Jimmy v Republic (Criminal Appeal E016 of 2021)
[2022] KEHC 11354 (KLR) (11 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11354 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E016 OF 2021

GMA DULU, J

AUGUST 11, 2022

BETWEEN

ROBERT MUNYWOKI JIMMY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.N Mwaniki in Makueni Senior Principal Magistrate's Court (S.O) Case No.12 of 2020 pronounced on 29th October, 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement Contrary tosection 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on diverse dates between August, 2019 to December 2019 in [Particulars Withheld] Location, Mumbuni Subcounty in Makunei County intentionally and unlawfully caused his penis to penetrate the vagina of FMM (name withheld) a Juvenile aged 15 years.

2. In the alternative he was charged with committing an indecent act with female contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that between the same dates and at the same place intentionally touched the vagina of FMM a child aged 15 years with his penis.

3. He denied both charges. After full trial, he was convicted on the main count of defilement and sentenced to 12 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds;

    i. That the trial court failed to consider that the mother of the child relied on only hearsay and rumors in that from her testimony she doubted the statement of her daughter.

ii. The trial court rushed to convict him of the alleged offence without any investigation in which PW3 did not show up to testify on her findings as required by the law.

iii. The trial court failed to consider that there was no DNA report adduced before court even after orders were made by the trial court as required under section 36(1) of the *Sexual Offences Act* to ascertain whether or not it was the appellant who committed the alleged offence of defiling the complainant and therefore whether there was sufficient evidence to sustain a conviction against him.

iv. The trial court erred in law and fact by ignoring the fact that PW1 could not identify the accused in that from her testimony, she said that she only heard a sound from a far distance which is a fundamental element to establish a *prime faci*e case.

v. The prosecution case was insufficient, unconstitutional, unreliable, speculative, conjunctive and lacked probative value to justify a conviction.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant, and those filed by the Director of Public Prosecutions.

6. This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences see *Okero v Republic* (1972) EA 32.

7. In proving their case, the prosecution called three (3) witnesses. The appellant on his part, tendered unsworn defence testimony, and did not call any other witness.

8. In all criminal cases, the burden is always on the prosecution to prove all the elements of an offence beyond any reasonable doubt. An accused person does not have a burden to prove his innocence.

9. The elements of the offence of defilement, for which the appellant was convicted are first, the age of the victim which should be below 18. Secondly, sexual penetration, even if of a partial nature. Thirdly, the identity of the culprit.

10. Did the prosecution prove the age of the victim herein beyond any reasonable doubt?

11. In my view, the prosecution did not prove the age of the victim beyond any reasonable doubt. From the evidence on record, both the complainant PW1, and her mother PW3 NW, did not touch on age of the victim. None of the two relied on any document to determine the age of the victim. PW1 merely said that she was a standard 7 pupil at [Particulars Withheld] Primary School, while PW3 just said that the victim was her daughter.

12. Though a birth certificate was produced by PW2 Dr. Athman Lugogo, the said birth certificate in the name of FM was neither identified by PW1 and PW3, nor did Dr. Lugongo indicate in evidence how he came to be in possession of that birth certificate. Thus, it cannot be said with certainty that the document produced in court, was a genuine birth certificate, or that it belonged to the victim herein.

13. Thus in my view, the age of the victim herein PW1 was not proved by the prosecution beyond any reasonable doubt.

14. With regard to penetration of a sexual nature, the evidence on record from PW1 the victim and PW2 Dr. Athma Lugogo, was to the effect that the victim was pregnant at the time she went to hospital. She had taken pills and the pregnancy had aborted. In my view, the prosecution proved beyond any reasonable doubt that sexual penetration did occur on the victim.

15. With regard to the culprit, in my view, the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. This is because first, crucial witnesses such as N who was the first person informed by PW1 about her abdominal pains, and who gave PW1 pills allegedly at the house of the appellant, was not called to testify in court. More importantly, the investigating officer of the case was not called to testify. In my view, both were crucial witnesses who could have shown the connection between the alleged incidents and the appellant. The failure to call them as witness created a big gap in the prosecution case.

16. Secondly, the alleged sexual incident as described by the victim PW1, occurred at night. It is not clear from the evidence whether the circumstances were favourable for positive identification. It would thus be difficult to connect the appellant with the incident.

17. Thirdly, though the court ordered that DNA test be conducted on the appellant and the aborted foetus, the results of the DNA tests, were not availed in court. No reason was given for the failure of the prosecution to avail in court the results of the DNA test.

18. In my view, therefore the above prosecution evidence on record, creates sufficient doubt, which in my view should have been determined by the trial court in favour of appellant. The trial court appears to have expected the appellant to exonerate himself, which amounted to shifting the burden of proof on him, and which was wrong, as the appellant did not have a burden to prove this innocence.

19. I thus find that the prosecution did not prove that the appellant was the culprit. The conviction will thus be quashed and the sentence set aside.

20. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 11TH AUGUST, 2022 IN OPEN COURT AT MAKINDU.

GEORGE DULU

JUDGE