WO v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 25699 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E003 OF 2022

GMA DULU, J

NOVEMBER 23, 2023

BETWEEN

WO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E012 of 2021 at Voi Law Courts delivered on 7th October 2021 by Hon. F. M. Nyakundi (SRM)

JUDGMENT

1. The appellant was convicted of defilement contrary to section 8(1) as read with section 8(3) and sentenced to 30 years imprisonment.

2. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-

    1. That the learned magistrate erred in convicting him on a charge sheet which was defective.

    2. The offence was not proved to the required standard or beyond reasonable doubt.

    3. The magistrate erred in convicting him by relying on evidence which contradicted and had discrepancies and immaterial evidence of witnesses.

    4. The learned magistrate erred both in law and fact when he convicted him by uncorroborated evidence of witnesses.

    5. The learned magistrate erred both in law and facts by finding that the evidence adduced by PW2 and PW3 of defilement case based a conviction and sentence (sic).

6. The learned trial magistrate erred both in law and in fact by convicting him by the case of fabrication and framing and of incrimination by the two ladies grudge and used his daughter buying her chapatis, mandazi and sweets.

7. The learned trial magistrate erred in law and fact by failing to evaluate and observe that there was allegation of the girl that she slept in the same mattress with him and a younger brother M allegation of lies (sic)

8. The learned magistrate erred in law and in fact by failing to find that the girl informed the lady that EN nicknamed (particulars withheld) that she had pain on the back not being defiled whereby she gave her panadols.

9. The learned Magistrate erred both in law and facts and failed to find that there was no way he could defile his daughter and at the same time allow E N to take the child to hospital and give her money to pay in the hospital.

10. The learned magistrate erred both in law and facts by failing to call the mother of the girl and her younger brother M whom they stay together to prove the allegation whether they are true, and also failing to call the grandmother.

11. The allegations of the girl being defiled continuously five days is framing because her mother was present at the time of alleged days before she ran away because of mama EN who wanted him to befriend her and leave his wife.

12. The learned magistrate erred both in law and facts by failing to find that the alleged dates of defilement are different dates, May, August also April and February.

13. That no way a child can be defiled and fail to tell her own mother or her grandmother and instead inform outside person who are not related at all.

14. That if the girl was being defiled could her mother have known before or after.

15. The learned trial magistrate erred both in law and facts by failing to consider his defence of alibi which he adduced in the trial court explaining what transpired and the reasons of his arrest.

16. The trial court failed to find and observe why PW1 EN was interested in his child who had a mother and grandmother and a brother coming to his house two times without being called.

17. That no medical examination was done on him to prove the allegations of defilement.

18. That the age of the girl differs 10 years and 13 years.

19. The learned trial magistrate erred in failing to find that the lady EN did not say anywhere that she had called him and told him that the girl Renish was defiled. Even the alleged three (3) women did not say anywhere that they were told of defilement but information of being told by the alleged defiled girl that she had pain in the stomach and back pain and she was not able to walk well and the girl told them that she had fallen down.

20. The allegations of the trial Magistrate that the prosecutor failed to amend the charge sheet to reflect on the proper charge as per the age assessment it is curable under article 159 of the *Constitution* instead found that failure to amend the charge was not vital, while it was a violation of his right under section 214 of the *Penal Code*.

21. The evidence availed before court and report given to the police station does not support the charges in court by the 8 witnesses.

22. The girl was not treated at Moi Referral Hospital but in a private hospital Ndovu, while Moi Referral was very near which was a government hospital.

3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.

4. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences – see *Okeno vs Republic* (1972) EA 32.

5. In proving their case, the prosecution called eight (8) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.

6. The appellant has raised technical as well as substantive grounds of appeal. He first of all complains that the charge was defective as the age of the complainant indicated in the charge sheet was not the age testified to by witnesses who referred to 13 years.

7. In my view, the charge was not fatally defective by the mere fact of the variance of age of the complainant. If the prosecution proved a different age through evidence then the court was bound to go by the proven age, not the allegation in the charge sheet. I dismiss that ground.

8. The critical ingredients of the offence of defilement have been restated by courts repeatedly to be the age of the complainant, sexual penetration, and the identification of the perpetrator.

9. With regard to the age of the complainant PW4, she stated that she was 10 years old in 2021 when she testified in court. PW5 Dr. Joto Nyawa stated that the complainant's age was indicated in the P3 form to be 13 years old. PW8 Sammy Bosire Magutu of Moi Referral Hospital Voi an age assessment health technician testified that he carried out dental tests and established that the complainant was 13 years old in 2021 which was the year of the alleged offence.

10. In my view, the prosecution proved beyond any reasonable doubt that the complainant was aged 13 years as at the time of the alleged defilement.

11. With regard to sexual penetration, PW4 the complainant stated that she was sexually penetrated. She reported the incident to PW1 E N, and PW2 H H. In addition, PW5 Dr. J N of Moi Referral Hospital Voi, and PW6 G W a health practitioner at Ndovu Health Centre Voi testified that medical examination and tests were done on the complainant, whose hymen was broken, and there were signs of sexual intercourse.

12. In my view, the prosecution proved beyond any reasonable doubt that the complainant was sexually penetrated.

13. Was the appellant the culprit. On this, the evidence implicating the appellant is that of the complainant PW4. She informed PW1 and PW2 about the incident. She was consistent all through. She knew the appellant well as a step father.

14. Though the appellant has argued that the complainant should have complained to him, in my view that would be impossible for the complainant to report the complaint to the perpetrator.

15. The appellant also argues that the complainant should have reported the incident to her mother. Again even on this, it all depends on the family arrangements and trust between individuals. It is not unknown for children to report sensitive matters to friends or to their teachers, and not to their parents or relatives.

16. With the evidence on record, I am of the view that the evidence of PW4 the victim was believable, and consistent and satisfied the requirements of the provisal to section 124 of the *Evidence Act* (cap.80).

17. I thus find that the prosecution proved beyond any reasonable doubt that the appellant was the perpetrator. I will thus uphold the conviction.

18. With regard to sentence, the trial magistrate having considered that the complainant was 13 years, for a first offender, in my view a sentence of 30 years imprisonment is on the higher side, as a sentence of 20 years imprisonment could still be imposed.

19. I thus set aside the sentence of 30 years imprisonment and order that the appellant will instead serve twenty (20) years imprisonment.

20. Consequently and for the above reasons, I dismiss the appeal on conviction and uphold the conviction. As for sentence I set aside the sentence of the trial court, and order that instead the appellant will serve twenty (20) years imprisonment from the date he was sentenced by the trial court. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2023 AT VOI IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State