Njiru v Republic (Criminal Appeal E007 of 2022)
[2022] KEHC 12248 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E007 OF 2022

LM NJUGUNA, J

JUNE 29, 2022

BETWEEN

HARUN NYAMU NJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence by Hon. J.W. Gichimu in Criminal S.O. No. 03 of 2020 at Runyenjes Law Court and delivered on 04.11.2021)

JUDGMENT

1. The appellant herein was arraigned in court before the Senior Principal Magistrate's court at Runyenjes in Sexual Offence No 3 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on February 19, 2020 about 1700hrs at [Particulars Witheld] village Kyeni North sub location within Embu County, intentionally attempted to cause his penis to penetrate the vagina of BM a girl aged 3 years.

3. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006, the particulars being that on February 19, 2020 at about 1700hrs at [particulars witheld] village Kyeni North sub location within Embu County, intentionally touched the vagina of BM a girl aged 3 years with his penis.

4. The case proceeded with the prosecution calling six (6) witnesses and upon the close of the prosecution's case, the appellant was put on his defence and he opted to give unsworn statement in support of his case.

5. In a judgment delivered on November 4, 2021, the appellant was convicted and thereafter sentenced to life imprisonment. Being dissatisfied with both the conviction and the sentence, he appealed to this

court *vide* a petition of appeal filed in court on February 2, 2022 in which he raised eight (8) grounds of appeal which can be summarised as: that the prosecution failed to discharge the burden of proof.

6. When the appeal came up for hearing, the court directed that the appeal be canvassed by way of written submissions.

7. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt and that, the trial court failed to consider the appellant's mitigation given that he is 60 years of age, that he has children and as such, the life sentence meted out by the trial court is very severe and harsh. That he is remorseful and therefore, he pleads with this court to acquit him of the charge so that he could go take care of his family.

8. The respondent on the other hand submitted that the prosecution proved its case beyond any reasonable doubt and that the trial court's determination was proper in the given circumstances. That in regards to contradictions, section 124 of the *Evidence Act* stipulates that a court can convict a person on uncorroborated evidence of a victim as long as it is convinced that the victim is truthful. He relied on the case of *Arthur Mshila Manga v Republic*, Criminal Appeal No 24 of 2014 [2016] eKLR. That the complainant despite being of tender years, was forthright in her account of what occurred and further, all other witnesses were clear and consistent. That in reference to sentencing, the trial magistrate was right given that the offence provides a mandatory sentence thus the same was within the law. In the end, it was the case of the prosecution that the appeal herein is not merited.

9. This being the first appellate court, I am guided by the principles enunciated in the case of *Okeno v Republic* (1972) EA 32 where the court of appeal set out the duty of the first appellate court as follows: -

> 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] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

10. I have considered and analyzed the evidence which was tendered at the trial court by both the appellant and the prosecution, the grounds of appeal and the written submissions by the parties herein and I find that the issue for determination is whether the prosecution proved its case beyond any reasonable doubt and whether the sentence was harsh and excessive.

11. In reference to section 107 (1) of the *Evidence act*, the burden of proof rests on the prosecution to establish every element in a criminal charge beyond any reasonable doubt. [See *Miller v Minister of Pensions* 2 ALL ER 372 – 373].

12. The appellant herein was charged with the offence of defilement. The same is provided for under section 8(1) as read with 8(2) of the *Sexual Offences Act*.

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 3. 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.

13. In the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are;

    1. Identification or recognition of the offender
    2. Penetration

3. Age of victim.

14. For the offence of defilement to be proved, the prosecution must prove each of the above ingredients beyond reasonable doubt. [See the case of *John Mutua Munyoki v Republic* [2017] eKLR.

15. In regards to proof of age, I wish to state that the importance of proving the age of a victim in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim.

16. In the case of *Mwalengo Chichoro Mwajembe v Republic*, Criminal Appeal No 24 of 2015 (UR) the court stated as follows;

> "……..the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Denis Kinywa v Republic* Criminal Appeal No 19 of 2014) and (*Omar Ucher v Republic* Criminal Appeal No 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"

17. In this case, the appellant did not dispute the age of the complainant as stated in the charge sheet. PW1 testified that the complainant was about 5 years old at the time of the hearing. PW5 tendered the complainant's birth certificate which proved that she was 3 years and 9 months at the time the alleged incident occurred. Her age was therefore adequately proven by way of the birth certificate.

18. In reference to identification of the appellant as being the person who perpetrated the offence herein, it is trite that in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. In the case of *Kariuki Njiru & 7 others v Republic*, Criminal Appeal no 6 of 2001 (Unreported) the court held as follows:

> "Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

19. In regards to the identity of the defiler, the appellant is a person who was well known to the complainant and her family; he is the grandfather of the complainant herein. The appellant himself confirmed that he knew the victims' family though asserting that there was a grudge given that PW4 was not happy that he gave land to his uncle and thus she decided to frame him. I humbly find that the appellant's defence is lame and hereby holds the view that the prosecution ably proved this element.

20. In regards to whether there was penetration, section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

21. In this case, PW1 testified that on the material day, she had allowed the complainant to go visit PW4 at Gatuumbe area. That later, her husband was called to go to PW 4 and upon returning, he told her that the complainant had been defiled by the appellant. PW4 stated that she had left the complainant in company of other two children when she left for the tea center. That upon coming back, she found PW3 checking on the complainant for the reason that she had allegedly been defiled. She testified that upon asking the complainant, she told them that the appellant herein removed her pair of trouser and underpants and then proceeded to urinate on her. Further that, the appellant had inserted something inside her vagina and that once he was done, the appellant dressed her and then let her go. In reference to PW1, she testified that she checked the complainant who had complained that she felt pain while passing urine and as a result, took her to the hospital for medical checkup. PW6 on the other hand testified that upon examining the complainant, he found the hymen intact but in the same breadth, noticed that there were lacerations on her labia majora and minora; that upon carrying out a high vaginal swab, it showed numerous pus cells and thus came to a determination that someone had tried to penetrate the complainant. But the fact that the hymen was not ruptured does not mean that the complainant was not sexually assaulted. [See Court of appeal in the case of *Erick Onyango Ondeng' v Republic* (2014) eKLR].

22. Having analyzed the facts herein and the law applicable, I hold the view that the prosecution has not proved beyond any reasonable doubt the charge of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006 but a different offence of attempted defilement provided for under section 9 (1) as read with section 9 (2) of the *Sexual Offence Act*; The same provides that;

    1. A person who attempts to commit an act would cause penetration with a child is guilty of an offence termed attempted defilement

    2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term not less than ten years.

23. In reference to the above, I am guided by the second schedule of the *Sexual Offences Act* wherein Section 186 of the *CPC* having been repealed and replaced with the new section which reads that:

> When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.

[Also see section 354 (3) of the *CPC* in reference to the powers of this court].

24. Having already determined that indeed the appellant herein was positively identified as the perpetrator; the age of the complainant at the time of the alleged offence was proved to be 3 years and 9 months and in regards to the attempt penetration, I find guidance in the finding of Makhandia, J (as he then was) in *Abraham Otieno v Republic*, Kisii High Court Criminal Appeal No 53 of 2009, where he found that the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted. In this case the offence was that of attempted defilement.

25. In the same breadth, I am in agreement with Makau J where he held as follows in *David Aketch Ochieng v R*, [2015] eKLR:

> "....For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/ or bruises or lacerations of culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

26. In the instant case, the complainant testified that the appellant removed her pair of trouser and underpants and then proceeded to urinate on her. Further that, the appellant had inserted something inside her vagina and that once he was done, the appellant dressed her and then let her go. The evidence of the complainant was further corroborated by PW6 when after examining the complainant, he found that indeed someone had tried to penetrate the complainant and on that premise, I am convinced that this limb was also proved.

27. The appellant has contended that the trial court disregarded his defence without giving reasons for the same. The record shows that the appellant herein was given an opportunity to present his defence; however, the court weighed his defence against the evidence adduced by the prosecution and found that the prosecution had proved its case against the appellant beyond any reasonable doubt and as such, the appellant cannot be heard to say that his defence was never considered.

28. In reference to the ground that the prosecution's evidence was contradictory, it is trite that not every contradiction warrants rejection of evidence. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. [See *Jackson Mwanzia Musembi v Republic* [2017] eKLR]. In relation to the case herein, the prosecution witnesses were consistent and very clear thus, that ground of appeal cannot stand.

29. In the end, I hereby find him guilty for that offence and convict him under section 9(2) of the *Sexual Offences Act*. Consequently I set aside the life sentence imposed on him by the trial court and sentence him to serve 20 years imprisonment. The term that he has spent has been taken into account.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent