BK v Republic (Criminal Appeal E036 of 2021)
[2022] KEHC 12745 (KLR) (26 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E036 OF 2021

FA OCHIENG, J

AUGUST 26, 2022

BETWEEN

BK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the PM's Court at Tamu by Hon. Ondieki E. M. (PM) dated the 28 th July 2021 in Criminal Case (S.O) No. E008 of 2021)

JUDGMENT

The Appellant, BK was convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*.

1. He was sentenced to Life Imprisonment.

2. In his appeal, the Appellant has raised 6 issues, which can be summarized as follows;

   (1) The sentence was manifestly harsh, due to its mandatory nature.

   (2) The appellant was not accorded ample time to defend himself.

   (3) The investigation was shoddy.

   (4) The case was based on fabrication and afterthought.

   (5) The trial court failed to take into account the appellant's mitigating factors.

   (6) The evidence tendered was inconsistent and insufficient to sustain a conviction.

3. When canvassing the appeal, the Appellant pointed out that the victim was his daughter. He attributed the case to the fact that he had disagreed with the victim's mother, hence the determination by the victim's grandmother to punish him by bringing a fabricated case against him.

4. As regards the sufficiency of the evidence, the Appellant pointed out that no scientific tests had been conducted.

5. In his view, the clothes should have been analyzed at the Government Chemist.

6. He also said that there ought to have been a testing of sperms, with a view to ascertaining whether or not there was a nexus between the victim and the Appellant.

7. As far as the Appellant was concerned, he had not been with the victim on the material day.

8. Indeed, the Appellant submitted that the witness named R, who had been summoned by the trial court, testified that the victim had not been left at his house. Therefore, as the victim's mother had alleged that she had left the victim in R kitchen, the Appellant submitted that the testimony of the victim's mother could not be relied upon.

9. Furthermore, when it was considered that the victim was only 9 months old, the Appellant expressed disbelief that the victim could have survived the defilement which allegedly lasted the whole night.

10. On the issue of the sentence, the Appellant submitted that mandatory minimum sentences were unconstitutional as they disregarded all the individual characteristics of each case. He therefore urged this Court to find that every trial court is enjoined to give consideration to the specific circumstances of the particular case before it could determine the most appropriate sentence.

11. The Appellant faulted the trial court for being influenced by the sentiments of the community and of the Complainant's family.

12. Being the first appellate court, I am obliged to re-evaluate all the evidence on record. I will proceed to do so, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses when they were testifying. Therefore, if the trial court arrived at a particular conclusion or finding, based upon the demeanor of a witness, this Court would be very slow to disagree with such a finding.

13. When the decision of the trial court was pegged on the demeanor of a witness, the appellate court should not deviate from such a finding unless it was found to be inconsistent with the totality of the evidence on record.

14. The trial commenced on April 1, 2021. Before the prosecution produced the first witness, the Appellant informed the Court that he was ready to proceed.

15. PW1 is the mother of the victim. She testified that on the material date, she left the victim in the kitchen, when she (PW1) went to the farm.

16. PW1 testified that the Appellant greeted her, and he then went to the kitchen where PW1 had left the victim.

17. According to PW1, the Appellant took the child and went with her to his house, where the victim remained until the next day.

18. PW1 went to get the victim from the Appellant's house, on the following morning. She noted that the victim did not have a panty, and she was crying.

19. As the victim could not sit properly, PW1 removed her clothes and she checked her private parts. PW1 noted that;

> " The vagina was reddish and had cuts and bruises. The vagina was inside out and something was protruding from the vagina."

20. PW1 rushed the victim to Fort Ternan Hospital. At the hospital, PW1 was advised to report the matter at the police station.

21. When PW1 made the report at the Fort Ternan Police Station, a police officer PC Rose Loye (PW3) accompanied her to the hospital.

22. Back at the hospital, the Clinical Officer, Alex Ngetich Kipyegon, examined the victim. Alex testified as PW2.

23. He told the trial court that there were lacerations at the vulva of the victim; and that her hymen was broken.

24. PW2 said that the lacerations were fresh, and;

> " The hymen was torn and the vulva was inflamed and was reddish. There was a conclusive report of penetration."

25. Although PW2 did not know who had defiled the victim, he was categorical that the victim had been defiled.

26. During cross-examination, the victim's mother denied the assertion that the case was a frame-up. The Appellant had suggested to PW1 that she had framed him so that the 2 of them could separate.

27. When the Appellant was put to his defence, he denied having defiled the victim.

28. He said that the victim's mother had gone to her parents' home after he had differed with her.

29. The Appellant told the Court that the victim's mother had been coached on how she was to frame him. However, he did not elaborate on the alleged coaching.

30. Although the Appellant admitted having met the victim's mother on the material day, he testified that the victim was not with her mother at the time.

31. When the Court summoned Ronald as a witness, he told the Court that on the material day, he saw the Appellant and the victim's mother. Ronald said;

> " When I went back home, I found the accused and his wife standing near my home. The accused was carrying a child."

32. Ronald also said that the victim was not sleeping in his house when the accused took the child.

33. However, Ronald admitted that because he had been working on his farm, he would not have been able to know if someone had put a child in the kitchen.

34. But because Ronald has a fierce dog, he did not think that the baby was in the kitchen, as no one could enter his house when he was not there.

35. I have given due consideration to all the evidence on record.

36. I find that the medical evidence proved that the victim had been defiled. The lacerations at the vulva; the reddish and inflamed vulva; the absence of the freshly torn hymen; the fresh whitish discharge from the vulva; Epithelial cells; and the pus cells in the vagina constitute the totality of the evidence which conclusively proved that there had been penetration.

37. When the Appellant was cross-examining the victim's mother, he never raised any questions to challenge her evidence concerning how she found him "still asleep with Chebet." In effect the said evidence was uncontroverted.

38. I therefore find that the victim spent the night at the Appellant's house, where her mother found her, on the following morning. And when the victim's mother found the victim, she (the victim) did not have a pant and she was crying.

39. The inescapable conclusion to be derived from the available evidence is that it is the Appellant who defiled the victim.

40. The evidence was neither fabricated nor an afterthought. It was tangible and conclusive.

41. I also find that when the Appellant was put to his defence, he expressly told the trial court that he was ready to proceed with his defence.

42. In the circumstances, and also considering that from the start, the Appellant was ready to go on with the trial, I find absolutely no merit in his contention that he was not accorded time to defend himself.

43. The manner in which the Appellant cross-examined the prosecution witnesses is further testament to his readiness to proceed with the trial.

44. As regards the sentence, I note that the learned trial magistrate gave an opportunity to the Appellant, for mitigation. The Appellant used the said opportunity to say that he did not agree with the Judgment. He reiterated that he never defiled his child.

45. Apart from repeating the contention that he was innocent, the Appellant told the trial court that he had nothing else to say.

46. Given those facts, I find no merit in the Appellant's assertion, that the trial court failed to take into account his mitigation.

47. Thereafter, when handing down the sentence, the learned trial magistrate took into account the fact that the Appellant was a first offender.

48. In the absence of any other mitigation, that was the sole mitigating factor.

49. The trial court weighed that factor against the aggravating factors. The Court noted that the victim's innocence was taken away by the very person who was supposed to have provided her with protection.

50. The Court also took into account the physical injuries sustained by the victim, when she was being defiled.

51. I find that the trial court did not simply impose the sentence of life imprisonment because it was mandatory. The trial court derived guidance from the Sentencing Policy, and it took into account the specific circumstances prevailing in this particular case.

52. Accordingly, I find no merit in the appeal against the sentence.

53. The appeal is therefore dismissed in the entirety. I uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE