Keter v Republic (Criminal Appeal 18 of 2020)
[2022] KEHC 12650 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 18 OF 2020

WK KORIR, J

JULY 28, 2022

BETWEEN

THOMAS KIPLIMO KETER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. J. Tamar, PM dated 04/3/2021 in Eldama Ravine Eldama Ravine PM's Court Sexual Offence Case No. 31 of 2018)

JUDGMENT

1. The Appellant, Thomas Kiplimo Keter, being aggrieved and dissatisfied with his conviction and sentence in Eldama Ravine SPM Criminal Case No. 31 of 2018 appeals to this Court under undated amended grounds of appeal as follows:

    i. That the learned trial magistrate erred both in law and fact by holding that the offence of defilement was proved without proof of the ingredients of the offence.

    ii. That the learned trial magistrate erred in law by failing to appreciate the Appellant's defense of alibi and did not give it an objective and open-minded analysis.

2. The Appellant consequently prays that his appeal be allowed, conviction quashed, sentence set aside and he be set at liberty.

3. The brief background of the appeal is that the Appellant was in the main count charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence being that on the 29th July, 2018 at around 11:00 hours at [particularas withheld] Village in Mogotio Sub-County within Baringo County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of LJK, a child aged 10 years.

4. The Appellant also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence being that on the date and at the place mentioned in the main charge, the Appellant unlawfully caused his penis to come into contact with the vagina of LJK, a child aged ten years.

5. At the conclusion of the trial, the Appellant was found guilty as charged in the main count and sentenced to life imprisonment.

6. Through his undated submissions filed together with the amended grounds of appeal, the Appellant contends that the ingredients of the charge of defilement being penetration, the age of the victim and the identity of the offender were not proved. The Appellant relied on Court of Appeal case of *Charles Wamukuya Karani v Republic* (citation not provided), in support of his submission that the three ingredients must be proved.

7. The Appellant submits that in the case of defilement, age is very important aspect that requires to be proved as the sentence to be imposed upon conviction is determined by the age of the victim. According to the Appellant, the evidence regarding the age of the victim was contradictory in that the complainant who testified as PW1, PW2 MM (name concealed by this Court) and PW4 Police Constable Lynett Omwamba, all stated that the complainant was ten years old but the complainant later testified that she was eleven years old. The Appellant states that although PW4 produced a birth certificate showing that the complainant was born on the 8th March, 2008 and therefore ten years old, the contradictory testimony of the prosecution witnesses should lead to the conclusion that age was not proved. In support of his submission that it is essential to establish the age of a victim before a conviction can ensue, the Appellant cites the holding in the Ugandan Court of Appeal case of *Francis Omuroni v Uganda*, Appeal No. 2 of 2000 that:

> " In defilement cases, 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...."

8. The Appellant further relies on the case of *Kaingu Elias Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal No. 504 of 2010 where it was held that:

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

9. Further reliance is placed on the Court of Appeal decision in *Alfayo Gombe Okello v Republic* [2010] eKLR where the Court of Appeal stressed the importance of proving the age of the victim of defilement by stating that:

> " In its wisdom, parliament chose to categories the gravity of the offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8(1) .... in this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came into proving the age was statement by her mother MA when she testified on 16th October, 2007 that...." this child in court is mine aged 14 years born in 1992..... The

other piece of evidence on age was an estimate made in the P3 Form dated 20th August,2007 that she was 15 years old. We must therefore take the construction which is favourable to the Appellant. In our view, there is reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the Appellant."

10. The Appellant submits that penetration as defined in the *Sexual Offences Act* was not proved in his case. It is the Appellant's case that the trial magistrate erred by finding that there was penetration based on the evidence of PW1 and PW5 Edwin Kamurwa because a close scrutiny of their evidence cannot prove that PW1 was actually defiled. The Appellant contends that the trial magistrate did not consider the evidence of PW1 that she took a bath after the defilement. The Appellant submits that if a bath is taken after sexual intercourse, medical examination will never be positive. The Appellant therefore faults the trial magistrate for not analyzing this piece of evidence. Further, that the trial court failed to consider the evidence of PW5 that there was no vaginal discharge or bleeding despite the hymen being broken.

11. The Appellant further submits that the evidence of PW1 was not properly analyzed considering that she told the court that it was the first time for her to have sex but there was no bleeding notwithstanding that the hymen was freshly broken. According to the Appellant, the medical evidence did not corroborate the complainant's evidence that she was penetrated because clinically one cannot have a freshly broken hymen without any bleeding.

12. It is the Appellant's case that the trial magistrate erred in relying on the broken hymen as evidence of penetration. It is the Appellant's case that absence of the hymen is not of itself sufficient proof of penetration. He supports his submissions by reference to the holding by the Court of Appeal in *P.K.W. v Republic* (citation not provided) that:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The *Queen v Manual Vincent Quintanilla*, 1999 ABQB 769."

13. On the second ground of appeal, the Appellant submits that the trial magistrate did not analyze the evidence he gave in his defence as required by the law. Further, that the trial magistrate misdirected himself by stating that his alibi was an afterthought and that nothing turned on his evidence that he had an affair with the mother of the complainant. According to the Appellant, it was the duty

of the prosecutor and not the magistrate to prove the untruthfulness of his defence. Relying on the Ugandan case of *Uganda v Sebyala & others* [1969] EA 204, the Appellant contends that an accused does not have to establish that this alibi is reasonably true as all an accused has to do is to create doubt as the strength of the case for the prosecution. Further, where the alibi is plausible and although raised for the for the first time during the defence, it is the duty of the prosecution to rebut that defence. The Appellant points to Section 309 of the *Criminal Procedure Code* as granting the prosecutor an opportunity, with the leave of the court, to adduce evidence to rebut any new matter introduced by an accused person in his defence.

14. The Appellant also relies on the holding in *Adedeji v The State* (1971) 1 ALL N.L.R 75 that "failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

15. The Appellant therefore urges this Court to find that his conviction and sentence was not based on sound evidence and allow his appeal.

16. The Respondent opposed the appeal through submissions dated 13th June, 2022. As to whether the essential ingredients of defilement were established, the Respondent submits that PW1 clearly narrated to the court how she was lured by the Appellant to have sexual intercourse with him. According to the Respondent, the evidence of PW1 that the Appellant carried her forcefully, placed her on the bed, removed her clothes and defiled her was consistent and was not rebutted by the Appellant in cross-examination. The Respondent submits that the complainant's evidence on penetration was corroborated by that of the medical officer.

17. The Respondent submits that there is no better way in which the complainant could have explained the incident. The Respondent contends that the complainant knew the Appellant by the name Thomas. It is the Respondent's case that the complainant told her mother what had happened and a report was made to the police, investigations carried out and the Appellant arrested and later charged in court. According to the Respondent, the identification of the Appellant was clear and undoubtedly established. The Respondent submits that the complainant told the court that she previously knew the Appellant before the incident.

18. On the Appellant's claim that his defence was not considered, the Respondent submits that the alibi defence was considered in the judgement and the trial court concluded that the same could not stand and was an afterthought in light of the overwhelming evidence of the complainant. The Respondent submits that the Appellant's alibi defence was not corroborated by any witness. The Respondent relied on the holding in *R v Sukha Singh S/o Wazir Singh & others* [1939] 6 EACA 145 that "if a person is accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval".

19. The Respondent urges this Court to make a finding that all the essential elements of the offence of defilement were proved and dismiss the appeal.

20. Upon perusal of the amended grounds of appeal and the submissions by the parties, it emerges that this appeal revolves around the questions as to whether the charge was proved and whether the trial court considered the defence case.

21. This being a first appeal, the duty of this Court is to analyse the evidence afresh in order to reach its own conclusion. In doing so, this Court should bear in mind that that unlike the trial court, it did not

see or hear the witnesses testify. This statement of law finds support in several decisions among them *Mark Oiruri Mose v Republic* [2013] eKLR where the Court of Appeal stated that:

> " It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well known case of *Okeno v Republic* (1977) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court."

22. I have already outlined why the Appellant believes that the charge against him was not proved. It is therefore important to appreciate at the outset, that as submitted by the Appellant, a conviction for the charge of defilement will only arise where the prosecution proves penetration of the sexual organ of the victim by the accused, the age of the child and the identity of the assailant. Again the Appellant is correct that the age should be proved because it will determine the sentence to be imposed. It goes without saying that it is only a human being under the age of eighteen years who can be defiled. The need for establishing the age of the victim not only serves to guide the court on the appropriate sentence to impose, but also serve in determining whether the offence was committed at all. The Appellant has in his submissions cited sufficient authorities on this issue and I need not cite other authorities.

23. In this appeal, the Appellant argues that the age of the complainant was not proved to the required standard and that there was a lot of contradictions by the prosecution witnesses on her age. As already stated, it is a matter of utmost importance that the age of the victim be proved beyond reasonable doubt. In *Hadson Ali Mwachongo v Republic* [2016] eKLR, the Court of Appeal held thus:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

24. In the case at hand, the evidence on the age of the complainant was adduced by the complainant, PW2 and PW4. In her evidence, the complainant told the court that she was ten years old having been born on 8th March, 2008. She identified her birth certificate in court and the same was marked as an exhibit. PW2 confirmed that the complainant was indeed ten years old. PW4 produced the birth certificate of the complainant which confirmed that she was ten years old. There was therefore consistent oral and documentary evidence showing that the complainant was ten years old at the time of the commission of the offence.

25. In claiming that the evidence on the age of the complainant was contradictory, the Appellant relies on the statement of the complainant on 30th October, 2019 that she was eleven years old. On that date, the complainant was being cross-examined by the Appellant's counsel who had successfully applied for the recall of the complainant. Nothing of use to the Appellant can be gleaned from the statement of the complainant that she was eleven years old for indeed she was eleven years old in October, 2019. She was not asked to state her age at the time of the commission of the offence. The evidence of the complainant was therefore not contradictory as to her age. The age of the complainant was therefore established beyond reasonable doubt.

26. I now turn to the issue as to whether penetration occured. 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 person". On this aspect of the case, the complainant stated that on the material day the Appellant who was well known to her went and found her alone at home. Her mother had gone to the church and her two brothers had gone to look after the cattle with the Appellant's brother. On arrival, the Appellant asked her for tea and as she serving him, he grabbed her from behind and carried her to the bed where he lifted her dress, removed her panties, unzipped his trouser and inserted his penis in her vagina. The complainant testified that she felt a lot pain but she did not bleed. Thereafter the Appellant left her and went away. She washed herself but the pain remained.

27. The complainant's evidence of penetration was supported by that of her mother who testified that when the complainant reported the incident to her she checked her private parts and found it bruised. Her testimony was that the complainant was in pain whenever she urinated.

28. Further corroboration of the complainant's evidence is found in the testimony of PW5 Edwin Kamurwa, a clinical officer. His evidence was that the hymen of the complainant was freshly broken and there were bruises outside the vulva. He also stated that there was a lot of inflammation and tenderness although there was no discharge or bleeding. Lab tests revealed blood in the urine but there were no spermatozoa.

29. In urging this Court to find that there was no penetration, the Appellant submitted that because the Appellant had indicated that she did not have a boyfriend and she was having sex for the first time, there should have been some bleeding. The Appellant contends that as was held in the case of *P.K.W. v Republic* [2012] eKLR, a broken hymen cannot be equated to penetration.

30. Considering the circumstances of this case, the decision of the Court of Appeal in *P.K.W. v Republic* [2012] eKLR cannot come to the aid of the Appellant. In the case at hand, the evidence of PW2 and PW4 was that the bruising of the complainant's vagina was fresh. Indeed, PW5 was clear that the hymen was freshly broken. In the circumstances of this case, penetration was therefore proved beyond reasonable doubt.

31. Although the question of the identification of the complainant was not raised, it is necessary to state for the record that the complainant clearly stated that she had known the Appellant who was their neighbor for over three years. The fact that the Appellant could comfortably ask for tea from the complainant and the fact that the complainant could, without any hesitation, give him tea confirm the level of comfort they had with each other. The Appellant was therefore not a stranger to the complainant. The Appellant was therefore clearly identified.

32. The remaining ground of appeal is whether the trial magistrate considered the Appellant's defence. The Appellant's complaint is that the trial court misdirected itself by stating that his alibi was an afterthought and that nothing turned on his evidence that he had an affair with the mother of the complainant. According to the Appellant, the trial court failed to apply the law applicable to an alibi defence.

33. In simple terms, an accused who raises an alibi defence is telling the court that he had no opportunity to commit the offence because he was not at the scene of crime at the time of the commission of the offence. The alibi defence is weighed against the prosecution case and where doubt is created in the mind of the court by the defence, the benefit of doubt goes to the accused person.

34. In the case at hand the Appellant sprang his alibi defence when giving his evidence. Nevertheless, the trial magistrate correctly appreciated the law when he stated at page 9 of the typed judgement that:

> " An alibi put up late in trial though disadvantages the Prosecution is an alibi nonetheless and must be considered as stated in *Morris Mutie Thomas v Republic* Criminal Appeal 114/2014."

35. The magistrate then went ahead to analyse the evidence and stated that:

> " The accused defence of alibi that he was in Sirwa with PW2 MM (identity concealed by this Court) must be weighed against the Prosecution evidence. The minor clearly told the court that the accused went to their house at 11.00am asked for tea and before being served forcefully carried her to the bed and defiled her. The accused said in his defence that he was at Saru Trading Centre playing pool leaving MM in Sirwa. I do not believe the accused. His alibi is clearly an afterthought."

36. I have reviewed the testimony of the Appellant at the trial and I find myself in agreement with the trial court that the alibi defence was an afterthought. After telling the trial court that he had gone to attend prayers at Sirwa Secondary School where his brother was sitting for KCSE, the Appellant stated that he "was with the complainant's mother on 29th July, 2018 during prayers day." If the Appellant is to be believed, why didn't he cross-examine PW2 on this crucial information? It is noted that in the course of the trial the Appellant instructed counsel who asked for the recall of the complainant. If indeed the Appellant had informed his counsel about the alibi, counsel would have asked for the recall of PW2. He did not do so and this supports the trial court's finding that the Appellant's defence was an afterthought.

37. The trial magistrate was also correct in holding that nothing turned on the issue of an alleged affair between PW2 and the Appellant. Even if there was indeed an affair between the Appellant and PW2 some years prior to the incident, and I am not convinced that there was such an affair, the Appellant did not establish a nexus between the alleged affair and his being reported for defiling the complainant. He has not shown the benefit that PW2 would get by lying that he had defiled the complainant. No reason was advanced as to why the police and the medical officer would joyfully play along with PW2's "evil" scheme. Like the trial magistrate, I find the Appellant's defence unbelievable. I reject it.

38. At the end of it all, I come to the inevitable conclusion that the case against the Appellant was proved beyond reasonable doubt and the lawful sentence passed against him. His appeal is therefore found to be without merit and is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 28TH DAY OF JULY, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT