Evayo v Republic (Criminal Appeal 23 of 2021)
[2023] KEHC 24313 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24313 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 23 OF 2021

JN KAMAU, J

OCTOBER 26, 2023

BETWEEN

EMMANUEL MURUNGA EVAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (PM) delivered at Vihiga in Principal Magistrate's Court in SO Case No 23 of 2021 on 26th April 2019)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon S.O. Ongeri, Principal Magistrate who sentenced him to fifteen (15) years imprisonment.

2. Being dissatisfied with the said Judgement, on May 6, 2019, the appellant lodged the Appeal herein. His Petition of Appeal was of even date. He set out three (3) grounds of appeal.

3. His Written Submissions were dated July 18, 2023 and filed on July 27, 2023 while those of the respondent were dated and filed on February 20, 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. 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 but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & another vs Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the appellant by the trial court was lawful and/or warranted.

7. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

8. Grounds of Appeal Nos (1) and (3) were dealt with together under this head as they were both related.

9. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR.

10. This court therefore considered if the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt of the aforementioned ingredients of the offence of defilement under the following distinct and separate heads.

A. Age

11. The Appellant did not submit on the issue of age. On its part, the Respondent submitted that CML (hereinafter referred to as "PW 1") was fifteen (15) years old at the material time of the alleged incident.

12. A perusal of the Certificate of Birth showed that she was born on August 28, 2003. The alleged offence was said to have taken place on diverse dates between August 15, 2018 and August 19, 2018. She was therefore aged fourteen (14) years, eleven (11) months and twenty two (22) days at the material time of the incident.

13. As the Appellant did not controvert and/or rebut PW 1's age, this court found and held that her age had been proven and that for all purposes and intent, she was a child.

B. Identification

14. Notably, the Appellant did not address the issue of identification as he denied having committed the offence.

15. On its part, the Respondent did not submit on how the Appellant herein was identified. It merely submitted that the Trial Court correctly addressed its mind to the defence the Appellant presented

and that in his submissions, he owned up to having a relationship with PW 1 but that he did not force sexual intercourse.

16. The respondent appeared to have relied on the determination by the trial court in which it stated as follows:-

> "The Defence in submissions stated that there was an existing relationship and the complainant willfully consented to the intercourse."

17. This court perused the Appellant's Written Submissions that he filed in the Trial court and noted that he set out the following issues for determination by the trial court:-

a. Whether the victim was defiled;

b. Whether the victim acted as a mature individual; and

c. Whether the Appellant was the offender therein.

18. He then submitted as follows:-

> "...without prejudice (emphasis court) to the forwarding (sic), it is our submission that the evidence tendered by the victim is one of that who voluntarily engaged in the act; questions to be asked are how did the victim own the phone, who was the registered owner of the said phone, was the phone ever produced in court as an exhibit? ...the accused person being married and DW 2 having testified to the effect that she was in the house from 15th to August 19, 2018, then so such offence took place herein. For this reasons...the accused person be acquitted."

19. This court found and held that the questions regarding the production of the Appellant's phone as an exhibit before the court were immaterial as he admitted that the line PW 1 said was his actually belonged to him. However, knowing a person's mobile number was not proof that they knew each other.

20. Be that as it may, a careful perusal of his said submissions did not show that he admitted that he was in a relationship and it was consensual and not forced. What he posed was a hypothetical question. He expressly stated "without prejudice" to the foregoing. The Trial Court therefore erred in having concluded that he had admitted to having committed the offence and that PW 1, having been fifteen (15) years at the time could not have given consent to engage in sexual relations with the Appellant herein.

21. It was not lost to this court that the Trial Court did not address itself to the two (2) versions that PW 1 gave to court in its decision. When she first testified on August 24, 2018, she stated that on August 15, 2018 at about 1.00pm, she went to the Supermarket where the Appellant worked and he seduced her. Her evidence was that he told her that if her aunt quarreled her, she should go back. At about 9.00pm, she called him and told her that her aunt had quarreled her and he collected her with a motor bike and he took her to his house where he had sex with her. She said that he used protection and they had sex once.

22. She added that he told her to go to Mbale or Chavakali and could come in the evening. She said that she stayed at his place until August 20, 2018 when he told her to go to Kisumu. When she got there, she went to her aunt and when she reached Majengo at 8.00 pm, his uncle Joshua and aunt arrested her and escorted her home. After they interrogated her, she led them to the Supermarket and together with the Appellant, they were escorted to the Police Station.

23. When she was cross-examined, she averred that she stayed at the Supermarket till about 6.00 pm and that when she said that she would go to another shop, he started seducing her.

24. When she was recalled for cross-examination on 19th September 2018, which was about a month later, she said that she knew the Appellant as her boyfriend for three (3) years. When her aunt quarreled her, she went to his house. She told the Trial Court that he did not lock her in the house and that she did not offer herself. She also averred that he did not force or threaten her.

25. The trial court relied on the proviso to section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) and found PW 1's evidence to have been sufficient to sustain a conviction against the Appellant herein as he found that she was with him between August 15, 2019 (sic) and 1August 9, 2019 (sic).

26. The said proviso to section 124 of the *Evidence Act* states that:-

> " 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 (emphasis)."

27. Notably, a trial court must exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other.

28. It was evident that PW 1 gave contradictory evidence on what allegedly transpired on the material dates. She had at first insinuated that she met the appellant for the first time on August 15, 2018 when he seduced her a fact that was re-emphasised by the Investigating Officer, No 112154 PC Oliver Osundwa (hereinafter referred to as "PW 5").

29. However, on being cross-examined further about a month later, she had said that the Appellant had been her boyfriend for three (3) years. This was also confirmed in the P3 Form and re-affirmed by the Clinical Officer, Emmanuel Mueke (hereinafter referred to as "PW 5").

30. Her evidence on how the Appellant knew where she stayed if they had only met on 15th August 2018 raised doubt in the mind of this court on how he knew where she stayed if she left him at the Supermarket and they had only met for a day. Her assertions that he told her to go to Mbale, Chavakali and Kisumu was haphazard as it was not clear why he had told her to go to those places. She was almost fifteen (15) years and was expected to have adduced consistent and cogent evidence.

31. In view of the two (2) differing versions, this court took the view that she was not a credible witness and the Trial Court erred in not having looked for further corroborating evidence.

32. Indeed, relying on the evidence of a single witness, other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

33. According to PW 5, when he examined PW 1, he found that she had a foul smelling discharge. The syphilis, pregnancy and HIV tests were negative. The external genitalia were normal. Urinalysis revealed no spermatozoa and there were no epithelial cells. The court took judicial notice that from testimonies

of many medical officers in similar cases that if epithelial cells were present, that was evidence of there having been sexual activity.

34. PW 1 was taken to hospital on August 21, 2018, two (2) days after the alleged sexual activity. PW 5 did not present evidence to show if epithelial cells could have been present two (2) days after sexual activity to prove that the Appellant had sexual relations with her.

35. The fact that PW 1's hymen was raptured did not mean that the Appellant caused the same by way of penetration. From PW 4's evidence, the hymen was torn but the same had healed. He stated that the hymen took fourteen (14) days to heal. If PW 1 had had sexual intercourse with the Appellant once a few days before, there was no logical explanation how the raptured hymen which took fourteen (14) days took a few days to heal.

36. The inconsistency and gaps in PW 1's evidence led this court to doubt her version of what really transpired. This court found that the inconsistencies, gaps, discrepancies or contradictions in the Prosecution's case were material and relevant and weakened its case. The co-existing circumstances weakened the inference of guilt on the appellant's part. His sworn defence rebutted and outweighed the evidence the Prosecution tendered in court.

37. This court therefore found and held that the prosecution did not prove its case against the appellant herein to the required standard, which in criminal cases, is proof beyond reasonable doubt.

38. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1) and (3) of the Petition of Appeal were merited and the same be and are hereby allowed.

II. Sentence

39. Grounds of Appeal Nos (2) of the Petition of Appeal was dealt with under this head.

40. As pointed hereinabove, the Appellant herein was charged under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. section 8(3) of the *Sexual Offences Act* provides that:-

> " 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."

41. In view of the aforesaid finding that the Prosecution did not prove its case against the Appellant herein, it was not necessary to interrogate whether or not the sentence that was meted upon the Appellant herein was lawful. It sufficed to state that in the event the Prosecution had proved its case against the Appellant herein, the sentence for defiling PW 1 who was a child who was aged between twelve (12) to fifteen (15) years old was twenty (20) years imprisonment. The sentence of fifteen (15) years that the Trial court had meted on him had the case been proved against him was therefore very lenient.

Disposition

42. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated and filed on May 6, 2019 was merited and the same be and is hereby allowed. The Appellant's conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

43. It is hereby directed that the Appellant herein be and is hereby released from custody forthwith unless he be held for any other lawful cause.

44. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE