CLE v Republic (Criminal Appeal 19 of 2018)
[2022] KEHC 14114 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 14114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL 19 OF 2018

JK SERGON, J

SEPTEMBER 29, 2022

BETWEEN

CLE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Lodwar Senior Principal Magistrates Court Criminal Case No. 194 of 2012, Hon. H.O Barasa, Ag PM on 21st March 2013)

JUDGMENT

1. The appellant herein, at the trial court, was charged with defilement contrary to section 8(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the January 17, 2012 at [particulars withheld] village in Turkana Central sub-county in Turkana county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PW1, a child aged 13 years (herein after referred to as the victim).

2. At the end of the trial, the appellant was convicted and sentenced to serve twenty (20) years imprisonment, by the trial magistrate on March 21, 2013. The appellant was dissatisfied with both the conviction and sentence. Subsequently, he filed amended grounds of appeal together with his written submissions.

3. The appellant, in his appeal to this honourable high court, and in praying for his appeal be allowed, conviction quashed, sentence set aside and an acquittal granted; filed grounds of appeal and written submissions, on the following grounds:

    i. That the learned trial magistrate erred in law and facts when convicting the appellant person without observing that the complainant (PW1) was positive while the appellant was negative on HIV status.

ii. That the learned trial magistrate erred in law and facts when convicting the appellant person with single evidence of the complainant (PW1).

iii. That the learned trial magistrate erred in law and facts when convicting the appellant person without observing that in this instant case there were contradictions on testimony evidence of the prosecution witnesses.

iv. That the learned trial magistrate erred in law and facts when convicting the appellant person without observing that no investigations were done by the investigating officer in this instant case.

v. That the learned trial magistrate erred in law and facts when convicting the appellant person without considering the defence.

vi. That the learned trial magistrate erred in law and facts when convicting the appellant person without proper identification by the complainant to the appellant person.

vii. That the learned trial magistrate erred in law and facts when convicting the appellant person without proving the age of the complainant (PW1).

viii. That the learned trial magistrate erred in law and facts when convicting the appellant person without observing that the prosecution side did not prove penetration in this instant case.

4. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the lower court and come to its own conclusions and findings in respect thereof. The Court of Appeal in the case of *David Njuguna Wairimu v Republic* [2010] eKLR, cited with approval the decision in Okeno v R [1972] EA 32 in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

> " The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

5. Accordingly, this court has perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The prosecution called six (6) witnesses. The prosecution's case was as follows; That on January 17, 2012 at about 4.00 pm, that PW1 was at a certain hotel within Lodwar town when the appellant approached her and asked her to accompany him to his home. They then jumped onto a motorcycle and proceeded to a certain house. She said that the appellant then opened the house and on entering the same, he asked her to remove her clothes. She hesitated but the appellant removed the same for her. She said that the appellant also removed his shirt and started touching her breasts after which he defiled her. She said that the room had a mattress and that the appellant made her lie on the said mattress before he defiled her. She explained that the appellant asked her to remain in the said house until morning when he was done and that at 9.00 am, on the following day, he put her on a motor bike and together they proceeded to a place called Napute. She told the court that she later got sick and the appellant took her to hospital at Napetet where she was examined and was later given HIV drugs. She said that she stayed at the appellant persons place for one day and that the appellant did not use a condom during intercourse. She said that she is currently on HIV drugs.

During cross-examination she explained that she and the appellant had agreed to meet in the hotel in question. She also said that the appellant is the one who infected her with HIV.

6. PW2 told the court that she is a standard-five pupil at [Particulrs Withheld] primary school and that she is fourteen years old. She testified that on February 5, 2012 she and her colleagues met PW1 at Kalokol stage and they got into talking. She later accompanied them to church and at 1 .00 pm they went together to Lodwar primary school. PW1 later told her that she left her home at Lokichogio and came to Lodwar where she met the appellant herein who took her to his house and raped her before sending her away. After listening to her story, they went to the appellant person's house where they saw his sister wearing her (PW1 's) clothes. They went back to school and the following Sunday they went back to church after which she asked PWI to take her to the man who defiled her. She led her to a certain hotel near Salama where they found the appellant. PW1 further explained to her that she was tested and found to be HIV positive.

7. PW3 told the court that she is a community health worker at St Catherine's Dispensary. She testified that in February, 2012 PW1 was brought to their dispensary by the appellant. She said that PW1 was HIV positive and that the appellant alleged that she was her sister. She said that they enrolled the appellant as PW1's brother. Later the appellant showed up again at their said dispensary and sought to know what happens when an HIV patient disappears. She later looked for PW1 and managed to trace her at Lodwar primary school. She talked to PW2 who was her friend and from that talk; she learnt that PW1 had been defiled. She took PW1 back to their dispensary where she was counselled by one Lucy Ndombi. She then took her to one Madam Mwajuma who deals with children issues but as they were going there, PW1 saw a woman seated on a stone. She pointed at the woman and said that she was wearing her skirt. They then approached the woman who confirmed that she knew PW1 as her brother's wife. Together with Miss Mwajuma, they traced the appellant herein at Zebrano hotel and had him arrested.

8. PW4 the officer in charge of Lodwar police station testified that on March 1, 2012 at about 5.30 pm he was in his office when Madam Eunice Majuma of the Child Protection Unit, Diocese of Lodwar and another lady came with two young girls and the appellant herein. It was then alleged· that the appellant had defiled PW1. He said that he caused PW1 and the appellant to be taken to hospital where they were examined. He also caused PW1's age to be assessed. She was found to be fifteen years old.

9. PW5 a clinical officer working at Lodwar district hospital produced in evidence the P3 forms in respect of PW1 and the appellant which were duly filled by his colleague namely Mr Hosea Kiringi who apparently had been transferred from Lodwar District hospital and could not be availed to testify before this court. According to the P3 form in respect of PW1, she was examined two months after the alleged incident. Her general condition was good and she was well oriented in place, time and person. She had no physical injury and both her labias were normal. Urinalysis was carried out on her and leucocytes and pus cells were noted. Serology was also done which was basically reactive. VDRL (syphilis) test was negative. Mr Hosea Kiringi concluded that this was a possible case of defilement. The P3 form in respect of the appellant revealed that he was also examined on March 1, 2012. Specimens were drawn from him for examination. HIV and VDRL (syphilis) tests were carried out on him and were both negative. Urinalysis was carried out and revealed the presence of leukocytes and nitrates. There was also blood in the urine together with pus cells. Mr Hosea Kiringi concluded that it is possible the appellant transmitted the infection to the girl.

10. PW6 told the court that he is the county community oral officer in charge of dental services. He said that PW1 was examined by his colleague, Michael Loposh who was however sick and· could not make it to court to testify. He told the court that PW1 was examined at their facility with a view to assessing her age. She was found to be fifteen years old. He produced a report dated July 6, 2012 to that effect.

11. At the close of the prosecution case, the appellant was put on his defence. The appellant chose to give unsworn statement, without calling any witness. In his defence, the appellant explained how he was arrested and subsequently arraigned in court.

12. The appellant submitted, that the prosecution case was clouded with doubts, unproven beyond reasonable doubts, and conviction was on unsound evidence. On the first ground, the appellant submitted that PW1, PW2, PW3, and PW5, all testified that the victim PW1 was HIV positive, but none inquired for how long she had the virus. Also, that PW3 testified that it was the appellant who brought PW1 to hospital for treatment, thus he was not the one who infected her with the virus. That PW6 testified that he was reported to have infected the victim with the virus after sexually assaulting her, yet when tests were done the victim was HIV positive while appellant was negative. The appellant questions who infected the victim with the virus. To that end the appellant submitted that it is evident that he did not engage in sexual intercourse with the victim PW1, thus prays for the appeal to be allowed on this ground.

13. On the second ground, the appellant submitted that none of the prosecution witnesses testified as eye witnesses. That only PW1 was the key witness, thus that the other witnesses' testimonies were hearsay evidence which is not permitted in law. Therefore, that the prosecution and trial court relied on singe evidence. Reliance is placed on the case of *Maitanyi v Rep* (1986) KLR 198; *Myers v DPP* (1964) ALL ER 88, *Kinyatti v Rep* (1984) eKLR, section 63 of the *Evidence Act*, The book of Numbers 35: 30, Deuteronomy 17:6, Deuteronomy 19:15.

14. On the third ground, the appellant averred that there exists contradiction regarding the dates that the crime is alleged to have occurred. That PW1 testified it occurred on January 17, 2012, and that PW2 stated February 5, 2012. Therefore, that the two dated are uncorroborated evidence. The case of *Ramkrishna Panya v Rep* (1957) EAC A 339. That corroboration strengthens other evidence thus it is important. That PW1 testimony was not corroborated by the testimony evidence of PW5 as regarding defilement. Reliance was placed on the cases of *Wanjera v Rep* (1944) vol page 138, and *Muthuri Muchiri and another Two v Rep* CR App No 70 of 1978.

15. On the fourth ground, the appellant submitted that no investigation was conducted in this case, thus leading to injustice on the appellant. That PW4 investigating officer testified that he did not visit the crime scene, and that the prosecutor repeated the same. That therefore, the prosecution case did not clarify the doubts in this case.

16. On the fifth ground, the appellant submitted that the trial magistrate never considered his defence, which he considers to be strong, thus creating injustice to the appellant. Reliance was placed on the case of *Sekitoleko v Uganda* (1967) EA 531.

17. On the sixth ground, the appellant averred that there was no eye witness who testified against him. That, also PW1 had testified that they had met prior to the incident, and also testified that she did not know him. That identification and recognition are two different things. Reliance in the case of *Anjononi V Rep* KLR1 (1976-1980), and *Peter Kirera V Rep* (2014) eKLR.

18. On the seventh ground, the appellant averred that the age of the victim PW1 was not established since different ages were presented. That PW1 testified to be sixteen years old, that PW4 testified the victim was thirteen years old, PW5 testified that the victim was thirteen years old, while PW6 stated that the victim was fifteen years old. That no special document was produced to support the age of the victim PW1. Reliance was on rule 4 of the *Sexual Offences Act*, the case of *Hillary Nyongesa v Rep* Eldoret Criminal Appeal No 123 of 2009, *Kalusi Elis Kasomo v Rep*, Malindi Criminal Appeal No 504 of 2010.

19. On the eighth ground, the appellant averred that prosecution did not prove penetration in this case, since penetration would only be proved by PW5 clinical officer, who testified that after examining PW1 he stated that the genitals were normal with no bruises. To the appellant, this shows that he did not defile the victim, and further supported by evidence of PW1 being HIV positive while appellant being negative. Reliance was on the case of *Walter Otieno Okumu v Rep* (2017) eKLR, and *Allan Mungai Githonga v Rep* Nairobi HCCR App No 343 of 2005.

20. In response, the respondent opposed the appeal. The respondent submitted that the key witness was the victim, and that her evidence was corroborated by PW2 and PW3, and medical officer. Also that the aspect of penetration was established. That the appellant was well known to the complainant; the defence was properly considered; all the ingredients of the offence were established; and elaborate *voir dire* evidence of the victim was conducted. Therefore, that the case was established beyond reasonable doubt, and that the HIV status could not be raised to defeat the case.

21. The issue for determination was whether the prosecution proved its case beyond reasonable doubt. It is trite law that in order to prove defilement the prosecution must prove that the complainant is a minor, that there was penetration of the minor and lastly that the penetration of the minor was by the accused person (identification/recognition).

22. It is the evidence of PW1 that she was sexually defiled. She maintained that the appellant removed her clothes and began to touch her breasts after which he defiled her without using a condom. That PW1 was able to recognize the appellant as the perpetrator, and that they had met prior to the sexual intercourse. In *Peter Kirera v R* (2014) eKLR where the court in dismissing the appeal had this to say; Recognition is more reliable than identification of a stranger. As this court stated in case of *Aniononi v R* KLR 1[1976-1980] at 1568 this is because:

> "... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. On penetration, as to genital examination on PW1, the clinical officer PW5, testified that he found the external genitalia was normal, and the labias were normal with no bruises, and with no discharge. He remarked that this was a possible case of defilement and that the victim was infected with HIV. Also that it is possible the appellant transmitted the HIV infection to the girl. Additionally, PW5 testified that HIV test on the appellant came out negative for the HIV. Notably, PW1 had testified that it was the appellant who infected her with the HIV virus, as according to her she did not have the virus before. That there was indication that the age approximate of the injury was about two months. In *Walter Otieno Okumu v R* (2017) eKLR where it was *inter alia* held that,

> "The medical evidence from PW3, P3 form exhibit 2 and treatment notes exhibit 1 were essential and conclusive evidence to enable the court ' make a finding of defilement of PW1." It is worth noting that the prosecution case should be proved beyond reasonable doubt.

24. As to the issue of age of the complainant, PW1's age was established as being 15 years old, as stated on the age assessment report which was produced as evidence by PW6. As per the evidence on record, victim's age was sufficiently proved as a minor of 15 years old. In *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, the court of appeal observed as follows

> "in defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in

absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense... Age means apparent age where the exact age is not known"

25. The appellant had alleged and submitted on inconsistencies in the prosecution's case as one of the grounds of appeal. In particular, the time and dates when the complainant was defiled against her court testimony, and whether the prosecution's case is rendered fatal by these inconsistencies. On this issue, it is established that the inconsistencies in the prosecutorial evidence are trivial discrepancies that cannot render the prosecution's case to be fatal. In determining this issue, this court finds guidance in the case of *Dickson Elia Ngamba Shapwata & another v The Republic* CR App No 92 of 2007 where the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows;

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter."

26. Further in the case of *Philp Nzaka Watu v R* (2016) eKLR where the Court of Appeal rendered itself as follows; "However, it must be remembered that when it comes to human recollection no two witnesses recall exactly the same thing to the minute detail. Some discrepancies must be expected because human recollection is not fallible and no two people perceive the same phenomenal exactly the same way.... some inconsistency in evidence may signify veracity and honesty just as unusual uniformity may signal fabrications and coaching of witnesses. Ultimately whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

27. In his defence, the appellant gave unsworn statement. An unsworn statement cannot be said to carry no legal weight. It is not evidence but it is not worthless. It is a safeguard granted to an accused by section 211(1) of the *Criminal Procedure Code*. See *Pius Arap Maina v Republic* (2013) eKLR and also see Court of Appeal's holding in *May v R* (1976-80) 1KLR 1118.

28. This court finds that in as far as penetration is concerned, the medical record is inconclusive as to the penetration of the complainant by the appellant. It was the testimony of the complainant that she was sexually assaulted by the appellant. However, the examination of the complainant's genitals was found to be normal. The trial magistrate relied on the presence of bacterial infection on both the complainant and the appellant to find penetration by the appellant. However, evidence does not show that the bacterial infection matched or was the same. The medical report was thus inconclusive as to the penetration of the complainant by the appellant.

29. Further, the complainant PW1 had testified that it was the appellant who infected her with the HIV virus, as according to her she did not have the virus before, yet scientific test showed the appellant to be negative of the virus. There is an explanation that the condition has a window period before detection. However, how would it only apply to the appellant -yet he was alleged to be the one carrying the virus in the first place - and not apply to the complainant. This phenomenal is not well explained. This court appreciates that there are circumstances where there are discordant partners, which in this case is inapplicable as the appellant is alleged to transfer the virus to the victim.

30. Therefore, this court finds that the prosecution did not prove its case beyond reasonable doubt, particularly on penetration. In the end, to this court, based on the record and evidence concludes that the appellant was improperly convicted of the offence and improperly sentenced. The appeal is thus merited.

31. The appeal is allowed. Consequently, the conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 29TH DAY OF SEPTEMBER, 2022.

.....**.....**

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent