Sifuna v Republic (Criminal Appeal 33 of 2018)
[2022] KEHC 11871 (KLR) (5 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11871 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 33 OF 2018

HI ONG'UDI, J

AUGUST 5, 2022

BETWEEN

JOEL WEKESA SIFUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment by Mr. J. K. King'ori – Chief Magistrate in Bungoma Criminal (S.O) Case No. 3 of 2016 delivered on 14th June 2017)

JUDGMENT

1. Joel Wekesa Sifuna hereinafter referred to as the appellant was charged and convicted of the offence of defilement contrary to section 8(1)(4) of the *Sexual Offences Act* No 3 of 2008. The particulars being that the appellant on the 9th of August 2016 at [particulars withheld] village, within Bungoma county, intentionally and unlawfully caused his penis to penetrate the vagina of CNS a child aged 16 years.
2. The appellant pleaded not guilty to the charge and the case proceeded to full hearing after which he was convicted and sentenced to fifteen (15) years imprisonment.
3. He filed this appeal raising the following grounds: -
    i. That appellant pleaded not guilty for the said charges.
    ii. That the appellant was a minor during the alleged incident but was handed a harsh sentence.
    iii. That the learned Magistrate erred in law and facts in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glaring lack of evidence.
    iv. That the medical report which was adduced did not link the appellant to the alleged offence.
    v. That the evidence from the whole lot of witnesses collaborate.

vi. That the evidence from the entire prosecution side was contradictory.

4. In the lower court case, the prosecution called a total of five (5) witnesses. A summary of their evidence shows that PW 1 (CNS) was born on April 11, 2000. She was invited by the appellant to his house on August 8, 2016, after meeting on the way. On the next day at 8:00 pm she went to his house. He requested her for sex and she agreed. She removed her clothes and he also did the same. The appellant inserted his penis into her vagina and they had sex.

5. There was then a knock on the door but they did not open. The door was kicked and three people i.e. PW 1's mother and two brothers entered. They testified as PW 2, PW 3. They beat up both PW 1 and the appellant who later escaped. She was escorted home. The matter was reported, statements recorded and PW 1 examined at the hospital and was treated. She identified her birth certificate (MFI), P 3 form (EXB 2) and hospital card (EXB 3). The appellant was later arrested and charged. It was PW 1's evidence that they had sex on August 9, 2016.

6. PW 2 Christine Naliaka Sifuna and PW 3 Wilberforce Barasa Sifuna testified on how PW 1 was not at home on August 9, 2016 by 10:00 pm and accompanied by another brother they went looking for her. The rest of the evidence is as narrated by PW 1. They confirmed finding the appellant and PW 1 lying on the floor in the former's house.

7. PW 4 Elias Adoka Omudang a clinician based at Bungoma County Hospital testified on having treated PW 1 on August 12, 2016 and later filled her P 3 form on August 14, 2016. His findings were that she had no hymen and her genitalia did not have fresh tears or bruises. She also had a foul smelling pavaginal discharge. According to her history she was aged 17 years.

8. PW 5 No 33812 PC Alfred Wamalwa testified that on August 11, 2016 at 12:30 pm he was at [particulars withheld] police post base when he received the appellant a suspect of defilement, from the Assistant Chief among others. Investigations were conducted and he was charged with defilement and an alternative count of indecent assault. He said PW 1 had claimed she was 16 years old.

9. When placed on his defence the appellant elected to give an unsworn statement and denied committing the offence. He stated that on August 18, 2016 at 9:00 pm he was in his mother's house, and proceeded to his house after supper. He had his torch on and as he approached his house he noticed that his door was open. He then saw two men come out with items. They dropped the items and took off. The next morning at 6:00 am he called the village elder who noted the stolen and broken items. A report was made to the Assistant Chief. On August 11, 2016 PW 1 made allegations against him.

10. The appeal was disposed of by written submissions. In his undated submissions, the appellant contends that the element of the age of the complainant (PW 1) was not proved to the required standard. He referred to the following cases: -

    i. *Phillip Muiruri Ndaruga v Republic* [2016] eKLR

    ii. *Hilary Nyongesa v Republic* Criminal Appeal No 123 of 2009 (Eldoret)

11. He submits that the birth certificate (MFI) was never produced as an exhibit, and as a result it can't be relied on as evidence. On this he cited the case of *Justus Musau Wambua & another v Republic* [2020] eKLR, and urged the court to allow the appeal.

12. He submits further that there was no proof of penetration or nexus between him and PW 1 medically. He argues that PW 1 was examined on August 12, 2016 when the offence was said to have occurred

on August 9, 2016. Furthermore, the P 3 showed that the injury was a month old. Reference on this was made to the cases of: -

i. *Arthur Mshila Manga v Republic* 2016 eKLR.

ii. *Dominic Kibet v Republic* [2013] eKLR.

He contends that lack of hymen in a victim's vagina is not only attributed to sexual offences. See *PKM vs Republic* [2012] eKLR.

13. He argues that there was no proof of identification owing to the fact that the offence occurred at night. There was no evidence of there being any light at the scene.

14. The appellant dismissed the prosecution witnesses as being untruthful and inconsistent witnesses. He referred to what each said about where they found PW 1 and him and what they were doing. He further submits that PW 1 did not testify voluntarily as she was beaten by her brothers. He submits that the investigations were shoddy and the investigations officer relied on hearsay evidence.

15. He blames the trial court for not considering his defence against the prosecution evidence. Further that he was not sentenced in line with the sentencing policy.

16. Counsel J Tarus filed submissions on behalf of the Director Public Prosecutions dated May 6, 2022. It is submitted on ground No 2 that the appellant is not a minor as at the time of assessment on August 16, 2016 he was found to be aged 18 – 19 years. Counsel further submits that the evidence on record is corroborative. Further that issues for determination were set out and were well addressed by the trial court.

17. On PW 1's age counsel submitted that the same was proved *vide* the birth certificate produced as PEXB1. That PW 1 was 16 years old at the time of the offence. He contended that the issues of penetration and identifications were also well proved by the evidence on record.

18. Finally, on sentence counsel submitted that the trial court considered the appellant's mitigation and gave him the minimum sentence which was fair and just.

19. This being a first appeal, this court has a duty to re–examine and re–consider the evidence on record and arrive at its own conclusion. the court must also appreciate that it did not see nor hear the witnesses and so give an allowance for it.

20. In *Patrick and another v Republic* [2005] 2 KLR 162 the Court of Appeal held: -

> " 3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of fIrst appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions."

Also see -

i. *Boru & another v Republic* [2005] 1 KLR 649.

ii. *Kiilu & another v Republic* [2005] 1 KLR 174.

21. Having been duly guided and having carefully considered the evidence on record, the grounds of appeal, both parties' submissions, cited authorities and the law I find the issues falling for determination to be:-

    a. Whether PW 1's age was proved.

    b. Whether there was penetration of PW 1's genital organ by a male organ or any other object on the August 9, 2016.

    c. Whether the appellant was identified as the culprit.

Issue No (b) – Whether There Was Penetration Of Pw 1's Sexual Genital By A Male Organ Or Any Other Object On The 9Th August 2016.

22. PW 1 in her evidence testified that indeed there was sexual intercourse between her and the male lover whom she had been dating since July 2016. She confirmed having met with her lover on her way to the shops on August 8, 2016 when he requested her to visit him. She indeed visited him on August 9, 2016 at 8:00 pm. She clearly explained what happened that night before PW 2, PW 3 and her other brother ambushed them. Those who ambushed them did not find them in the act.

23. Coming to the medical evidence, PW 4 testified that he treated PW 1 on August 12, 2016. He confirmed to court that a defilement victim is best examined within 24 hours of the defilement. Her examination on August 12, 2016 was clearly outside the 24 hours' limit. PW 4 found a case of multiple defilements to have been the case. PW 1 had told him the two love birds had made love ten (10) times before being caught. This explains why there is no hymen, no fresh tears or bruises since it was an ongoing thing. The P3 form and treatment card (PEXB 2 and 3) and PW 1's evidence confirm penetration.

Issue No (c) – Whether The Appellant Was Identified As The Culprit.

24. There is no dispute that this is an incident that took place at night and identification is a key element for purposes of proof of the charge. From the evidence of PW 1, she was not ambushed by the person she had sex with. He was her lover and he had invited her to his house. She went there at 8:00 pm and he received her. They knew each other. Secondly PW 3 and his brother knew that their sister (PW 1) and the man were in a love relationship. When they learnt from their mother (PW 2) that the girl (PW 1) was not in their kitchen they went straight to the man's house to look for her.

25. The man to whose house they went and found the girl is the appellant. PW 1, PW 2 and PW 3 all identified the appellant as the person PW 1 was with in his house on August 9, 2016 after 10:00 pm. It is not a case of mistaken identity.

Issue No (a) – Whether PW 1's Age Was Proved.

26. One of the main ingredients in a charge of defilement is proof of age of the victim. The reason is that sentences in Sexual Offences differ based on the age of the victim. In this case the victim was said to be aged 16 years as per the charge sheet. The clinician (PW 4) who examined her said she was 17 years old. PW1 said she was born on April 11, 2000. She referred to a birth certificate which was marked as PMFI – 1. Her mother only said, she is 16 years old but did not give her date of birth. She however identified a document referred to as a birth certificate.

27. First and foremost a document marked for identification does not form part of the evidence on record until it is produced as an exhibit. I have perused the entire record and I have confirmed that PMFI – 1 was at no point produced as an exhibit. The investigating officer (PW 5) never referred to it at all.

28. Even if one were to guess the age of PW 1 would he/she place her in the bracket of a minor? Her conduct betrays her. She explains having gone to the appellant's house at 8:00 pm in the night. When she landed there she did not struggle over anything. She is the one who voluntarily removed her clothes and the mission was accomplished. Without the proof of the age as required coupled with her conduct there would be no reason to blame the appellant who believed he was dealing with a mature girl who was his lover.

29. The learned trial Magistrate erred in relying on non–existent evidence in form of a birth certificate to prove age. Had the age been proved the conviction would have been upheld.

30. In the circumstances the appeal has merit and I allow it. The result is that the conviction is quashed and the sentence set aside.

31. The appellant to be released forthwith unless otherwise held under a separate warrant.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 5TH DAY OF AUGUST 2022 IN OPEN COURT AT BUNGOMA.

H. I. Ong'udi.

JUDGE OF THE HIGH COURT