Elvis Barasa Khaoya alias Dennis Ndimu v Republic (Criminal Appeal 27 (E039) of 2021) [2022] KEHC 12478 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 27 (E039) OF 2021

LK KIMARU, J

JULY 25, 2022

BETWEEN

ELVIS BARASA KHAOYA ALIAS DENNIS NDIMU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of conviction and sentence of Hon. M.I.G. Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 242 of 2020 delivered on 23rd April 2021)

JUDGMENT

1. Elvis Barasa Khaoya alias Dennis Ndimu, the appellant herein, was charged with the offence of defilement of a child contrary to section 8 (1) as read together with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on September 19, 2020 at [Particulars Withheld] village, Kapsitwet sub location in Kwanza sub-county within Trans-Nzoia County, the appellant intentionally caused his penis to penetrate into the vagina of BC, a child aged three and a half (3 ½) years old. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. . The particulars of the offence were that on September 19, 2020 at [Particulars Withheld] village, Kapsitwet sub location in Kwanza sub-county within Trans-Nzoia County, the appellant intentionally caused the contact between his penis and the vagina of BC, a child aged three and a half (3 ½) years. When the appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.

2. The appellant was aggrieved by his conviction and sentence. In his appeal, the appellant faulted the decision of the trial court in that he stated that it was based on contradictory and inconsistent evidence. He was of the view that the prosecution had failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. He faulted the trial court for failing to consider that

the complaint was not reported in time hence cast doubt on whether the appellant committed the offence. Finally, he maintained that his defence was unfairly rejected. He therefore urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. The appeal was heard on the basis of parties' rival written submissions. The appellant submitted that the element of penetration was not proved to the required standard of proof. He pointed out that it was critical for the complainant to report the offence as soon as it occurred. The delay in reporting the offence, he submitted, cast doubt on whether the offence did indeed occur. He took issue with the fact that from his understanding of the evidence on record, PW4 and PW5 gave contradictory testimonies. The appellant's further submissions were that the investigating officer conducted shoddy investigations. He suggested that the medical evidence adduced was insufficient as his biological samples were not taken for DNA analysis. This would have conclusively tied him to the offence. He was thus of the view that based on that analysis, he ought to have been acquitted. Finally, he submitted that his defence was cogent and ought to have been taken into account.

4. Miss Mumu, Learned Prosecutor, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She stated that since the appellant inserted a pencil shaft in the complainant's private parts, the appellant was guilty of sexual assault contrary to section 5 (1) (a) (1) as read with section 5 (2) of the *Sexual Offences Act* and not defilement. She rebutted the allegations raised by the appellant who stated that there were contradictions and inconsistencies in the evidence of the prosecution stating that if there were any contradictions, they were immaterial. She further submitted that the judgment was based on the evidence on record hence cannot be faulted. Finally, she submitted the sentence meted was merited due to the rampant and prevalence of the cases in the area. She urged the court to uphold the conviction and affirm the sentence that was imposed on the appellant as it was lawful. She supported the court's rejection of the appellant's defence which she also submitted had no probative value. She urged this court to substitute the conviction for defilement with one for sexual assault.

5. The prosecution called a total of ten (10) witnesses in a bid to establish the charges preferred against the appellant. The complainant, BC PW2 was left at home by PW1, CK, the complainant's grandmother and PW3, SCC, the complainant's grandfather on September 19, 2020. PW1 had gone to fetch for milk while PW3 had gone to the dip. The appellant had been employed by PW1's husband as a herd's boy. His house, also referred to as 'thingira' was located ten (10) metres away from PW1's homestead. At the material time, the appellant took the complainant from the house. He escorted her to his house. He then put her on the bed and lay on her. Thereafter he inserted something into her private part. The complainant testified that he had slept on her three (3) times before.

6. When PW1, came back home, she found the complainant crying while leaving the appellant's house. The complainant informed her that the appellant had slept on her. PW1 then informed PW3 and PW7, EK, their neighbour about what had transpired. PW1 and PW7 physically examined the complainant and noticed the presence of discharge on her thighs. PW3 and PW7 further testified that when the appellant was asked why he committed the offence, he informed them that the complainant was not a child but an angel given to him by God.

7. On the evening of that fateful day, PW8, IK bathed the complainant. The complainant also confided her about what had transpired. When she removed her innerwear, the complainant cried. She further testified that the complainant's innerwear was soiled.

8. The complainant was seen by PW5 Flora Osinde Nyarangi, a nurse stationed at Kapsitwet Health Centre on September 24, 2020. She filled the treatment notes. On examination, her vulva suffered no bruises. However, she had some discharge. While her hymen was not torn, her vulva was hyperemic.

There were pus cells and leucocytes on the region. The complainant contracted a urinary tract infection.

9. The complainant was also seen by PW4 dr Mbelezia Linet Akinyi Lukaleat Kwanza Sub-County Hospital on September 25, 2020. She filled the P3 form. She testified that the appellant had used a pencil shaft to penetrate into the complainant's private parts. She observed that the complainant's private part was tender and hyperemic. There were no lacerations. Her hymen was intact. She confirmed that the complainant had sustained a bacterial infection.

10. The complainant's age assessment examination took place on September 29, 2020. It was conducted by PW6, Pharis Sitati, a community oral health officer based at Kitale County Hospital. She estimated the complainant's age to be three (3) years. She then filled the age assessment form which was produced into evidence.

11. The appellant was arrested by Sgt Sylvester Wanga, PW9. He received the report of the sexual assault on September 24, 2020 from PW1 and PW3. The appellant was received at the police station by PW10, PC Woman Delphine Diema, the investigating officer at Kwanza Police Station. The appellant informed PW9 and PW10 that God had blessed him with a wife who was the complainant. PW10 then collected the evidence and charged the appellant with the present offence.

12. After close of the prosecution's case, the trial court found that the appellant had a case to answer. He was placed on his defence. His unsworn testimony was that he had worked for PW3 for one (1) year three (3) months as at September 2020. When he went to collect his dues on September 19, 2020, PW3 ordered him to leave. PW3 then called someone on phone who would later arrest him. He was taken to Kapsitwet and subsequently to Kwanza Police Station. He was then charged with the present offence. He denied committing the offence.

13. This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge vs Republic* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the prosecution established to the required standards of proof beyond any reasonable doubt that the appellant committed the offence that he was charged with.

14. In order to sustain a conviction on a charge of defilement, the prosecution must establish the following three ingredients:

    1. Age of the complainant
    2. Penetration
    3. Identification of the perpetrator

15. The first ingredient is that of the complainant's age. The complainant's age assessment form, produced in evidence, disclosed that the complainant was three (3) years old at the time of the offence. This court finds that the age of the complainant was proved to the required standard of proof. The complainant was a child within the meaning ascribed to the term under section 2 of the *Children Act*.

16. The second ingredient that the prosecution had to establish was the identity of the perpetrator. The complainant testified that she had known the appellant as her grandfather's herd's boy. PW1 and PW3 confirmed this. The incident took place during the day. The complainant was able to identify and recognize the appellant. The learned magistrate, in her analysis, found that the complainant's evidence was truthful. She had no reason to lie against the appellant. This courts arrives at the same findings

and concludes that the appellant was positively identified as the perpetrator of the sexual assault and shall not disturb that finding.

17. The last ingredient is that of penetration. Section 2 (1) 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.”

18. The complainant testified that on September 19, 2020, the appellant inserted something in her private parts. On examination by PW4 and PW5, the general consensus was that the complainant’s hymen was not torn. Her vulva suffered no bruises but was hyperemic. Further observations revealed that the complainant had contracted an infection. According to PW4, the appellant had used a pencil shaft, and not his penis, to penetrate into the complainant’s private parts. Based on the foregoing, was it safe to conclude that the prosecution had discharged their burden of prove to establish penetration to the required standard of proof?

19. From the evidence adduced, it is clear that as per the definition of penetration, the appellant did not insert his genital organs into the appellant. He used a pencil shaft while lying on top of the complainant. It was thus unsafe for the trial court to conclude that the element of penetration was proved beyond any reasonable doubt. Both medical practitioners at trial gave no such testimony as to enable the trial court to conclude that the complainant was sexually defiled by way of penetration.

20. Consequently, this court comes to the conclusion that defilement was not proved to the required standard of proof beyond any reasonable doubt. However, this court takes note of the complainant’s testimony corroborated with that of PW4 in that the appellant lay on the complainant when he inserted a pencil shaft into the complainant’s vagina. He was in contact with the complainant’s private parts. As a consequence, the complainant’s vulva was made hyperemic. She had also contracted a urinary tract infection. The doubts raised on whether penetration was proved to the required standard of proof leads this court to the conclusion that the conviction against the appellant on defilement was unsafe. However, there is sufficient evidence to convict the appellant on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* herein.

21. The upshot of the above reasons is that the appeal on conviction on the charge of defilement succeeds. The trial court’s conviction on the main charge is set aside and substituted with a finding of guilt on the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. On sentence, the same is as a consequence also set aside. The sentence is reduced to ten (10) years imprisonment. The sentence meted out shall run from the date the appellant was arraigned before the trial court on September 29, 2020.

    It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE