Kanyithia v Republic (Criminal Appeal E012 of 2021)
[2022] KEHC 11952 (KLR) (28 April 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E012 OF 2021

EM MURIITHI, J

APRIL 28, 2022

BETWEEN

JOSEPHAT KANYITHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of the Principal Magistrate's Court at Tigania in Criminal Case No. 505 of 2019 delivered on 11th November 2020 by Hon. P. M. Wechuli SRM)

JUDGMENT

Introduction

1. The Appellant, Josephat Kanyithia, was on November 16, 2020 convicted and sentenced to imprisonment for the offence of defilement contrary, as charged, to section 8(1) as read with 8 (4) of the *Sexual Offences Act*, and sentenced to imprisonment for 15 years. The particulars of the offence were that the appellant had "on the 28th day of January 2019 at around 19:00 hours at Tigania Central sub-County within Meru County intentionally and unlawfully caused his penis to penetrate the vagina of [PG], a child aged 14 years old." There was an alternative charge of committing an indecent act with a child c/s 11 (1) of the *Sexual Offences Act*.

2. In his amended grounds of appeal, the appellant set out the following grounds:

    1. That, the learned trial magistrate erred in both law and fact by failing to analyze the light used to identify the appellant at the scene.

    2. That, the learned trial magistrate erred in both law and fact by failing to note that there was contradiction in the evidence of the prosecution.

3. That the learned trial magistrate erred in both law and facts by failing to note that the key witnesses were not called.

4. That, the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (pre-trial) under section 333 (2) was not considered.

5. That, the learned trial magistrate erred in both law and facts by failing to consider the appellant defense."

3. In support of his appeal, the appellant filed submissions challenging principally the sufficiency of evidence before the court and failure by the trial court to orders that the sentence takes into account the period of pretrial detention as the appellant had been in custody from 28/1/2019 as shown on the Charge Sheet dated 29/1/2019.

4. The DPP written submissions urged that it had proved the three elements of the offence of defilement, and the appellants, consequently, had no merit.

Duty of the first appellate Court

5. As a first appellate court (see *Okeno v. R* (1972) EA 32), this court has considered the evidence presented by the Prosecution and the defence as a whole as required by *Okethi Okale & Ors. v. R* (1965) EA 555, citing *Ndege Maragwa v. R* (1965) EACA, Cri. Appeal No. 156 of 1964 (unreported) and see also *Ouma v. R* (1986) KLR 619. In evaluating the evidence, the court must bear in mind the accused's defence and satisfy itself that the Prosecution evidence has left no reasonable possibility of the defence being true, as counselled by *Ouma v. R*, *supra*.

Issues for determination

6. The evidence of the prosecution in a case of defilement contrary to section 8 (1) of the *Sexual Offences Act* must prove the ingredients of the offence which are the minor age of the victim as charged, the fact of penetration partial or complete and the identification of the accused as the perpetrator. Particularly, the appellant's case raises the issue of identification; competency of the complainant on account of mental challenge and impact on failure to call all material witnesses to the offence.

Determination

Age of the victim

7. Although the Charge Sheet charged that the accused defiled the complainant a girl aged 14 years old, there is no prejudice to the assessment of the complainant's age as 16 years as being a higher age the sentence for the offence is lighter, and there is no embarrassment on the accused as to the nature of the offence charged. He understood that he was charged with the penetration of a child aged 14 years, and that the age of the child turned out to be 16 years did not prejudice him in understanding the nature of the offence facing him as required by section 134 of the *Criminal Procedure Code*.

Proof of age by Age Assessment

8. The court accepts the position taken by Mutende, J. in *Joseph Kiet Seet v. R* (2014) eKLR that the age of a victim may be determined by medical evidence. The age assessment report by the clinician PW4 is adequate proof of age of the complainant.

Penetration

9. The competence of the complainant to testify has been raised by the appellant. The court record shows that at some point the trial court had allowed an application by the prosecution for appointment of "an intermediary to communicate with the court as per Article 50 of the *Constitution*." The order which was made on 22/2/2019 based on a finding by the court as to the complainant's mental status as follows:

> " I have seen the medical report. It shows that due to a mental condition the victim is not fit to testify."

10. One year later on 4/3/2020, without any further mental assessment on record, the court went on to take the testimony of the complainant then presented as a child of "around 15 years" after a voire dire examination upon which the trial court ruled –

> " Court: The victim is competent to testify. She shall give sworn evidence."

11. On account of section 125 (2) of the *Evidence Act*, the court does not find any prejudice to the accused as the trial court found that the victim was competent to testify upon an elaborate *voire dire* set out on the record. Section 125 (2) of the *Evidence Act* provides as follows:

> "(2). A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

12. The Court shall, however, warn itself of the danger of convicting on the evidence of the complainant under section 125(2) as with section 124 of the *Evidence Act*, even though there is no requirement for corroboration of the testimony of a child victim who testifies on oath. Even under section 124 of the *Evidence Act* where the court may convict on the testimony of the victim of a sexual offence alone, where the court believes her/he to be telling the truth the reasons for such belief must be recorded. Such is the caution that the court must exercise.

What is the evidence of penetration in this case?

13. The complainant described the act committed by the appellant as follows:

> " I had put on a trouser, biker and pants. He removed all those three clothes. I don't know the organ he used. He inserted in the place I use to urinate. Kanyithia house is made of wood but it has holes. It has a bed. He put me on the bed. Wanja rescued me. I tried to scream but he covered my mouth and threatened to kill me."

14. PW2, W the complainant's sister testified as to how upon being told by J that Kanyithia the accused had gone with the complainant, they went searching for her at Kanyithia's house and found her "on the top of the bed [in Kanyithia's house] .... When she was naked downwards save for a top. Even Sub-area Manager was present." On cross-examination, PW2 said it was herself, the Sub-area manager together with complainant's mother who escorted the accused to the police station but refused to write a statement as he was the accused's brother.

15. PW3, the mother of the complainant, SN confirmed the search of the child on 28/1/2019 at a bpout 8.30pm when she was informed by Wanja PW2 that G the child was lost. She said that the child was found in the accused's house upon a search by Wanja, PW2, the accused's brother who was the sub-

area manager and herself. On cross-examination PW3 said that the sub-area manager brother of the accused had refused to record a statement. PW3 said the child "was naked [and] she said the accused had removed her clothes, slept on her and raped her."

16. PW4 Clinician Absalom Wambua of Mikinduri Sub-County Hospital testified that upon examination on 29/1/2019 with a history of sexual assault on 29/1/2019 at 7.00pm, it was found that the girl's hymen was freshly torn, labia minora had bruises and there was a white discharge; there was no spermatozoa but there were red blood cells, and her age was assessed at 16 years.

17. PW5, the Investigating Officer testified that it was the Sub-area manager who had brought the accused to the police station after the rescue of the child from the accused's home. On cross-examination he said "eye witnesses found you with the girl naked in your house. I re-arrested you. Both the complainant and you were brought to Police."

18. When put on his defence, the accused gave an unsworn statement on 20/9/2020 an adjourned date for that purpose, in which he said:

> " The charges are false. It was false allegations. We were born three boys and 2 girls. My father died in 2015. My father went to stay with my step mother who made these allegations. My mother wanted me to sell the land I was given. She wanted me to sell to her son. When I refused she brought these false allegations. They have now taken due my land. Our children ran away to bushes after father died." (*sic*)

Analysis of the evidence

19. The accused has no duty to prove his innocence but his incoherent unsworn statement does not help matters. When weighed against the coherent and consistent evidence of the Prosecution that he was found with the child in his house, the child being naked and upon investigation shown to have been penetrated, no reasonable doubt is established by the accused's statement. Significantly, the defence of trumped up charges is raised at the defence hearing for the first time. When cross-examining the complainant's mother PW3, no suggestion of any grudge about refusal to sell land was put to the witness. It is clearly an afterthought conjured up upon the accused being placed on his defence.

Identification of the Appellant as the perpetrator

20. The complainant PW1 identified the accused as the person who came and placed her on his shoulder and ran away with her to his home. PW2 and PW3 confirmed that upon a search, the complainant was found at the accused's house when the accused finally agreed to open the door. The Investigation Officer PW5 confirmed that the accused and the complainant had both been taken to the police station by PW2, PW3 and the Sub-Area manager. The accused did not in cross-examination raise the question of not being known to the witnesses. Rather, upon being placed on his defence, he presented a defence on a dispute over land. The court must find the accused was properly identified.

Failure to call all material witnesses

21. The prosecution did not need to call all the material witnesses. The principle of *Bukenya & Others v. Uganda* (1972) EA 349, applies where the prosecution's evidence is barely sufficient to prove the charge. Where the offence may be proved by the evidence presented by the Prosecution, it is unnecessary to call all the witnesses to a redundancy. The evidence of Joy, the girl who told PW2 that the complainant had gone with the accused became redundant when upon going to the accused's house, the complainant was found in the accused's house on a bed naked. The accused had been caught red-handed and was immediately arrested and escorted to the police station. The accused may also

not benefit from the prosecution's failure to call the sub-area manager, who is said to be his brother, and who, according to PW5 the Investigating officer, was among the persons arresting and who was among the people who escorted the accused to the police station. PW5 confirmation of the escort of the accused to the police station is sufficient. As provided in section 143 of the *Evidence Act*, no particular number of witnesses is required and a single witness may prove a fact.

Corroboration

22. If I had to look for corroboration of the complainant's testimony, although this is unnecessary as she testified on oath, I would find the evidence of PW2, PW3 and the medical evidence of PW4 to corroborate the evidence the complainant PW1.

Conclusion

23. The complainant 16-year old girl class 8 pupil was sexually assaulted by the appellant and rescued from the appellant's house by PW2 and PW3 and both were taken to the Police Station where the appellant was re-arrested. PW4's medical evidence confirmed penetration. The accused's defence of trumped up charge on account of a land dispute is rejected as an afterthought which was not taken up at all during cross-examination of the prosecution witnesses and in the face of the coherent and consistent evidence of the complainant PW1, her sister PW2 and mother PW3 who rescued the complainant PW1 from the accused's house and the medical evidence of PW4. The accused is guilty of the offence of defilement contrary to section 8 (1) and 8 (4) of the *Sexual Offences Act*, which carries a minimum imprisonment term of 15 years.

Judgment of the trial court

24. On its judgment, the trial court also the accused did not cross-examine any of the witnesses on the existence of a land dispute if indeed such dispute existed, and concluded that "The [Prosecution] has proved this matter beyond reasonable doubt. The accused is convicted of the main count. The alternative count is spent." Although the main charge the accused for defilement of a child aged 14 years which falls under section 8(3) of the *Sexual Offences Act*, no prejudice was suffered as the sentence imposed corresponds to the sentence provided for under section 8 (4) and not section 8 (3) of the Act.

25. This court finds that the trial court properly convicted the appellant for the offence of defilement contrary to section 8 (1) and 8 (4) of the *Sexual Offences Act* which applies for child victims aged 16 years and the sentence passed by the trial court to accord the minimum sentence under section 8 (4) of the *Sexual Offences Act*.

26. As regards sentence, the court agrees with the appellant that, pursuant to section 333 (2) of the *Criminal Procedure Code*, he is entitled to the period of his pre-trial detention being taken into account in reckoning the imprisonment term. There is no indication on the record that the trial court took into account the appellant's custody time. The court only said: "I have considered mitigation by the accused. He is sentenced to serve 15 years imprisonment." There shall, therefore, be an order that the sentence commences on the date of his arrest and remand for trial.

Orders

27. Accordingly, for the reasons set out above, the court finds no merit on the appellant's appeal from conviction, and the same is dismissed. The sentence of fifteen (15) years shall commence on the 28th January 2019, when the appellant was arrested and detained to await his trial.

    Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the Prosecution.