**Buthul v Republic (Criminal Appeal 40 of 2021)**
**[2022] KEHC 3371 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3371 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**CRIMINAL APPEAL 40 OF 2021**

**A ALI-ARONI, J**

**MAY 19, 2022**

**BETWEEN**

**HASSAN BARE BUTHUL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the conviction and sentence of Hon D.W. Mbuteti in Chief Magistrate Court at Garissa Case No. 6 of 2021 dated 8th October 2021)***

**JUDGMENT**

1. Hassan Bare Buthul, the appellant herein was charged and convicted to 20 years imprisonment for the main offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the 14th Day of October 2020 at about 1600hrs in Ijara Sub- County within Garissa County, he unlawfully and intentionally caused his penis to penetrate the vagina of MA a child aged 12 years.

3. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the said Act.

4. The particulars thereof are that on the 14th day of October 2020 at about 1600 hours in [Particulars Withheld] village Torabora location in Ijara sub-county he touched the vagina of MA a child aged 12 year with his penis.

5. Aggrieved by the trial Court's decision the appellant petitioned this court on 25th October 2021 raising the following grounds;

a. That the trial court erred in law and fact by not considering the material contradictions of the prosecution case, the contradictions were so material that the prosecution's case was not believable and should not have been relied on to arrive at a conviction.

b. That the trial court erred in fact and in law by failing to conduct a proper viore dire and thus did not have sufficient basis to determine whether the complainant had the capacity to testify under oath.

c. That the trial court erred in law and in fact, by failing to read the appellants his rights pursuant to Section 211 of the Criminal Procedure Act.

d. That the trial court erred in law and in fact by dismissing the appellant's sworn defence which was plausible and cogent and which had impeached the prosecution case.

e. That the trial court erred in law and in fact by convicting the Appellant on evidence that did not meet the evidentiary threshold.

f. That the trial court erred in law and fact by failing to give reasons for finding contrary to the law of the Criminal Procedure Code.

6. On 23rd November 2021 the Court directed the parties to canvass the appeal through written submissions. Both parties filed their written submissions summarized as follows; -

Submissions

Counsel for the Appellant first took issue with the conduct of voir dire examination by the trial court. He submitted that sufficient questions were not asked to ascertain whether the complainant knew the consequence of lying. In this regard, he cited the case of *David Mwasia Makau versus Republic* [2016] eKLR.

Counsel further submitted that the evidence of PW3, a clinical officer, who testified that there were no injuries in the outer and inner lining of the vagina was not consistent and could not be sufficient to corroborate the evidence of the other prosecution witnesses.

He also submitted that the prosecution witnesses failed to positively identify the Appellant to have been the perpetrator of the offence in that it did not come out clear from the witnesses that they previously knew the Appellant.

Lastly, the trial court failed to read the appellant's rights under section 211 of the Criminal Procedure Code which was prejudicial to the Appellant who was acting in person.

7. The Respondent on its part submitted that the prosecution witnesses' testimonies were consistent and the medical officer confirmed the element of penetration. That no objection was raised by the appellant at the trial court on the conduct of voir dire examination and that the trial court only proceeded after satisfying itself that the minor understood the meaning of the oath and the importance of speaking the truth.

8. With respect to the provisions of Section 211 of the *Criminal Procedure Code*, the respondent submitted that it is clear from the evidence that the appellant elected to give sworn evidence, an election made after the options available to him were explained.

9. The Respondent further submitted that the appellant's defence was a mere denial. The appellant was positively identified by the complainant, PW1 whose evidence was corroborated by PW2 and PW3 and that the trial magistrate also clearly weighed and highlighted the points

of determination in his judgement as provided for in Section 169 of the Criminal procedure Code.

**Analysis and Determination**

10. This being the first appeal it is the court's duty to re-evaluate the evidence and make its own conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated the duty of the Court on a first appeal in the following words:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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, see *Peters v. Sunday Post, [1958] E. A. 424*."

11. In the trial court, the Respondent called four (4) witnesses to support the case against the Appellant while the Appellant presented his defence as a sole witness.

12. PW1 MA a child aged 13 years old testified that on the material day she was in their house preparing to pray when the Appellant came into the said house, got hold of her, took her headscarf and used it to cover her mouth. Upon covering her mouth, the Appellant pushed her dera up, tore her under wear, pushed it down, placed his finger in her vagina and thereafter penetrated her with his penis and defiled her and only stopped when he heard PW2 entering the house. The witnesses identified the scarf & underwear, which were produced in court as exhibits.

    Further the witness testified that the appellant was wearing a t-shirt and kikoi. At the time, her mother had travelled and her father was grazing their goats.

    She also pointed out at the Appellant as the person who defiled her.

13. PW2 IAA testified that she had gone to borrow salt at PW1's house when she met the appellant leaving the said house. She was familiar with the appellant and she saw the appellant's BobaBoda was outside the house which he used and ride away. Upon entering the house, the witness found PW1 lying on the ground, she had a cloth around her mouth, her Dera pushed to the chest and her underwear was pushed to her legs. She removed the scarf from the PW1's mouth, however, PW1 could not speak on interrogating her, she gave her milk and water to drink. Thereafter PW1 informed her that the appellant had defiled her. The Witness went and informed her mother of the incident. Later PW1's father returned home and informed of the matter. He reported the matter to the police station.

14. In cross-examination and re-examination, the witness restated being familiar with the appellant since they come from the same clan. She also stated that at the time the appellant was getting out of the house he was wearing a t-shirt and kikoi.

15. PW3 Gerald Muchieno a clinical officer, Ijara Sub- County Hospital produced the P3 report. It was his testimony that from the results there was penetration, the hymen had a scar though not fresh. Further he noted the presence of epidural cells and semen which was proof that there was sexual intercourse. He also told the court that there were no injuries to labia minora and majora but it is possible that

there can be sex without the labia minora and majora being injured. He noted that the complainant also had an injury on the thigh.

16. PW4 P.C. James Muthangira testified that on 14th October 2020 they received a report of a rape case. On the same day, they escorted the complainant to Ijara Sub-County Hospital where she was examined and treated. The P3 confirmed that the complainant had been defiled. They also visited the scene where they found an innerwear and leso belonging to the complainant. In court, he identified a tear on the biker that appeared to be on the part that covered the private parts. He produced the complainant's birth certificate as Pexh 1, black leso as Pexh2 and the biker as Pexh 3.

    He further testified that they were able to arrest the appellant by tracing his phone number away from the scene as if he was hiding. He confirmed being familiar with the appellant as he worked at the water office where they pay their water bills. He also stated that the complainant properly identified the appellant.

17. At the close of the prosecution case, the trial court found that the appellant had a case to answer. The appellant was put in his defence. He testified as a sole witness.

18. In his sworn testimony, the appellant told the court that he had stayed in [Particulars Withheld] for 2 years working at the Water Department as a motorcycle rider. That on the material day he was from work and went to [Particulars Withheld] where they reside with his family. That at around 6:30 p.m. he was arrested on an allegation that had defiled the PW1. He denied knowing the PW1 and PW2. He was later to find that they come from the same tribe as PW1's father. Further he informed the court that elders had called for negotiations between his family and that of the complainants but he was not privy to the same.

**Analysis and Determination**

19. Voir dire examination is necessary in order to determine the admissibility of evidence or the competency or qualification of a witness. As relates to children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of telling the truth. See *Japheth Mwambire Mbitha v Republic* [2019] eKLR

20. The record indicates that the trial court did conduct a voire dire examination. The proceedings state as much;

    > " Court; Hearing to proceed. The Court will first conduct voire dire
    >
    > Voire Dire
    >
    > I am 13 years old. I am in class six. I am in [Particulars Withheld] Girls Primary School. I know if I am under oath I cannot lie to the court."

21. The purpose of voir dire is to determine that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. It would have been good practice if the trial court recorded both the questions and the answers given by the minor during the examination and then proceed to make a determination on the inquiry. This was not the case in this matter. Nonetheless, the court has taken due consideration of answers PW1 gave during the voire dire examination and the evidence given thereafter. The court is satisfied that the voire dire examination was well conducted and equally satisfied from the answers by the witness that she understood the import of taking an oath. The decision of the trial Court is therefore not faulted and this court sees no reason to interfere with its finding. Indeed it affirms the same.

22. As to whether the provisions of Section 211 of the Criminal Procedure Code were explained to the appellant. The record shows that at the close of the prosecution case the court made a finding that the appellant had a case to answer. Thereafter record is as follows;

> " "Accused:
>
> I will give sworn testimony. I have two witnesses. I pray for another day. "

23. The matter thereafter proceeded on a later date where the appellant gave a sworn testimony.

24. Taking into consideration the above set of facts this court does not find any basis for assuming that the trial court did not explain to the accused his rights under section 211 of Criminal Procedure Code, although the fact of explaining to the accused his rights is not recorded. From the statement of the Appellant, he made a choice. This choice must have been informed by options made available to him. Of course, the trial court must be faulted to the extent that it did not record this bit of the proceedings which would have avoided speculation. However, it is clear that a choice was made by the Appellant and it will be a travesty of justice to capitalize on the omission. In addition, no prejudice is shown to have been suffered by the accused who proceeded to give his defence in a sworn statement followed by cross-examination by the Prosecution. Inevitably this ground must fail

25. As to whether there are material contradiction in the prosecution's case, counsel for the appellant alluded to the same but failed to pin point the alleged contradictions.

    The court has considered the evidence of the prosecution. PW1's evidence was unshaken during cross-examination. The evidence of PW2 who appeared and attended to PW1 immediately after the incident corroborated PW1's testimony. Both PW1 & PW2 recognised the appellant at the scene of crime. PW3 confirmed the element of penetration. Whereas PW4 narrated the findings in the course of investigations and presented exhibits. The court therefore forms the opinion that inconsistences if any in the evidence of the prosecution witnesses was not material as to water down the same.

26. Ground d relates to whether the trial court considered the appellant's defence. The trial court in its determination held that it had considered the appellant's defence and found that the same only confirmed that the PW1's family had no differences with the appellant hence there was no reason for the family to report false allegations. In his testimony, the appellant stated that he was working until 6:30 p.m. when he was arrested by the police on the charges before the trial court. The evidence of the appellant was therefore based on alibi evidence. The appellant did not call any witnesses to corroborate his testimony. In his cross-examination of PW1 and PW2 the defence of alibi was not raised. The appellant's alibi defence was not proven and the same was a clear afterthought.

27. This being a case for defilement three ingredients had to be proved as stated in *George Opondo Olunga v Republic* [2016] eKLR, "identification or recognition of the offender, penetration and the age of the victim."

28. Age of the victim is not contested in this appeal. Both PW1 and PW2 recognized the perpetrator. The incident occurred during the day and they were well known to him. In her evidence PW2 also saw the Appellant's motor bike and she saw him ride away in it. PW4 in his evidence alluded to the Appellant's motor bike, he also knew him. The Appellant affirmed in his evidence that he was a motor cycle rider. This is affirmation in addition to the evidence of recognition.

29. The evidence of PW1 and PW3 proved the element of penetration. The said evidence was clear and consistent.

30. On sentence, the trial court considered the evidence and the mitigation by the appellant and sentenced him to 20 years imprisonment commencing 13th October 2021. Section 8 of the *Sexual Offences Act* provides as follows;

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

31. Sentencing is discretionary, and an appeal court cannot interfere with a sentence unless there is a reason to; if the same is unjust and harsh or against the law. This court has taken due consideration of the nature of offence, the aggravating, mitigating factors and the law and finds that the trial court's determination on sentence was proper and just.

32. Based on the above the Appellant's appeal is found to be devoid of merit and the same is hereby dismissed.

**DATED DELIVERED AND SIGNED IN GARISSA THIS 19TH DAY OF MAY 2022**

**ALI-ARONI**

**JUDGE**