Kuria v Republic (Criminal Appeal E090 of 2021)
[2022] KEHC 13306 (KLR) (Crim) (27 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E090 OF 2021

DO OGEMBO, J

SEPTEMBER 27, 2022

BETWEEN

EDWIN NDUNGU KURIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of the Hon. J. Kibosia, Senior Resident Magistrate, delivered on 20.2.2020 in Makadara Chief Magistrate's court S.O Criminal case No. 56 of 2016)

JUDGMENT

1. The appellant Edwin Ndungu Kuria, was charged in the lower court with the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on diverse dates between December 2018 and September 2019 at [particulars withheld] Estate in Embakasi East Sub-County, Nairobi, he unlawfully and intentionally attempted to cause his penis to penetrate to vagina of PM, a child aged 13 years.

2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. That on diverse dates between December 2018 and September 2019 at [particulars withheld] Estate, Embakasi East, Nairobi County, he unlawfully and intentionally touched the vagina of PM, a child aged 13 years with his penis.

3. After a full hearing, the appellant was convicted on the alternative charge. On October 4, 2020, he was sentenced to serve 10 years imprisonment.

4. The appellant has now fixed an appeal herein against the said conviction and sentence. In his petition of appeal filed on October 13, 2021, the appellant has listed the following grounds:

1. That the learned trial magistrate erred in law and in facts in finding that the prosecution had proved its case on the required standard of proof.

2. That the learned trial magistrate erred in law and fact in relying on the uncorroborated evidence of the complainant who is a child of tender age.

3. That the learned magistrate erred in law and in fact in relying on the evidence of the complainant yet it was full of gaps and doubts.

4. That the learned trial magistrate erred in law and in fact in relying on the evidence of the medical doctor (PW2) yet the doctor did not tell the court the nature of infection the complainant had.

5. That the learned magistrate misdirected herself in law and in fact, in failing to appreciate the fact that the complainant had admitted in cross-examination that she had had sex with another man during the same period.

6. That the learned magistrate erred in law and in fact in failing to believe the appellants evidence in defence.

7. That the learned magistrate erred in law and in fact in handing the appellant a sentence which was manifestly excessive.

8. That the learned magistrate erred in law and in fact in failing to consider the appellant's mitigation in her sentence.

9. That the learned magistrate erred in law and in fact in finding that it is the appellant who had committed the act yet no medical examination was carried out on the appellant to establish if he was the one who had infected the complainant.

5. The appellant has pleaded with this court to allow his appeal, quash the conviction and set aside the sentence. This appeal is opposed by the respondent. This appeal was canvassed, by consent of the parties, by way of written submissions. Both sides duly filed their set of submissions.

6. The appellant first referred to the definition of indecent act in section 2 of the *Act* and submitted that the evidence of the complainant lack corroboration and was contradictory and that complainant admitted to disagreements between her mother and the appellant. That the prosecution did not prove the ingredients of the offence.

7. Relying on *Eric Onyango Ondeng v Republic (2014)eKLR*, the appellant submitted that

> ... the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent, that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case ....."

8. It was submitted that the evidence of PW1 was contradictory as she admitted on cross examination having said no when her mother asked her whether the accused was holding her inappropriately.

9. It was submitted that the appellant was never medically examined and no tests were done to connect him with the allegation. And that the court only relied on the uncorroborated evidence of the

complainant. Appellant relied on section 124 of the *Evidence Act* and the case of *Fappyton Mutuku Ngui v Republic (2014)eKLR* , that;

> In our view, such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who defiled her."

10. That there was nothing creating a nexus between him and the offence.

11. It was further submitted that the court failed to take into consideration the exonerating evidence on record. That the complainant had admitted (page 7) that she had earlier been raped by someone known to her and he grandmother. Also that the doctor examined the complainant a week after initial visit.

12. The appellant also maintained that the trial magistrate failed to give any regard to the defence of the appellant which was sound in law and raised doubts in the credibility of the prosecution's case. He summed up with the ration in *Peter Ng'ang'a Kahiga v Republic*, Criminal Appeal No 272 of 2005 on the scope of jurisdiction of the 1st appellate court.

13. For the respondent side, counsel first submitted on the definition of indecent act under the *Sexual Offences Act* and that the prosecution were under a duty to prove the following ingredients:

    a) Proof that the victim is a child in law.

    b) Proof that there was contact between any body parts of the appellant with the genital organs, breast, buttocks of the victim or proof of exposure or display of pornographic material to a child.

    c) Proof that the acts were intentional and indecent.

    d) Positive identification of the perpetrator.

14. It was submitted that the complainant was 13 years old with the date of birth being December 21, 2006. On proof of contact, counsel referred to the evidence of PW1 that the appellant placed his penis in her private parts and she felt pain on the lower abdomen, a fact corroborated by PW2 who examined her at Mama Lucy Hospital.

15. On identification of the assailant, it was submitted that PW1 knew the appellant, her stepfather counsel relied on the case of *JWA v Republic (2014) eKLR*, where it was held;

> We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act* clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

16. It was also submitted that under section 143 of *Evidence Act*, the prosecution can call any number of witnesses to prove the elements of its case. And that the key witness herein was the victim. Counsel denied there being any inconsistencies in the prosecution's case, nor a requirement of a medical report in a case of indecent assault. The court was urged to dismiss this appeal.

17. I have considered the 2 rival submissions on this appeal. As rightly submitted by the appellant while relying on *Peter N'gang'a Kahiga v Republic*, Criminal Appeal No 272 of 2005, the jurisdiction of this court as a 1st appellate court is to examine and evaluate the evidence on record and to come to its own conclusion, while observing and considering that the trial court had the advantage of being

the witnesses and observing their demeanor. This is really the position in the famous case of *Okeno v Republic (1972)EA 32*.

18. This court is therefore expected to consider such evidence on record and to reach its own conclusion.

19. From the record of proceedings, the case of the prosecution commenced with the evidence of PM, 13 (PW1) whose evidence was that she was born in December 2006, that the appellat is her step father, and used to work with her mother in a club. She testified that on the material day, a Saturday while her mother was away, the appellant started touching her hands and breasts during the day as the other children were playing outside. That the appellant lay on top of her, removed her black t-shirt and pants and had sex with her. She felt pain in her lower abdomen but did not tell anyone. This witness gave evidence of other occasions of interactions with the appellant when the appellant had sexual intercourse with her.

20. To the questions asked, this witness answered that the phone she was using was of her grandmother. And that when her mother asked her if the appellant touched her inappropriately, she would deny. She admitted that she had been raped by someone known to her and her grandmother when she stayed at her place.

21. PW2 was Dr Kiato of Mama Lucy Kibaki Hospital. His testimony was on September 17, 2019, the complainant was examined at the hospital on allegations of defilement. The doctor saw her again on September 17, 2019 and September 5, 2019. She noted that on examination, she had bruises on her private parts on the outer part and foul smell. The hymen was intact and the anal area was normal. In her opinion, the smelling was due to infection after sexual contact she produced the P3 form and the PCR form as exhibits (Exh 2, 3).

22. PC Pema Oola, a police officer at Kayole Police Station is the one who re-arrested the appellant from the police officers of Mihango police station. He then had the appellant charged in court following the doctor's report. He produced the complainant's birth certificate (Exh-1).

23. When the appellant was put to his own defence, he gave a sworn defence. He denied the allegations. He wondered why he was not tested and yet the Doctor said the complainant had STD. That he had a relationship with the mother of the complainant and he took her to hospital as a step father. That these charges were brought up against him when he was against the mother's decision to take the complainant for family planning injection.

24. He confirmed on cross examination, that the complainant's mother went to Saudi Arabia in May 2019. He also admitted that the complainant was a minor, and that he took the child for family planning, which in his knowledge, is for persons who are sexually active and want to plan their families. He conceded that he never reported the matter to the police or the children's officer. He called no witness.

25. I have considered the above evidence as was laid before the trial court side by side the submissions made by the parties to this appeal. This appeal is against the conviction and sentence of the appellant on the alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Section 2 of the *Act* defines indecent act, thus;

> Indecent act means an unlawful intentional act which causes-
>
> a) Any contact between any part of the body of a person with the genital organs, breasts, buttocks of another, but does not include an act that causes penetrations.

b) Exposure or display of any pornographic material to any person against his or her will."

26. It is clear from the above definition, that for this charge to succeed, the prosecution must prove that the acts complained of are intentional and indecent in nature. In this case, the prosecution's case was based on the evidence of PW1 who gave evidence on the various instances that the appellant held her hands, breasts, removed her t-shirts, and pants, lay on her and even had sex with her. The prosecution's case went further that on being examined, bruises were noted on the upper part of the vagina and in the opinion of PW2, the findings were out of sexual contact. The findings of the examination as indicated on both the P3 form and the PRC form, to me, corroborates the evidence of PW1 on the various instances of the sexual assaults she went through in the hands of the appellant.

27. In any case section 124 of the *Evidence Act*, at its proviso states;

> Provided that where in a criminal case involving sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. From the evidence of PW1, it is clear that she is a child at a cross-roads, with her mother migrating to Saudi Arabia. She was also unable to stay with her grandmother and her stay with the appellant was far from being peaceful. It is even on record that she had been at an earlier date raped by another well known man, a fact she readily admitted. At her age she was even subjected to being taken to hospital for family planning injection. The appellant has admitted as much. This court is convinced, just like the trial court did, that this witness was truthful on her testimony of the incidences of sexual assaults against her by the appellant.

29. The age of the complainant at 13 years at the time of the commission of the offence was well proved by the birth certificate produced as exhibit (Exh-1), showing her date of birth as October 17, 2006. n identification of the assailant, there is no doubt that the complainant knew the appellant well. He was her stepfather and they even stayed in the same house. Some of the instances of sexual assault testified on by the complainant took place in broad daylight. I therefore do not see any possibility of mistaken identity of the appellant. I find that the identification of the appellant by the complainant was both accurate and without a doubt, proper and reliable.

30. When the accused was accorded the opportunity to offer his defence, he denied the charge and claimed that these charges were only laid against him after he objected to the child being given family planning injection. However, the defence of the appellant fell flat in cross examination when he conceded to a number of material facts. First, that he in fact took the child, a 13 year old to hospital to be counselled on family planning. Second, that even in doing this, he was fully aware that family planning is for persons who are sexually active. And lastly, even with this knowledge, the appellant, as a step father, never reported this matter either to the police or the children's officer. I therefore find no merit in the defence of the appellant, which I dismiss.

31. In the circumstances, I am convinced that the prosecution discharged its burden of proof herein and proved the alternative charge against the appellant beyond any reasonable doubt as required by the law.

32. On sentence, section 11(1) of the *Sexual Offences Act*, provides for a sentence of not less than 10 years imprisonment. The appellant had been out on bail during his trial. In the circumstances, I find the sentence meted out of 10 years imprisonment, both legal and proper.

33. This appeal of the appellant, lacking in any merit, is accordingly wholly dismissed.

D O OGEMBO

JUDGE

27TH SEPTEMBER, 2022.

Court:

Judgment read out in open court in the presence of the appellant, Mr Kiprono for the appellant and Ms Joy for the state

D O OGEMBO

JUDGE

September 27, 2022.

Kiprono:

We pray for copy of the same.

Court:

Certified copies of the Judgment to be prepared and served on the parties.