Maitano v Republic (Criminal Appeal 43 of 2019) [2022] KEHC 15152 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 15152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL 43 OF 2019

SN MUTUKU, J

JULY 26, 2022

BETWEEN

VINCENT MAITANO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against both the conviction and the sentence arising from criminal case No. 24 of 2017 in the senior Resident Magistrate's Court at Ngong, Hon. L.D. Ogombe, SRM and judgement delivered on 5/10/2018)

JUDGMENT

Background

1. The appellant, Vincent Maitano, was charged with the main count of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. (the Act). The particulars thereunder are that on May 23, 2017 at Birika township within Kajiado county intentionally caused his male genital organ (penis) to penetrate the female genital organ(vagina) of AS a child of 9 years.

2. The appellant faced an alternative charge of Indecent Act with a child contrary to section 11(1) as read with section 11(4) of the *Sexual Offences Act*. That on 23rd day of May at Birika township within Kajiado County intentionally caused his male genital organ (penis) to touch the female genital organ (vagina) of AS a child of 9 years.

3. He was tried and found guilty and convicted for the main charge and sentenced to life imprisonment. He is aggrieved by the conviction and the sentence and has filed the instant appeal challenging that decision.

Memorandum of Appeal

4. In his amended memorandum of appeal which forms part of his submissions, the appellant has raised the following grounds of appeal:

    i. That the Learned trial magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by the law.

    ii. That the learned trial magistrate erred in law and fact by relying on incredible prosecution's evidence of PW1 that was contradictory and inconsistent.

    iii. That the learned trial magistrate erred in law and fact by failing to find that the evidence of PW1 was obtained through coercion and intimidation.

    iv. The trial magistrate erred in law by finding that the whole evidence was based on suspicion which cannot form the basis for a conviction.

    v. That the trial magistrate erred in law by failing to note that the burden and standard of proof by the prosecution was not discharged.

Submissions

5. The appeal was canvassed by way of written submission. The appellant filed his submissions on April 20, 2021. Because of the fact that the issues in the submissions are jumbled up, I will discuss the grounds of appeal together.

6. The appellant has argued that the prosecution did not prove the elements of defilement and in particular penetration. He argued that while PW1 testified that she was defiled, PW2 testified that PW1 had told her that the appellant only touched her vagina; that the evidence does not clarify whether penetration was in the vagina, anus or oral; that it is not explained why the complainant had not reported the alleged defilements and that the trial court fell into error in not interrogating the circumstances of this case especially the evidence of the complainant and her aunt to find that the prosecution did not prove the case against the appellant.

7. He submitted that the complainant's evidence was obtained through coercion and intimidation that she will be beaten and taken to the police. He submitted that the evidence of the complainant (PW1) and that of her aunt (PW2) does not agree and therefore PW1 was not a credible witness

8. On credibility of the prosecution witnesses he relied on *Mohamed Swale Kaeze* Criminal Appeal No. 445 of 2003. It was his argument that the evidence adduced fell short of the standard required and incapable of sustaining a conviction.

9. The respondent did not file submissions and if this was done, those submissions are not in the court's record.

Determination

10. The first appellate court must relook at the evidence adduced as though it was the trial court. The first appellate court must reconsider and re-evaluate the evidence afresh in order to come up with its own independent finding. While I do this, I remind myself that I did not observe the witnesses testify to note their demeanour. I will give allowance for that.

11. The offence of defilement has 3 key elements that require proof: penetration, age of the victim and identity of the accused. To my mind, the appellant's grounds can be summarized into one main one,

that the evidence does not prove the case of defilement against him. It is this court, therefore, to make a determination whether the evidence adduced in this court proves this case against the appellant beyond reasonable doubt.

12. The complainant, was aged 9 years at the time of her testimony. A voire dire examination was conducted and the trial magistrate found her intelligent and knew the importance of telling the truth. He made a decision that she testify under oath. Her testimony is clear. The appellant was their domestic worker. He found her washing utensils and told her to make tea. She went to the room where they make tea and the appellant followed her and defiled her. She described in detail what the appellant did and that he covered her mouth to stop her from calling for help. It was her evidence that this was not the first time the appellant had defiled her. She testified that the appellant always threated to kill her if she dared tell anyone.

13. PW2 told the court that she heard the appellant telling the complainant to make tea but sleep overcame her on the seat where she was resting. She testified that she noticed that PW1 did not have her biker and on asking her she was reluctant to say anything until she threatened her. She stated that the PW1 told her that the appellant touched her vagina and did not defile her. That the appellant had defiled her prior to 23/5/2017.

14. The evidence of Dr. Caroline Muindi (PW3) testified that she examined PW1 on May 31, 2017 (this is 8 days after); that PW1 had a history of having been forcefully penetrated into her vagina and anus at their home and that she had a history of oral sexual encounters. According to PW3, the complainant did not have hymen, meaning that the hymen had been broken. Her conclusion is that there had been vaginal penetration.

15. PW4, Dr. Peter Wanyama, examined the complainant on May 25, 2017 who was taken to Nairobi Women Hospital with a history of defilement by their houseboy on diverse days. Dr. Wanyama, too, confirmed that the complainant's hymen was absent. He too found that penetration had taken place.

16. I have considered the evidence adduced in this case. There are three elements of the offence of defilement that this court must resolve. On the element of penetration I have considered the evidence of the complainant, her aunt and that of the two doctors that examined her. It is true that PW2 told the court that the complainant told her that the appellant touched her vagina. She did not disclosed to PW2 that she had been defiled. It is not lost to this court that the complainant is a child aged 9 years at the time. She had been threatened by the appellant that he would kill her if she tells anyone about the defilement. Besides, defilement had been going on for several times without her telling anyone.

17. This child lacked protection from her minders. To me she seemed not aware that it was wrong for the appellant or anyone else to touch her inappropriately, let alone defile her. She lived with this sexual torture as though it was normal and did not report it to anyone.

18. Dr. Muindi did not tell the court where she got information that the complainant had been penetrated on the vagina and anus as well as oral sex. Be that as it may, what is crucial to this court is the evidence in support of penetration. This was a child of 9 years with an absent hymen. There are no reported genital abrasions or lacerations. To my mind the absence of fresh injuries shows that the complainant had experienced sexual activity for some time to an extent that she would engage in sex without getting injured. This is consistent with evidence that she had been defiled on several occasions.

19. I have no doubt in my mind that the complainant had been defiled and therefore penetration was proved beyond reasonable doubt.

20. The appellant was someone known to the complainant. He was their houseboy. He lived with the family as one of the members of that household. There is no mistake in his identity. I find this element

proved beyond reasonable doubt. Further, from the evidence of PW2, there is no doubt that the appellant was the one who told the complainant to make tea. There is no doubt of mistaken identity given the circumstances of this case.

21. On the element of PW1's age, PW2 told the court that PW1 was 9 years and that she had an immunization card to prove the same. PW6 also testified that PW1 was 9 years old and produced a clinical card to show that she was born on 9/8/2007. I have no reason to doubt the evidence that the complainant was 9 years old which is backed by immunization and clinic cards.

22. When put on his defence the appellant denied defiling the minor and stated that he had been framed which the court dismissed and found him guilty.

23. The appellant has cited a list of 16 authorities as shown on the face of his submissions. I have considered his submissions and the cited authorities including *Charles Wamukoya Karani v Republic*, Cr. Appeal No. 72 of 2013 on the ingredients of defilement; *Sims (1946) KB 531*, Per Lord Goddard, C.J at Page 539 on the onus placed on the prosecution to prove all the issues in a case and *Sekitoliko v Uganda* (1967) EA 53. I am afraid these authorities do not come to the appellant's aid.

24. I have no reason to disturb the findings of the trial court. On my own accord, I find all the elements of the offence of defilement proved beyond reasonable doubt. The finding of guilty by the trial court and the consequent conviction are sound.

25. On the sentence, section 8 (2) of the Act is clear. It provides that:

> " 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."

26. The provision does not give the court any wriggle room. Until this provision is changed, this is the penalty provided for defilement of children aged 11 years and less.

27. Consequently, I do not fault the trial court in any manner. After my own re-evaluation of all the evidence and analysis of the same, I arrive at a similar conclusion that the appellant is guilty of the offence of defilement and that the evidence on record proves this offence against the appellant beyond reasonable doubt. Secondly, there is only one provisions for the penalty of defilement under section 8 (2) of the *Sexual Offences Act*. I therefore uphold the finding of guilt, the conviction and the sentence imposed. This appeal is hereby dismissed for lack of merit.

28. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY 2022.

S. N. MUTUKU

JUDGE