Opiyo v Republic (Criminal Appeal E068 of 2021)
[2023] KEHC 26229 (KLR) (Crim) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E068 OF 2021

GL NZIOKA, J

NOVEMBER 30, 2023

BETWEEN

WILFRED ONYANGO OPIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of; Hon. E. Boke, Senior Principal Magistrate (SPM), delivered vide the Chief Magistrate Court in Criminal Case No. S/O 20 of 2019 on 15th July, 2021)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate Court charged vide Criminal Case No. S/O 20 of 2019, with 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"). That on 23rd February 2019 in Kibra Sub-County, intentionally and unlawfully caused his penis to penetrate the vagina of SAW a child aged 6 years.

2. He is also charged in the alternative charge, with the offence of; committing an indecent act with a child contrary to section 11 (1) of the Act. That on 23rd February 2019 at Kibra sub county, he intentionally touched the vagina of the child aged 6 years with his penis.

3. He pleaded not guilty and the case proceeded to full hearing. The prosecution case is that, PW2, SAW (herein "the Complainant") was watching television in their house when the appellant took her to his house, lifted her dress, lowered his trouser and did to her "bad manners".

4. That, the appellant threatened her that if she told anyone he would kill her and then washed her private parts, and released her to go home.

5. However, when her mother (PW1) ZOW returned home at around 9.00 pm, she found the complainant asleep and woke her to eat. However, she discovered that the complainant's dress was socked with blood and when she inquired as to what had happened, the complainant hesitated to respond whereupon the mother threatened to cane her and she told the mother that their next door neighbour, whom she knew by nickname 'shee' called her to his house, placed her on the bed and defiled her.

6. Upon receipt of that information and in shock, PW2, ZOW took the complainant to Nairobi Women's Hospital where she was examined and found to have been defiled. The matter was then reported at Kilimani Police Station.

7. In the meantime, the appellant was arrested by the neighbours who had learnt of the incident and taken to the Police Station and after investigation he was charged accordingly.

8. At the conclusion of the prosecution case the trial court placed the appellant on his defence. The appellant testified in a manner, more of submission by tearing into the prosecution case. He stated that whereas the mother of the complainant told the court that she returned home at 8.00pm, but the truth is that it was at 3.00pm as admitted by her.

9. Further, although the husband returned at home at night, PW2 ZOW said that, she did not have a husband. Furthermore, whereas she also told the court that the child was treated at night, the doctor said she was treated and discharged the same day. Further, had the child been defiled she would have been admitted.

10. That the prosecution did not call the complainant's neighbours as such there was no eye witness. Again the child's clothes were not brought to court. Similarly, despite his being taken to the Police Station for DNA sampling the results was not availed.

11. Furthermore, although the Police Officers said he was beaten by the neighbours, it is the child's father and other relatives who beat him up. He questioned why he was not confronted immediately after the incident occurred, until 11.00am when he was attached in his house.

12. Be that as it may, at the conclusion of the case the trial held that, the prosecution had proved o its case on the required standard, that the victim was defiled by the appellant and found him guilty as charged in the main count and convicted accordingly. The appellant was then sentenced to serve twenty (20) years imprisonment.

13. However, he the appellant is aggrieved by both conviction and sentence and appeals against the same based on the following grounds as verbatim reproduced:

    a. The trial court erred in law by convicting the Appellant when the Prosecution had not satisfied the standard of proving its case beyond reasonable doubt, rendering the entire judgement, conviction and resulting sentence a nullity.

    b. The trial court erred in law and fact in convicting the Appellant when in fact the prosecution failed to establish that the core ingredients of the offence of defilement — penetration — was attributed to the Appellant.

    c. The trial court erred in law and in fact by relying on self-contradictory and inconsistent evidence by the prosecution witnesses and failed to pass the benefit of doubt on the inconsistent evidence to the Appellant thereby causing injustice.

d. The trial court erred in fact in her analysis of the evidence presented before her and failed to properly consider that the accused person before her had not been properly identified and matched to the offence complained of.

e. The trial court erred in law and in fact by failing to make adverse inference on the Prosecution's failure to tender the scientific evidence and DNA analysis which evidence the prosecution had gathered and all along indicated was being processed and would be relied on, and erred momentously by convicting the Appellant based on incomplete and uncorroborated evidence of a child of tender years when the prosecution had ample opportunity to corroborate through the said DNA analysis and scientific evidence.

f. The trial court erred in fact and in law by stepping in to fill in the loose ends of the investigating officer's work, and failing to appreciate that the prosecution had a chance of combing the locus in quo, the complainant's clothes and the Appellant's clothes for DNA and scientific evidence that could have resolved the case, and indeed took away these scientific materials and the Appellant's DNA samples but failed to use them in court in a manner raising reasonable inference that the evidence was adverse to the prosecution's case.

g. The trial court erred in law and in fact when it proceeded to rely solely on evidence of the complainant, a child of tender age, to prove 'penetration' and the offence by carrying out an incomplete and inconsequential voire dire examination when it was explicit from her appreciation that the complainant did not understand obligations created by oath and therefore ought to have been subjected to a reasonable and foul-proof examination to determine competence prior to recording her testimony.

h. The trial court failed to properly appreciate facts, and that given the densely populated environment where the offense was alleged to have occurred there would have been immediate independent witnesses to the act, as opposed to only the complainant.

i. Had the trial court properly exercised its mind to the evidence, the facts and the applicable law it would have found that the accusations against the Appellant were not proven against him even by a standard lower than that of 'beyond reasonable doubt' and the conviction and the sentence therefore remain unsafe.

14. However, the respondent on its apart filed grounds of opposition dated; 19th May 2022 in which it states that: -

a. The Appeal is misconceived and unsubstantiated.

b. The Appeal is an abuse of the court process since the Appellant was properly convicted before the trial Court and the prosecution did discharge it burden of proof beyond reasonable doubt.

c. That the Appeal lacks merit and the same should be dismissed in its entirety.

15. The respondent further filed a Notice of Enhancement of Sentence dated; 23rd June 2022, seeking that the sentence of the trial court be enhanced from a sentence of twenty (20) years to life imprisonment so as to be commensurate with section 8 (1) as read with section 8(2) of the Act.

16. The appeal was disposed of the parties filing submissions. The appellant filed submissions dated; 26th May 2022 and argued that, the prosecution has a duty prove a criminal charge beyond reasonable doubt and any evidential gaps that raise material doubts must be in favour of the accused as held in the case of; *Pius Arap Maina vs Republic* [2013] eKLR.

17. That, the prosecution failed to produce the complainant's blood-stained clothes alluded to by (PW1) ZOW in her evidence and (PW3) Njuguna the Clinical Officer, which were material evidence that led PW1 ZOW to discover a possible offence and in the circumstances, the prosecution failed to prove its case beyond reasonable doubt.

18. He relied on the case of; *Kenya Akiba Micro Financing limited vs Ezekiel Chebii & 14 others* [2012] eKLR where the court stated that where a party fails to tender evidence in its custody or control over, the court will draw adverse inference that such evidence is adverse to that party's case.

19. Further, the prosecution failed to prove penetration beyond reasonable doubt which is an essential element of the offence of defilement. That, despite visiting his house, the investigating officer, (PW4) PC Dorine, did not provide crime scene documentation such as photographs of his house, including the jerry-can used to wash the complainant, which would have placed both the complainant and appellant at the scene of the crime.

20. Furthermore, (PW3) Njuguna failed to inform the court whether the complainant's hymen was freshly torn or not, thus the medical evidence was inconclusive. He placed reliance on the case of; *MM vs Republic* [2020] eKLR where the court stated that it was high time medical practitioners informed the court whether they hymen was freshly torn or not, as a missing hymen was not proof of penile penetration per se.

21. The appellant submitted that the trial court relied on contradictory and inconsistent evidence of (PW1) ZOW and (PW4) PC Dorine on whether the complainant was admitted in hospital for two days or not, raising doubt on the truthfulness of the witnesses and whether (PW4) PC Dorine fabricated her testimony to fit the narrative.

22. He relied on the case of *Philip Nzaka Watu vs Republi*c [2016] eKLR where the Court of Appeal held that whether discrepancies in evidence are believable or not depends on the circumstances of each case and the nature and extent of such discrepancies and inconsistencies.

23. Lastly, the appellant submitted that, the prosecution failed to call the Government Chemist to produce the report of samples taken for analysis despite the trial court issuing summons for the witness. That, in the case of; *Bukenya and others vs Uganda* 1972 EA 549, the court held that the prosecution must make available all witnesses necessary to establish the truth and where the evidence is inadequate, the court may infer the evidence of the uncalled witness was averse to the prosecution.

24. That, section 124 of the *Evidence Act* (Cap 80) Laws of Kenya is applicable where the only evidence adduced is that of the alleged victim. That, in the present case multiple witnesses adduced evidence thus, the trial court was required to analyse the evidence of the prosecution witnesses as a whole. Furthermore, if no corroboration was required, the trial court was required to record reasons which it failed to do.

25. However, the respondent in submissions dated 23rd June 2022 argued that, the prosecution had sufficiently proved the elements of the offence of defilement. That, penetration was proved through the cogent evidence of the complainant who narrated how the appellant lured her to his house and defiled her, and was corroborated by the evidence of (PW3) Njuguna who examined her and produced the medical evidence.

26. Further, the complainant's age was proved through the production of the complainant's immunization card which showed that she was born on 2nd February 2012 and was six (6) years old at the time of the offence.

27. Furthermore, the appellant was positively identified by complainant who knew him as her neighbour and that he was the only person present during the offence.

28. The respondent submitted that, under section 143 of the *Evidence Act* the prosecution can call any number of witnesses to prove its case. That, in the instant case, the key witness was the complainant who was the only witness of the crime. Further, the medical officer who examined the complainant testified and gave expert evidence of penetration. That, the DNA report would only corroborate the complainant's evidence, however, corroboration is not mandatory in sexual offence involving children.

29. Lastly, the respondent submitted that, the sentence provided for the offence herein under section 8 (2) of the Act is life imprisonment and therefore the sentence be enhanced.

30. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court thereof is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.

31. In that regard, the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, thus observed: -

> " 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"

32. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of the Act, that states: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

33. The law is thus settled that, the ingredients of defilement as discussed in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of 2002, by the Court of Appeal are that, in order to constitute the offence of defilement the following must be proved:

    (i) sexual intercourse

    (ii) victims age below 18 years

    (iii) the accused is the culprit.

34. Similarly, in *Bassita Hussein vs. Uganda* Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as;

    (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.

35. To revert back to the matter herein, the charge sheet reads that the complainant was aged six (6) years at the time the offence as committed. However upon the parents availing the immunization card produced as prosecution exhibit No. 1, it was established that, the child was seven (7) years old and the charge sheet amended accordingly.

36. In the Ugandan case of *Francis Omuroni -vs- Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 it was held that the primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or any other document prepared by a competent medical practitioner. The secondary evidence would include the evidence of a parent or guardian, or physical observation of the child and/or common sense therefore the immunization card is prima facie evidence of the age of the child and I am satisfied the age was properly proved.

37. As regards penetration I find that, the complainant testified that she was defiled. The PRC and P3 form produced by PW3. John Njuguna on behalf of Abraham Muturi, his colleague who examined the complainant but had gone for further studies, stated that, the examination revealed that, there was blood in her vagina and the hymen was torn. That she had not changed her clothes so there was blood stains.

38. I have carefully considered the two medical documents and I note the conclusion on the PRC form is that, the complainant was a victim of "penile vaginal penetration". The P3 form also indicated that, the doctor noted "the complainant had "blood from vaginal orifice" These results clearly corroborates the complainant's evidence that she was sexually assaulted by a person who inserted his male organ, (the penis) into her private parts thus defiling her.

39. Pursuant to the definition of penetration under section 2 of the Act as "the partial or complete insertion of the genital organs of a person into the genital organs of another person", I hold that the element of defilement was proved.

40. The last ingredients and more importantly is whether the prosecution proved that, the appellant is the one who defiled the complainant. In this regard, the complainant is noted as having pointed out the appellant in court, as the perpetrator of the crime. She narrated how the appellant lured her to his house and defiled her.

41. In the cross-examination by the appellant, she stated that, she was in their house with her siblings when he called her. That, the mother was away. That her mother had given the appellant "Ugali" when he went to their house in the day with fish. Therefore from this evidence the child was not a stranger to the appellant. She was not seeing him for the 1st time when he allegedly defiled her. Is it possible then in this circumstances she has mistaken him for someone else? I find the answer in the negative.

42. Furthermore, PW1 the victim's mother testified that they had been neighbor's with the appellant for two years. That, they could share food with him when she cooked. Further, whenever, any of them spoke from their house they could hear the conversation, because their house were very close, thus pointing to the close vicinity,. Apparently the appellant was not married and evidence reveals that, PW1 ZOW was on a mission to find him a wife and even took to him two different ladies.

43. Furthermore, PW1 ZOW stated that, when the complainant eventually told her what had transpired, complainant stated that "it was a next door neighbor who we call by the nick name "Shee" but his name is Wilfred" who had defiled her. The appellant did not rebut this evidence or the alleged nick name.

44. More still PW1 ZOW, corroborated the complainant's evidence that the appellant had gone to her house on the material date, in the day with fish and was given "Ugali". All this evidence was not rebutted

or denied. The same clearly indicates, neighbors who had a cordial and friendly relationship, with the appellant being the beneficiary of PW1 ZOW's hospitality.

45. The question arises once again, could the complainant mistake, the appellant, if so how, and why?. Was the appellant the only male neighbor? Why didn't the complainant point out anyone elseas the offender? Does the appellant answer to the question in his defence? No doesn't. Does the appellant even allude to bad blood between him, the complainant and/or her parents No. he doesn't.

46. Indeed as well observed by the trial court, the defence by the appellant is not tenable. He choose to attack the evidence adduced than address the allegations of defilement against him. He has further gone into adducing evidence through the submissions filed. He states that, the court did not analyse the entire evidence. That is not supported by the record.

47. Be that, as it were, the appellant urges that, the clothes that were allegedly soiled with blood and taken to the Government Analyst were not produced in court nor the results thereof. The prosecution responded by saying that the blood thereon was probably from the complainant and the failure to produce the same did not prejudice its case.

48. I concur that the clothes were essential exhibits and results from the Government analyst would have indeed corroborated the evidence of PW1 and PW2 or otherwise. However, I don't find that, the failure to produce the same weakened the prosecution case. This is so in view of the fact that, the medical evidence revealed that, when the complainant was examined by the doctor, she was found to be bleeding from her private parts. It was the same day of the alleged offence.

49. As such the logic is that the bleeding was as a result of the defilement and due to her tender age, signifying injury of her private parts during the defilement. That explains the torn hymen being fresh as much as the doctor may not have clarified.

50. Furthermore, the argument that the scene was not visited, or photos taken is neither here nor there, as the same would no value to the case. Similarly, failure to avail the results of DNA from blood taken from him would add no value as the same would be helpful if they were analysed for establishing paternity which is not applicable herein.

51. In the same vein the alleged inconsistence in evidence is not substantiated or expounded on and therefore holds no water. Finally, the provisions of section 124 of the *Evidence Act* do not apply as the complainant's evidence was corroborated by the medical evidence.

52. The upshot is that the appeal on lacks merit and I dismiss it. The sentence meted is within the law and although the respondent sought for enhancement I find that is an afterthought as the respondent was in court when the sentence was pronounced, and the court explained why the sentence was meted as such.

53. The appellant shall serve twenty (20) years from 15th July when the sentence was passed

54. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF NOVEMBER, 2023

GRACE L NZIOKA

JUDGE

In the presence of: -

Appellant in present virtually

Mr Ndiema for the respondent

Ms Ogutu; Court Assistan