The question is; is there any other evidence that can reconcile the two opposing versions. The answer lies in the evidence of Dr. Mburu (PW5).

23. The doctor testified that, he found the labia majora and labia minora were reddened. The hymen was broken and the vulva area was open; which was not common to a child of that age. The doctor concluded that, there was evidence of penetration of the genitalia, and produced the P3 form to that effect. He also produced treatment notes and PRC forms filed by the nursing officer who attended to the minor.

24. Penetration is defined under the *Sexual Offences Act* as; "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The use of male organ is crucial. In this case the child talked of a stick. She did not identify what kind of a stick. However, this is a young child of three (3) years and judicial notice can be taken of the fact that she may not, in the given circumstances, have been able to distinguish between a prick from a male organ or any other object.

25. Even then she testified that the person did bad manners to her, and therefore, further judicial notice can be taken of the fact that children of tender years will usually refer to sexual assault as "tabia mbaya". Furthermore, the evidence of the mother was that the appellant took the child away in the night and the child said she was taken to the forest, therefore the weapon used to assault her sexually may not have been easily visible in the circumstances.

26. Infact, it does appear that, the sexual assault may also have taken place on a previous occasion as the complainant talked of the appellant "doing it many times and daytime" and based on the finding of a broken hymen without evidence of bleeding and that the reddened labia and majora was evidence of the last incident. In fact, had a wooden stick been used, the child would have physical injuries in her private parts. Therefore, it is the considered opinion of the court that, the doctor's expert evidence puts beyond doubt the fact that there was penetration.

27. The other key ingredients of the offence is whether, the appellant committed the offence. In that regard, the complainant testified as follows: -

> " There is a person who did something bad to me. There is a person who did bad manners to me. He is PM. He hurt me at private part. The stick was big. Pierced me severally. He did it in the forest. The forest is near my home. I refused and he took me to the forest. It was at day time. He did it many times. We stay with him and my mother".

28. In addition (PW1) AW the children's grandmother testified that when she questioned the child on what happened she said "baba touched me with a stick". PW3 MW the mother of the child narrated how on 7th October 2021, the appellant took the complainant at 9.00pm and when she told him not to go with the child, he threatened to beat her and told her he was going for flour. That he went and bought her a cake but he never brought the flour upon return. At the same time, the minor was crying and asked what was wrong, the complainant looked at the appellant, the appellant, and the appellant threatened to beat her. As such the mother took the child to the grandmother.

29. The aforesaid evidence taken into totality reveals, first and foremost the complainant and the appellant were staying in the same house. According to PW3 the appellant is a step father to the complainant. In my considered opinion and based on the provision of section 22 of the Act, the appellant might as well have been charged with the offence of incest and not alleged sexual assault as submitted.

30. Be that, as it were, he did not deny or rebut the evidence adduced to the effect that; he was staying with the minor or complainant in the same house. That he took her out of the house on, 7th October 2022, to the forest as stated by the child and the mother.

31. In fact, from the child's evidence that he injured her on her private part severally as corroborated by the medical finding that, the hymen was not freshly broken and that the vulva was open, indicated as aforesaid the appellant sexual abused her severally.

32. In fact, the child was irritable even on medical examination. She returned home crying after being "dragged" out of the house in the night and kept away for over an hour. What was the appellant doing with a three (3) year old child in the night in the forest. What flour is sold in the forest at night. Did he need the child to go and buy the flour. It does appear, the appellant had terrorized his wife and child and whenever they questioned his conduct, he would threaten to beat them up.

33. Indeed, it does appear the wife became suspicious of the defilement and that is why she withdrew the child and took her to the grandmother. The appellant cannot wish away all this evidence by merely stating that the child was not with him between; 7th and 12th October 2021. Of course the child was withdrawn after the suspicion he was defiling her. The evidence places the appellant at the centre of the crime. He lived with the child. The child knew him as the father.

34. The appellant submitted that, the trial court relied on uncorroborated evidence and section 124 without warning itself. I have gone through the judgment. I find no such finding. The trial court clearly indicated the complainant's evidence was corroborated by the medical evidence and the other witnesses (PW1 and PW3).

35. Further the trial court considered the appellant's defence and found it unbelievable. The medical report clearly proved penetration as stated herein. Therefore all grounds of appeal hold no water. I find the conviction was safe and decline to quash it.

36. As regards sentence meted out of life imprisonment, I find section 8(2) of the Act, provides for the same. It is a lawful sentence which I decline to set aside. The appeal is consequently dismissed in its entirety. Right of appeal 14 days explained

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF AUGUST 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Atika for the respondent

Ms. Ogutu: court assistant