Odeke v Republic (Criminal Appeal E032 of 2022)
[2023] KEHC 25877 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E032 OF 2022

WM MUSYOKA, J

NOVEMBER 27, 2023

BETWEEN

BENSON ODEKE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. Tina Awino Madowo, Resident Magistrate, RM, in Busia CMCSO No. E071 of 2021, of 3rd August 2022)

JUDGMENT

1. The appellant, Benson Odeke, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 7th May 2021, at [Particular withheld], Teso South, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of TAA, a child aged 9 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.

2. PW1, TA, a pupil at [Particular withheld] Primary School, was the complainant. She described how, on 7th May 2021, the appellant took her his house, undressed her, and inserted his penis in her vagina. She felt pain. She said he threatened to kill her, and had covered her mouth. She reported the incident to her grandmother after she began to see blood in her urine. PW2, IO, was half-brother of the appellant, and was with PW1 on the material day. He saw the appellant take PW1 away, after ordering him to go to a funeral. The next day he saw flies following PW1. He stated that his elder brother told PW1 to shower, which she did. Later, PW1 told him and other that the appellant had taken her to his house. PW3, Salome Adikinyi, the grandmother of PW1, got to know of the incident on 14th May 2021, when PW1 woke up in shock, and informed her that she saw "milk" in her urine and blood. She enquired if someone had raped her, and PW1 told her that the appellant had defiled her. She saw pus in the genitals

of PW1. She took her to hospital . PW4, Dennis Paul Kirori, was the clinical officer who attended to PW1, on 14th May 2021. He saw found pus discharge from her gentalia, and she complained of pain whenever she went for short and long calls. She had a fresh bruise on here labia and majora, her hymen was broken and there was tenderness on touch. He concluded that she had been defiled. He stated that he did not examine the appellant. No. 225517 Police Corporal Shem Nginge, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 2nd December 2021. He made a sworn statement, on 11th May 2022. He denied the charges. He accused PW3 of family animosity. He said that the medical evidence did not link him to the offence.

4. In its judgment, delivered on 6th July 2022, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to life imprisonment, on 3rd August 2022.

5. The appellant was aggrieved, and brought the instant appeal, revolving around his plea of not guilty; the age of PW1 not being proved; medical evidence not linking him to the offence; the investigations being shoddy and unprofessional; all the key witness not being called; his *alibi* defence not being considered; and basing the conviction on insufficient circumstantial evidence.

6. Directions were given on 22nd September 2023, for canvassing of the appeal by way of written submissions. Both sides filed written submissions, which I have read through, and taken note of the arguments made.

7. In his written submissions, the appellant submitted on his plea of not guilty; the case being a frame-up, on account of differences with PW3; contradictions and invalid exhibits; and the case not being proved beyond reasonable doubt. He submits that the complainant, PW1, was variously referred to as T, TA and TA, creating confusion as there were 2 different individuals, and he lived with both, and he did not know who testified, as the matter was haired virtually, and his connection from remand was audio link and not video. He submits that PW1 and PW2 were children of PW3, and all were coached. On the charges being a frame-up, he points at the testimony of PW3, of 18th August 2021, to effect that the appellant was a violent person, who had at one time assaulted her, to submit that the alleged assault was the reason behind the defilement charges. He argues that it was impossible for the minor to have stayed with the pain between 7th May 2021 and 14th May 2021. He asked whether the pus discharge was a case of gonorrhea or syphilis or changroid. On contradictions, he argues that the testimony of PW1 that she defiled by her uncle contradicted all the other evidence. He revisits the reference to Tracy and Trasy He questions the certificate of birth placed on record, arguing that it was alleged to have had been issued Amase Dispensary. He states that the P3 form was filled by a "quark" doctor, who was unknown and unqualified. On the case not being proved beyond reasonable doubt, he submits that , although he was given a chance to defend himself, he could not manage to challenge the prosecution. He argues that the case was not proved beyond reasonable doubt, as he, the appellant, was not medically examined, DNA testing was not done, "the exhibits were not with the charges," and there was no proof that the appellant committed the defilement.

8. On its part, the respondent submits on the grounds raised in the petition of appeal, and not of what the appellant submitted on. The submissions by the respondent cover the age of the complainant, the medical evidence not linking the appellant to the offence, shoddy investigations, the omission to call crucial witnesses, the *alibi* defence not being considered, and the sentence being unconstitutional.

9. On the case being a frame up, due to differences between the appellant and PW3. I have very closely perused through the recorded testimony of PW3, and especially the cross-examination by the appellant. She did not talk of her relationship with the appellant, and did not discuss about the possibility of

it being strained, to warrant her trumping up charges against him. In cross-examination, he dd not question her on their relationship, and he did not suggest to her that she had trumped up the charges against him. When he testified in his defence, he did not claim that the charges were framed up. He merely complained of strained relations with PW3, over domestic issues relating to access to a shop and land. He complained that when he was arrested, the officers who arrested him said that PW3 had reported that he had assaulted her. He conceded that whenever he got drunk, he would abuse her, and that when he was arrested for assaulting her, he conceded to it. He said that PW3 once poisoned his food, and had threatened to use all means to her. Other than these allegations, there was no concrete proof. The appellant did not call any witness, to back up the allegations.

10. On contradictions he points at one incident, where he alleges that PW1 had reported that she had been defiled by her uncle. I have perused through the recorded testimony of PW1. She identified the appellant, as Buja, who she said was like a father to her. I am not very clear on what the complaint by the appellant is about, because the other witnesses, such as PW3 described as an uncle of PW1. In any event, whether he was an uncle of PW1 or not may not be relevant, so long as PW1 identified him as the person who defiled her. He also argues that some of the documents placed on record as exhibits, referred to PW1 as Trasy, rather than Tracy, and, therefore, the exhibits were not valid. The appellant is talking about the child health and nutrition card, which was produced as P. Exhibit No. 3. It refers to PW1 as Trasy, while the other documents spell the said name as Tracy. I do not think much turns on this. It is more of an error in the recording of the name. it could also be the case of the medical staff who made the card not knowing the proper spelling of the name. The said card also bears the middle name of PW1, and it also has the names and particulars of her parents, including the James mentioned by PW3 in her testimony. He further argues that P. Exhibit 3, was not valid as evidence of birth, for certificates of birth are not issued by dispensaries'. P. Exhibit 3 was put in evidence as proof of the date of birth of PW1. It is not a certificate of birth, but a child health and nutrition card. It was not produced as a certificate of birth, but as a document that had details of the birth date of PW1, and of her parentage. To the extent that it was an authentic document produced by a government health facility, and carrying details of the age of the PW1, it was a valid exhibit to prove the birth of PW1. He dismisses PW4 as a quark, probably meaning quack, doctor. PW4 produced the P3 form and treatment notes. He did not claim to be a doctor, and he identified himself as a registered clinical officer. He argues that PW4 was not qualified to sign the P3 Form as he was not a doctor. I have looked at the P3 Form, at the column where PW4 signed. it calls for signature of a medical officer/practitioner. It makes no reference to a doctor. A clinical officer is a medical officer, for he is an officer in the field of medicine. A clinical officer is also a medical practitioner, for he practices medicine, not as a doctor, but as a clinician. The exhibits the subjects of this ground, were proper documents, that were properly placed on record.

11. On the ground that the case against him was not proved beyond reasonable doubt, the appellant argues that he was not subjected to forensics, to connect him to the defilement; DNA was not done; the exhibits were not with the charges; and that there was no proof that he committed the offence. The issue of forensics tests on the appellant and DNA could go together. There is no mandatory requirement that a defilement case can be proved only by use of forensics. What matters is whether the testimony of the victim is believable and reliable. The omission to conduct forensics should not fatal to a defilement case. The same can still be determined on the basis of other evidence. See *AML vs. Republic* [2012] eKLR and *Samwel Mburu Wanyoike vs. Republic* [2018] eKLR On the exhibits, I have addressed that issue above, and established that the exhibits that the appellant's complains about were properly placed on record. on whether there was no proof that *Julius Kitsao Manyeso vs. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA) appellant committed the offence, the trial court had a chance to see and hear PW1, and the other witnesses who were involved, and it had a chance to peruse the exhibits that were placed before it, and it was satisfied that a case had been established against the

appellant. I have not seen material from Julius Kitsao Manyeso vs. Republic MalindiCACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA)submissions of the appellant pointing to any shortcomings in the trail, upon which I can decide that the case was nota adequately proved.

12. The appellant did not submit on the other grounds, and I am entitled to assume that he abandoned them. I shall, nevertheless consider them. On the issue of the age of PW1 not being proved, I have seen P. Exhibit No. 3, the child health and nutrition card, in respect of PW1. It is a normal practice for the age of the child to be indicated in such cards, for, from a health perspective age of a child of tender years is critical, in monitorial health and nutrition. It indicates that she was born on 28th July 2012. That made her 9 years and some months as at 7th May 2021. PW1 was a child of tender years at the time she gave evidence, and it was not unusual for her not to know her age. She testified on a straightforward manner, on what befell her in the hands of the appellant, and her narrative was supported by the medical evidence tendered by PW4. On the investigations being shoddy, I have gone through the record, and I am satisfied that the prosecution presented a strong case based on the evidence that it had been able to gather. On omission to avail all the witnesses, it is trite that the prosecution need only produce and present such number of witnesses as are sufficient to establish its case, and that it need not call everyone who might know something or other about the case, however peripheral. See section 143 of the *Evidence Act*, Cap 80, Laws of Kenya and *Keter vs. Republic* [2007] EA 135. On the *alibi* defence not being considered, I note that the penultimate paragraph of the judgment was devoted to the defence statement of the appellant. In the first place there was no *alibi* defence. In his defence statement, the appellant did not talk about 7th May 2021 at all, leave alone saying that he was elsewhere on that material day. The issue of an *alibi* defence did not arise at the trail, and should not arise now on appeal. on the sentence being unconstitutional, I would agree, that as at the date 6th July 2022, when judgment was delivered, and 3rd August 2022, when sentence was pronounced, the superior courts had already made pronouncements on mandatory sentences and declared that they were unconstitutional. I have in mind *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), although it was subsequently clarified that that decision only applied to murder cases, but the principle it had stated was of universal of application. P*hilip Mueke Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] eKLR (Odunga, J) and *Edwin Wachira & 9 others vs. Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), followed, with respect to sexual offences cases, and *Julius Kitsao Manyeso vs. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA) with regard to life imprisonment as a sentence in general. The current jurisprudence is that the sentence of life imprisonment is unconstitutional, and the one imposed on the appellant cannot stand.

13. In view of the above, I find no merit in the appeal herein, save on sentence. The appeal on conviction is dismissed, the conviction is upheld and affirmed. On sentence, PW1 was 9 years and some months at the time the offence was committed. She was of tender years. Guided by *Julius Kitsao Manyeso vs. Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), where the minor was 4½ years old, and the court substituted life imprisonment with 40 years imprisonment, I do hereby set aside the sentence of life imprisonment imposed on 3rd August 2022, in Busia CMCSO NO. E071 of 2021, and substitute it with a sentence of 35 years imprisonment, to be served from the date of conviction. The period spent in remand custody awaiting trial to be reckoned. t is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF NOVEMBER 2023

W MUSYOKA

JUDGE

Mr. Benson Odeke, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.