Visile alia Visy v Republic (Criminal Appeal 51 of 2020)
[2023] KEHC 23435 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 51 OF 2020

DAS MAJANJA, J

SEPTEMBER 29, 2023

BETWEEN

DICKSON VISILE ALIA VISY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Original Conviction and Sentence of Hon. V. Masivo, RM dated 28th July 2020 in Criminal (SO) Case No. 50 of 2018 at the Magistrate's Court at Nanyuki)

JUDGMENT

1. The Appellant was charged and convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*. The particulars were that on 10.07.2018 in Laikipia County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of TBM, a girl aged 11 years old.

2. The Appellant was sentenced to serve 30 years' imprisonment. He appeals against conviction and sentence in line with his petition of appeal dated 11.09.2020. The appeal was heard by Waweru J., who has retired before rendering the judgment. The Appellant has filed amended grounds of appeal and the parties have filed written submissions which I have considered.

3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify. With the above, I now proceed to determine the substance of the appeal. In his additional grounds and submissions, the Appellant has raised five grounds of appeal. He complains that the trial magistrate failed to appreciate the ingredients of the offence of defilement. That a key witness, the child mother refused to testify and turned hostile and that the prosecution and in particular the investigating officer failed to prove the

he and the child were acquainted. He further complains that his defence was not considered and that the charge was defective.

4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. In order to succeed in a prosecution for defilement, it must prove that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. The prosecution case was as follows. The Complainant (PW 2) gave sworn testimony after a voire dire. She stated that she was 12 years old and that she knew the accused. On 07.07.2018, the Appellant amongst other people were preparing for her mother's birthday and after preparations at night she went to sleep in the Appellant's house with her friend. While she was asleep, the Appellant came into the room and proceeded to grab her from the bed, lifted her dress and bra and penetrated her with his penis. She stated that the Appellant gagged her on the mouth with a piece of cloth which prevented her from screaming and that after the act of penetration he threatened to kill her if she revealed what he had done.

6. In her testimony, PW 2 gave clear and graphic testimony of her ordeal. She recalled that she had known the Appellant for three months prior to the incident and had been with her during the preparation for the birthday. Further, though it was at night she recognised his voice and had seen him when the lights were on in the house. I therefore hold the that the Appellant is the one who committed the act of penetration.

7. PW 2's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. This is what the trial magistrate stated:

> I have considered the evidence of the victim and referred to section 124 of the *Evidence Act*. I find the victim's evidence available, could be relied upon without being corroborated. The reason is that I listened keenly to her evidence she was firm in her testimony and response to the accused questions. Her testimony remained unshaken as she was being cross-examined by the Accused person. She gave or recall(ed) every detail. I am therefore satisfied that the victim is telling the truth.

8. What about the other corroborating evidence? The prosecution called the child's headmaster who testified as PW 1. He told the court how PW 2 told her that she had been defiled by the Appellant on 12.07.2018. PW 1 is an independent witness to whom PW 2 reported the incident as her mother did nothing when she reported what the Appellant had done to her. On the material day, when PW 2's mother came to school to report to PW 1, the Appellant came to the school threatening the child's mother about reporting the matter. I hold this act as an act inconsistent with the Appellant's innocence and also corroborates the prosecution case against the Appellant.

9. Lastly, there is the evidence of the Clinical Officer (PW 4) who carried out the medical examination of PW 2 on 13.07.2018 and produced the P3 medical report and the Post Rape Care (PRC) Form. He told the court that the outer part of PW 2's genitalia was normal but there were lacerations on her vagina and the inner vaginal wall had inflammation and the hymen was broke. He opined that PW 2 had been subjected to forceful penetration. I hold that this opinion is consistent with the evidence of penetration and corroborated PW 2's testimony that the Appellant penetrated her.

10. The Appellant complains that essential witnesses were not called. The first witness is the another child, W, who was in the same room as PW 2 when she was subjected to sexual assault and PW 2's mother. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143

of the *Evidence Act* provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required to prove of a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).

11. From the testimony of PW 2, W was in the room when the Appellant came in and committed the act of penetration. The trial magistrate considered this issue and held that the W was asleep and that the Appellant gagged PW 2 so she was unable to scream or attract attention. I agree with this finding as it is supported by the facts and hold that in view of the totality of the evidence, W's evidence would add nothing. Likewise, the testimony of the PW 2's mother would not assist the prosecution. PW 2 recalled that when she told her mother, her mother did nothing about the complaint. That is why she told PW 1. I hold that the testimony of the two was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with proviso to section 124 of the *Evidence Act*.

12. The Appellant complains that his defence was not taken into account. In his testimony, he denied the charges. He recalled that on 11.07.2018, while working he was approached by four people who arrested him and took him to Timau Police Station. He said nothing of the PW 2's testimony although he admitted that he was at the school where he was questioned by PW 1. When weighed against the prosecution evidence particularly the testimony of PW 2, it amounted to a mere denial of the offence and was rightly dismissed.

13. On age of PW 2, the trial court considered the birth certificate produced in evidence by PW 3. She was born on 27.01.2007 meaning that she was above 11 years. This was further corroborated by PW1 that her school admission records showed that she was born on that date. There is therefore no doubt that PW 2 was a child.

14. Although the Appellant complained that the charge sheet was defective, I do not find any defect, as it contained all the information including the statement of the offence and all the particulars necessary for the Appellant to defend himself in accordance with section 134 of the Criminal Procedure Act (Chapter 75 of the Laws of Kenya). From the totality of the evidence, the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. I therefore affirm the conviction.

15. On the appeal against the sentence, the Appellant states the sentence was harsh in the circumstances. Section 8(3) of the *Sexual Offences Act* provides that person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The prosecution proved that the child was 11 years old hence the court ought to have imposed the sentence of life imprisonment. However, the court was guided by the Supreme Court's decision in *Francis Karioko Muruatetu another v Republic* [2017] eKLR and the decision of the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR where the court held the mandatory minimum sentences were no longer applicable. In this respect the trial court did not err imposing the sentence of 30 years' imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed.

16. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 29TH DAY OF SEPTEMBER 2023.

A.K. NDUNG'U

JUDGE