PK v Republic (Criminal Appeal E019 of 2021)
[2022] KEHC 11769 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 11769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E019 OF 2021

EM MURIITHI, J

APRIL 28, 2022

BETWEEN

PK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Peter Kinoti was convicted for the offence of defilement contrary to section 8 (1) as read with 8 (4) of the *Sexual Offences Act* and sentenced to imprisonment for 30 years on September 24, 2020 by Hon G Sogomo, PM in Tigania PMC criminal case no S O 4 of 2020.

2. The appellant filed an appeal from the conviction and sentence on 3 Amended Grounds of Appeal as follows.

    1. That the learned magistrate and the prosecution erred in matters of law and fact by trying and convicting the appellant relying on a defective charge sheet.

    2. That the learned trial magistrate erred in matters of law and fact by failing to interrogate he qualification of PW3, hence contravening the provisions of section 48 of the *evidence act*.

    3. That the trial magistrate erred in matters of law and fact when convicting and sentencing the appellant by expressing biasness in this instant matter.

3 The appellant filed submissions as set out below:

> " Written Submissions
>
> By dint of the charge sheet dated February 12, 2020 the appellant was charged for the offence of defilement contrary to section 8 (1) as read with sub-section 4 of the *sexual offences act* no 3 of 2006.

It is my humble submission that the charge sheet was defective in substance and misleading to the appellant because the charge was framed contradictory to the particulars of the offence herein.

My lord the prosecution did not inquire to amending the charge sheet nor did the trial magistrate amend, propose or deliberate on the impugned issue of amending the erroneously misleading sub-section of the law which is vital because it prescribes the punishment to be preferred to the accused person.

May this court fmd it misleading to quote the wrong sub-section of the law reflects the sentence to be 15 years and failure for the trial court to appraise the substance on the charge sheet fatal to the prosecution case.

More importantly it was imperative that a trial court must be meticulous when dealing with expert's evidence.

The provisions of section 48 of the *evidence act*, provides that opinion of experts in a given field are admissible.

However, a trial court must first satisfy itself that the person giving an opinion or Statement is a person especially skilled or posse's expertise in that given field before admitting the opinion/statement in evidence.

A trial court as a matter of practice should require such experts lay a basis for their expertise before proceeding to testify in that regard to pw3 the court failed to lay any basis on the expertise of Geoffrey Muthomi and referred to him as a clinician going by the court proceedings the qualifications of pw3 is really a matter of conjecture.

My lord as the arbitrator in this matter allow me to contend that the short comings in my view rendered the trial a mistrial because there is no evidence that the 'expert' who tendered the experts opinion upon which the conviction of the appellant was based were actually qualified in terms of section 48 of the *Evidence Act*. May this court apply section 354 (3) (1) of the *C P C*.

It is common sense when the hymen is tom there ought to be a tear on the flesh having behind a wound but in this instant matter the absentia of the hymen wasn't fresh and the complainant was victimized on the previous day this was not logic vide pg l0 line 22 -23 I quote pertinent words "I have a p3 form for Mercy Katha aged 7 years who was seen at our facility on February 10, 2020 with a history of having been defiled the previous day.

"The hymen was torn but not fresh. No lacerations were established". This evidence would not accrue to prop the main charge of defilement in this matter. Your honour, the Investigating Officer did a shoddy investigation because she ought to have enjoined Gakii the mother of the victim who happened to escort her to hospital, Kindly, see the case of *IMN v Rep* CR Appeal no 139,140 141 at Embu, by Justice Lady Ongúndi upheld. " Failure for the prosecution to summon vital witness mention in various in trial records leave no doubts that the prosecution did not prove this case beyond reasonable doubts"

Bukenya v Uganda [1972] "A court of law has the right and duty to summon all important witnesses whose testimonies may seem essential and the prosecution must avail the necessary witness".

My lord may this court fmd that the trial magistrate expressed himself with biasness hence meted a harsh excessive sentence to the appellant herein without weighing the gravity of

the prosecution evidence vide pg 15 of the judgment copy line 7-12 and I quote "The aforedescribed disposition by the accused must send alarm signals of his lack of contrition for his crimes and such oust him from the facility of mercy that would otherwise be extended to him. These words by the trial court are owned by the trial magistrate he expressed himself with bias to the appellant herein.

Your honour I will be pleased for your able court to scrutinize and enjoin the whole testimonies tendered by the prosecution witnesses together with accused defense and arrive to an independent conclusion rather than that of the subordinate court by the learned trial magistrate.

Reasons wherefore;

I pray that this appeal be allowed conviction and sentence be set aside and I the appellant be set at liberty."

4 The DPP's Ms Nandwa prosecution counsel filed written submissions as follows:

" Respondent's Submissions

Introduction

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* no 3 of 2006.

Brief facts of the case are that on the February 9, 2020 at [particulars withheld] village, Kianjai location in Tigania West Sub county within Meru county, unlawfully and intentionally caused his penis to penetrate the vagina of MN a child aged seven (7) years old.

My lord in the appeal I wish to respond to all the grounds of appeal together as follows:

The law and analysis of the evidence

The appellant was charged with the offence of defilement under section 8(1) as read with section 8(2) of the *Sexual Offences Act* which provides as follows:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8 (2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

To secure a conviction on a charge of defilement, the prosecution must prove all the three elements of defilement as set out in section 2 of the *Sexual Offences Act* and as highlighted in George Opondo Olunga v Republic [20161 eKLR, that:

" "The ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim"

1. Age of victim *Kaingu Elias Kasomo vs Republic* [2010] eKLR the court held:

"Age of the victim of a sexual assault under the *sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape or defilement. It is therefore essential that

the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.

My Lord the prosecution did prove the age of the Victim PW1 to be 7 years. The evidence by the clinician PW3 which was uncontested and unimpeached showed that the age of the victim was 7Years at the material time. He produced the age assessment report that supported this and was marked as prosecution exhibit 3.

Joseph Kiet Seet versus Republic 2014 eKLR. "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni - Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 it was held thus:

> " "In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ..."

2. Penetration

Penetration is defined as follows under section 2 (1) of the *Sexual Offences Act* no 3 of 2006:

> " "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

PW1 in her witness statement stated that the appellant came to where she was sleeping in their house. He then covered her mouth and then removed his urinating thing and put it in her urinating thing. PW3 Who was the clinician who attended to the complainant provided in his statement that upon examination of the complainant he observed that the hymen was torn but not fresh red blood cells and pus cells were observed leading him to conclude that the minor had been defiled. He produced the P3 form as exhibit number 1. As such we submit that the element of penetration was proved beyond reasonable doubt.

3. Identification of the assailant

In *Anjononi and others vs Republic* [1989] KLR the Court of Appeal held that

> " "recognition on of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

The question to be answered is whether the appellant was identified by the complainant as the individual who defiled her. The answer to this question is to the affirmative. PW2 in her statement provided that she knew the appellant as he was the boyfriend to her mother. The complainant also testified that it was during the afternoon hours hence she could identify the Appellant as the individual who defiled her.

Conclusion

My Lord, based on the above analysis, it is clear that this appeal lacks merit and it is our humble submission that it be dismissed in its entirety, the conviction and sentence be upheld because it is lawful."

Issue for determination

5 The issue for determination before the court is the question of sufficiency of evidence to prove the charge of defilement contrary of section 8(1) and 8 (2) of the *Sexual Offences Act*.

Determination

6 The charge indicates the offence as defilement contrary to section 8(1) and 8(4) of the *Sexual Offences Act* and it is, to the extent that it refers to section 8(4), inconsistent with the particulars of the offence which indicate the child as aged 7 years which applies to the offence under section 8 (2). The error in setting out the correct section of the offence is not fatal because the accused is not embarrassed as to the nature of the offence that he is facing. It is clear from the particulars of the offence, as required by section 134 of the Criminal Procedure Code, that the accused faced defilement charges with respect to a girl aged 7 years.

Proof of elements of defilement

7 The age of the complainant was given by assessment report presented by a clinician PW3 who examined the victim. The competence of the clinician is challenged by the appellant purportedly under section 48 of the *evidence act*. Which provides as follows:-

8 It is noteworthy that the appellant did not put any questions to the clinician in cross examination. He testified that the child was 7 years old. The trial court which saw the complainant also noted upon a *voire dire* examination that-

> "In *voire dire* examination the minor impresses as possessing a threshold of intellect to appreciate the day's proceedings and the obligation to render a truthful account of events. The minor may proceed to give unsworn testimony having not attained the age of 14 years as per the provisions of the *Oaths and Statutory Declaration Act*."

9 On examination in chief by the prosecution the girl PW1 could not remember how old she was, but she said she was in class 1 at [particulars withheld] primary school before she was taken to ripples centre. The court will accept that the evidence of the clinician whose competence was not questioned by cross examination and who on assessment placed the age of the child at 7 years. The finding of the court on voire dire and her own statement that she was in class one primary school and could not remember her age, all point to the age assessment correctness.

Penetration

10 PW1, the complainant girl herself detailed the alleged act of defilement as follows:

> "My mother's name is GP and I used to live with her at [particulars withheld] alongside M, K and K. K is the one that caused my relocation to [particulars withheld]. My mother had gone to wash clothes and I recall that it was just before lunch hour on a date I cannot recall. I then went to sleep and that is when K who had been left behind with me in the house came to where I was sleeping on a bed in our house. K covered my mouth so I could not scream.

Kinoti then removed his urinating thing and put it in my urinating thing. He had removed his clothes and those of mine."

The court would find penetration proved by way of putting "his urinating thing into my urinating thing."

11 The assistant chief Chokere of Machaku PW2 testified that he had arrested the accused at the complainant mothers home upon ''information that the mother had given out the complainant for sex''. He said that upon forcing the occupants of the complainants mothers house to open on the night of February 9, 2020 at 10 pm he found ''this person Kinoti (pointing at accused) G and her daughter MN reveled that Kinoti had removed her underpant and inserted his finger in her vagina."

12 PW3, the clinician at Miathene subcounty hospital testified that upon examination, "her labia majora and minora were intact. The hymen was torn but not fresh. No lacerations were established. Red blood cells and pus cells were observed and he concluded that the minor had been defiled."

13 PW4 the investigating officer confirmed the report at Tigania Police Station on 9/2/2020 by the complainant who was accompanied by the area chief.

14 When put on his defense, the appellant stated that he had been arrested by the chief for no cause and denied knowing the complainant.

Analysis of evidence

15 The prosecution evidence by PW1 is that on a date that the 7 year old could not recall, at lunch time while she had been left with the accused K with whom she lived together with her mother G, M and K , the accused had gone to where she was sleeping and covered her mouth so that she could not scream put his penis into her vagina after he had removed her and his clothes.

16 It follows that it was on the said date that the chief upon information that the mother Gakii had given the child to the accused for sex, he at 10.00 pm in the night gone and found the accused, the complainants mother and another in the house and arrested the accused.

17 Despite protestation by the accused that he did not know the complainant, the court observes that the evidence of the complainant PW1 and the area chief PW2 and was that the accused lived with the mother of the complainant G and the complainant, and was in fact arrested in the house. Indeed, the accused in his defense said the chief had arrested him for no cause but did not dispute that he was arrested in the complainant's house.

Identification of the appellant

18 I find the prosecution's case for defilement of the complainant proved. It remains only to consider the identification of the appellant as the perpetrator. PW1 testified that she had lived with K and her mother in their house. It was at lunch time during the day so no question as to suitability of lighting used for identification arises. The complainant was wholly unshaken by the appellant in cross examination when she brazenly answered:

" My name is [M] not C. When I screamed no one came to my aid. No one showed up when you were doing what you did to me. I was present when the local chief Benja arrested you. I was unable to fight you off when you gagged me. It is true that my mother was also arrested."

19 In addition, the area assistant chief PW2 testified that the appellant was arrested at the complainant's mothers house, and the court must reject the defense that the accused was unknown to the complainant and her mother.

Conclusion

20. The court finds that the prosecution has proved all the necessary ingredients of the offence of defilement of a child aged 7 years.by the testimony of PW1, PW2 and PW3.

21 The trial court properly convicted the offender for the offence of defilement and on the state of the law, as it stood then, considered that the minimum sentences in the *Sexual Offences Act* were not mandatory. Hence the imprisonment for 30 years rather than life imprisonment provided for offence under section 8 (2) of the Act.

22 It has now been clarified by the directions in *Muruatetu & Another v R* (2021) eKLR that the decision of the Supreme Court in *Muruatetu and Another v R* (2017) eKLR, on which the trial court relied, does not apply to sexual offences.

23 However, as the appellant was not warned of the possibility of enhancement of the sentence so as to give him opportunity to consider whether or not to purser his appeal, this court shall not interfere with the sentence of imprisonment of 30 years imposed by the trial court.

Order

24 Accordingly, for the reasons set out above, the court finds no merit in the appeal from conviction and sentence for the offence of defilement contrary to section 8(1) and 8 (2) of the *Sexual Offences Act* imposed by the trial court.

25 This court however directs, pursuant to section 333 (2) of the *Criminal Procedure Code* that the sentence of imprisonment of 30 years shall commence on the February 9, 2020 when the appellant was arrested and detained to await his trial.

Order accordingly.

DATED AND DELIVERED ON 28TH DAY OF APRIL, 2022.

EDWARD M MURIITHI

JUDGE

Appearances

Appellant in person.

Ms Nandwa, prosecution counsel for the DPP.