KK v Republic (Criminal Appeal 87 of 2018)
[2022] KEHC 13634 (KLR) (21 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL 87 OF 2018

RK LIMO, J

SEPTEMBER 21, 2022

BETWEEN

KK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgement of Principal Magistrate Court (Hon. S.K. Ngii, RM) delivered on 8th November, 2018 in Mutomo Principal Magistrate's Court Criminal Case No. (S.O) 14 of 2018)

JUDGMENT

1. KK, the appellant herein, was charged with the offence of defilement contrary to Section 8(2) of *Sexual Offence Act* No 3 of 2006 vide Mutomo Senior Principal Magistrate's Court Sexual Offence Case No 14 of 2018. The particulars of the charge sheet were that on July 1, 2018 at about 5PM at [Particulars Withheld] Sub-Location, Voo Location, Mutomo within Kitui County, he intentionally caused his penis to penetrate the vagina of (name withheld) a child aged 10 years.

2. He also faced an alternative charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offence Act. Particulars of the alternative count which is relevant to this appeal are that on the same date, time and location he intentionally touched the vagina of (name withheld) a girl aged 10 years with his penis.

3. The appellant denied both counts but after trial where a total of 6 prosecution's witnesses were heard and the appellant's defence, the trial court found the appellant guilty of the alternative charge and convicted him and sentenced him to 10 years' imprisonment.

4. The appellant felt aggrieved and filed this appeal but before I embark on the grounds raised in the appeal, I will set out the evidence tendered at the trial court.

5. The victim of the offence or the complainant was a child aged 10 years and was PW1. Upon voire dire examination, the minor told the trial court that she lived with her grandmother. She testified that on July 1, 2018 as she was grazing cows with her cousin named M or C, at a bushy forested area, the appellant approached them and asked her to accompany him into the bush and that he would pay her Kshs 50 if she did so. The minor testified that she agreed because she was unaware of the appellant's intention. She stated that M, followed them before the appellant ordered her to go back and look after the cows. The girl testified that when M went back, the appellant lead her deeper into the thicket and laid her on the ground before removing her biker and pant.

6. She further narrated that the appellant removed his trouser up to the knees and then laid on top of her and to use her words 'he pulled his 'thing' between his legs' and tried to insert it into her vagina. The girl stated that the 'thing' could not penetrate and told her that he applied his saliva before he tried it again but he could not penetrate her. She testified that the appellant then stopped and that next time he would come with a 'Kilawa' which the little girl stated was a type of a tree. She added that the appellant then gave her Kshs 50 he had promised and told her to leave the scene and that he would follow her later.

7. The girl further testified that she did not put on the biker and pant and carried them on her hand and that when she got out of the thicket, she could not see where M was but before long, she testified that M came with her uncle known as N. She testified that when they went back to where the appellant was they found him gone.

8. She testified that when they got home, the uncle interrogated her on what had happened and she told him everything and gave him the 50/= the appellant had given to her. She testified that a report was later made to the police and she was taken for medical examination. She identified the note of Kshs 50 which she stated that she handed over to the police when the report was made.

9. M (PW2) a minor aged 8 years old testified on oath after viore dire examination she testified and majorly corroborated the narrative of events of July 1, 2018 given by PW1. She testified that she followed the appellant from behind as he led PW1 into a thicket and that she saw the appellant laying PW1 on the ground and saw the appellant removing her inner clothing before pulling his trouser half way and started lying on top of the minor. When she saw, the girl testified that she ran and informed her uncle who accompanied her back to the thicket. She testified that they found PW1 coming out of the thicket and that when the uncle questioned her, she started crying. The witness stated that the incident was not the first one and that whenever she informed her uncle, he used to brush her off.

10. NNK (PW3) testified that the complainant was his niece, a daughter to his sister known as M. He also stated that M (PW2) was his niece and daughter to his sister named C. He testified that he was informed on July 1, 2018 at around 6 Pm that the appellant had defiled his niece (R) (PW1) who was looking after the cows. He testified that he took the Complainant to the house of the appellant and inquired if what the girls were saying was true but the appellant according to him denied. He further testified that M informed him that PW1 had been given Kshs 50 note and showed him where the money was hidden. She testified that he took the note the following day on Monday and reported the incident, upon which they were referred to the hospital for medical examination of the victim. He further testified that he had heard rumours that the appellant used to sexually abuse children.

11. MKN (PW4), the victim's mother testified that on Monday, the July 4, 2018, his brother N (PW 3) called to inform that her daughter had been defiled and that she asked him to report to the police and that on Wednesday, PW3 gave her some documents which included P3 to be taken to hospital in the company of the Complainant. She testified that she tried to interrogate her daughter but she remained mum but M (PW2) opened up to her and told her what had happened. She testified that her daughter

was 10 years old and I identified a Clinic Card in respect that indicated that the minor was born on May 4, 2008. She testified that the appellant is well known to her as he is a cousin.

12. CPL KS (PW5) a Police Officer based at Mutha Police Station clarified that he got a report regarding the incident on July 7, 2018 when the Complainant's mother accompanied by the child and C went to the Station. He testified that the report had been reported on July 2, 2018 at Kanakoni Police Post. The Officer tendered Kshs 50 note as Exhibit 4. He testified that the Complainant's uncle (PW3) gave the note to him.

13. Ruth Mutinda (PW6), a Clinical Officer at Mutomo Hospital testified that she examined the Complainant on July 9, 2018 and filled the P3 Form. The Clinical Officer's evidence upon examining the victim, was that the opening of the vaginal wall was 2 Cm and with discharge. She opined that the victim had been defiled because according to her, 'the opening' could not have been attributed to anything other than external penetration. The witness tendered the treatment notes as P Ex 2 and P3 Form as P Ex 3.

14. When placed on his defence, the appellant gave a one sentence statement denying committing the offence. He stated that he was employed as a casual labourer and that the Complainant was brought by PW3 to where he worked and lied that he had given the Complainant Kshs 50.

15. In its judgement, the trial court found that penetration had not been proved and that the Complainant testified that the appellant tried in vain to penetrate her. The trial court also noted that there were no bruises or laceration noted on the genitalia. The trial court evaluated the evidence and found that the offence of indecent act had been proved and convicted the appellant on the alternative charge and sentenced him to serve 10 years' imprisonment.

16. The appellant felt aggrieved and filed this appeal and raised the following grounds namely;

    i. That the trial court erred to convict him when the salient ingredients of the offence had not been established.

    ii. That the case against the appellant was not proved beyond doubt.

    iii. That the trial court erred by failing to find that the prosecution witnesses were incredible and unreliable.

    iv. That the trial court erred by convicting the appellant against the weight of evidence.

    v. That the trial court erred by failing to note that the charge was a frame up by victim's uncle as the grandmother to the Complainant who stayed with, never got to know about the allegations.

    vi. That the appellant's clothes were never subjected to forensic analysis to provide a link of the appellant to the officer.

    vii. That the trial court erred by failing to note that the evidence of M contradicted that of the Complainant.

17. In his written submissions dated June 6, 2022 done through counsel, the appellant submits that the medical evidence tendered by PW6 indicated that there was penetration and that in such circumstances

the charge of indecent act could not stand. He cites the definition of 'indecent act' as given by Section 2 of Sexual Offence Act and states that it means;

> 'Unlawful intentional act which causes any contact between any part of the body of a person with genital organs, breasts or buttocks of another but does not include an act that causes penetration.'

18. He contends that PW5 and PW6 testified that there was penetration. He points out that PW5 preferred charges of defilement based on the medical evidence of PW6.

19. The appellant faults the trial court for disregarding the evidence of PW5 and PW6 and that it should not have convicted the appellant for indecent act.

20. The appellant also contends that the testimonies of PW1, PW2, PW5 and PW6 contradict each other. He points out that PW1 testified that the appellant tried to defile her but did not penetrate her. He also states that, PW2 stated that she saw him lying on top of PW1. He further contends that the doctor found that the Complainant had a Urinary Tract Infection (UTI) which could only be caused by penetration.

21. He submits that the prosecution was out to prove the charge of defilement but PW1 contradicted the charge of defilement because she stated that there was no penetration. He faults the trial court by convicting him on the alternative charge.

22. The appellant also submits that the age of the victim was not proved because there was no age assessment done. He submits that the trial court did not rely on the P3 Form to determine the age. He contends that the trial court also did not make observation on the minor to determine her age. He submits that the Health Card marked for identification (MFI 4) was never tendered in evidence and that despite that the trial court relied on it to determine the question of age. He relies on the decision of *Kenneth Nyaga Mwige versus Austin Kiguta & 2 Others [2015] eKLR* in his contention, that a document marked for identification cannot be of any use in evidence until it is formerly produced.

23. He contends that the prosecution did not discharge its burden of proof and relies on the decision of *David Muturi Kamau versus Republic [2015] eKLR*.

24. Finally, the appellant faults the manner in which the proceedings were conducted and that the proceedings did not capture the appellant as a blind person. This ground was however raised as an additional ground and without leave of this court as stipulated under Section 350 (2) (i) of the *Criminal Procedure Code*.

25. This court has considered this appeal, the grounds and submissions raised. For the record, this appeal is unopposed because the prosecution despite being served and being granted sufficient time to file its submissions failed to file any response. This court however is mandated to determine this appeal on merit notwithstanding the laxity exhibited by the Office of the Director of Public Prosecution.

26. This is a first appeal and this court is obligated to re-evaluate the evidence tendered at the trial court with a view to reaching own conclusion while acknowledging the fact that the trial court had the benefit of seeing the witness first hand as they testified and therefore, had the advantage of observing their demeanor.

27. The appellant as observed was charged with defilement under Section 8(1) as read with Section 8(2) of the Sexual Offence Act provides. He also faced an alternative charge of indecent act.

28. In the main charge indicates defilement Contrary to Section 8(2) of Sexual Offence Act. To begin with that Section, it is evident that the section premises that the sanction of anyone found guilty of the offence. It states;

> 'A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'

29. The Section that creates the offence is Section 8(1) of Sexual Offence Act which stipulates as follows;

> 'A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.'

30. The charge sheet was proper because the particulars given discloses the offence for which the appellant was charged.

For a charge of defilement under Section 8(1) as read with 8(2) of the Sexual Offence Act to be sustained, the following elements or ingredients are crucial and must be established and proved beyond doubt: -

i. Penetration

ii. Age of the Complainant

iii. Identification of the perpetrator

(i) Penetration

31. Before I re-evaluate the evidence to determine if this element was established, I will look at the definition of or what constitutes 'penetration' in law.

32. Section 2 (i) of Sexual Offence Act defines penetration as;

> 'Partial or complete insertion of the genital organs of a person into genital organs of another person.'

From the above, the element of penetration is not just established when the penetration is complete or where a sexual intercourse/defilement is fully accomplished or completed. It is also established if. Partial penetration is proved.

33. Now let me turn to the evidence tendered. The appellant concedes in his written submissions that the medical evidence tendered by PW6 indicated that there was penetration and this court finds the contention factually correct. RM (PW6), a Clinical Officer based at Mutomo Hospital testified that when she examined the minor on July 9, 2018 before filling the P3 she noted the following upon vaginal examination: -

i. Opening of the vaginal wall -2cm

ii. No bruise noted

iii. Whitish discharge noted.

34. The Clinical Officer opined that pus cells noted were consistent with Urinary tract infections which was only possible through 'sexual intercourse'. The Officer further opined that the child had been defiled because of the size of opening of the vaginal wall which she state was 2 cm wide and that' the opening could not have been attributed to any other cause other than external penetration.'

The medical officer was quite clear in her mind that the child was defiled and that opinion in my view was well grounded going by her own observations after physical examination of the victim.

35. This court has keenly considered the evidence of Pw1 and PW2 in regard to the element of penetration. PW1 on her part gave a vivid description of events of July 1, 2018. She stated that the appellant led her into thicket and laid her down after sending PW2 away from the locus in quo. He then removed her biker and pant and then pulled his own trouser half way to his knees and to use the words of the minor 'he pulled his 'thing' which is between his legs and tried to insert into my 'thing' (trial court noted her pointing to her genitalia/vagina).' The minor testified that the appellant tried to penetrate but found it hard and even applied saliva-perhaps to get some lubrication to aid penetration. According to the girl, the appellant did not succeed but was she accurate enough? Before I delve on the answer, the evidence of PW2-M is also important because to a large extent it corroborates the narrative given by the complainant.

    According to PW2-who was 8 years old, the appellant led the complainant to the thicket and the girl followed her from a distance and 'spotted R (Complainant) lying on the ground with K (Appellant) lying on top of her. R had removed her inner clothes whereas K had pulled off the trouser to the knees.'

36. The evidence tendered by PW1, PW2 and PW 6 on the question of penetration in my view were not contradictory as alleged by the appellant. The evidence of PW1 and PW2 collectively were consistent with the finding of the medical of PW6. Penetration was positive. I have looked at the treatment notes (P Ex 2) and find the same more detailed and evidently supports the opinion reached by PW6.

37. This court notes a particular observation made on the treatment chit which states 'vaginal wall-open accommodating a figure of 2 cm'. The opening was also found dilated. The fact that no bruises or lacerations in my considered view does not negate the positive finding of penetration. There was also no spermatozoa seen but given that the physical examination was first done after more than 24 hours, it is understandable if no spermatozoa was traced.

38. This court finds that the complainant was quite elaborate in her testimony she would even recall that the incident occurred on a Sunday July 1, 2018. PW3, the uncle to the victim testified that he reported the incident the following day which is confirmed was a Monday at Kinakoni Administration Police Post from where he was referred to Mutomo Sub-County Hospital. The treatment chits reflect what the Medical Officer noted on July 2, 2018. The P3 Form was filled a week later on July 9, 2018 by the same Medical Officer.

39. While it is true that the Complainant testified that the Appellant did not succeed in penetrating her, she may have been mistaken in what constitutes penetration. Obviously she could not be expected to know that even 'partial' penetration is considered 'penetration' for purposes of a charge defilement. There is no doubt in my mind going by the evidence tendered by the 2 minors PW1 & PW2 that the offence of defilement was, sufficiently proved to have been committed. The medical evidence fully supports that finding and that fact is even conceded by the appellant in his written submissions because he contends that the evidence of PW6 is not a matter of merely touching of the vagina with his penis but was actual penetration.

40. The trial court fell into error when it found that the medical evidence tendered was not conclusive regarding penetration. The trial court appears to have fallen into error when it made inconsistent finding after correctly finding that lack of bruises or swelling did not mean there was no penetration. It observed that :–

> 'Though the complainant's vaginal orifice had an opening of about 2 cm according to the doctor, there were no bruises, swellings or lacerations noted around and within genitalia'.

In my respectful view, penetration is not only positive when there is presence of bruises, swellings or lacerations on a victim's genitalia.'

The conclusion reached that penetration was not conclusive is inconsistent with definition of what constitutes penetration under Section 2 of Sexual Offence Act. Penetration includes 'partial' penetration and partial penetration may not necessary cause, swelling, lacerations, bruises or even breakage of hymen.

41. The opening of vaginal opening measuring 2 cm wide and dilated, in my view shows that there was partial penetration. The minor described how the appellant tried to gain penetration despite the obvious physiological challenges brought about by the age and the attendant size of the vagina of the complainant. The girl recalled seeing the appellant applying saliva perhaps for lubrication in order to facilitate ease in penetration.

42. The other findings made by the medical officer regarding urinary tract infection reinforced her finding that the minor was defiled and in my view the ingredient of penetration was clearly established and proved beyond any reasonable doubt.

(ii) Age

43. The age of a victim of Sexual Offence is also crucial because it determines the sanction apart from disclosing the offence as stipulated under Section 8(1) of the Sexual Offence Act.

It is true that the trial court relied on the child's clinic card which indicated that she was born on May 4, 2008. That in my respectful view was erroneous because the said clinic card was marked for identification (MFI 1) after the victim's mother identified it but was never formally produced in evidence due to some inadvertence on the part of the prosecution and also the trial court. When a document is only marked for identification it lacks any probative value in evidence and making a finding of based on it, is certainly erroneous.

44. However, this court as appellate court has re-evaluated the other evidence tendered in respect to age and finds that the other evidence tendered in respect to age and finds that the omission by the DPP was not fatal to their case because, the evidence of the mother of the victim (PW4) corroborates the evidence contained in both the P3 Form (P Ex1) and treatment chit (P Ex) in respect to age. The documents (Ex 1 & 2) clearly indicate that the victim was 10 years old. That evidence on age is also discernible from the record of proceedings and in particular the evidence of PW1. She was subjected to voire dire examination obviously owing to her age and size. She stated that she was in class 4 and was aged 10 which is quite consistent with the age of children in that class.

45. The element of age is not necessarily established only through age assessment report. An age of a person is a question of fact that can be established through medical (age assessment) evidence or any other evidence like, birth certificate, clinic card, P3 Form or Treatment Chits. What is crucial is that the age should be established beyond any reasonable doubt which is the standard required in criminal cases.

46. The question posed here is, was the evidence tendered establish and prove beyond doubt that the complainant or the victim was aged 10 years old? Looking at the evidence tendered at the trial this court has no hesitation in making a finding on the positive even after disregarding the clinic card that was marked but not produced?

(iii) Identification of the Appellant

47. The identification of the appellant is not contested here. He was well known in fact PW4 stated that he was her cousin. The minor (PW1 & PW2) knew him well by name 'K'. That issue therefore, was

well settled. He was identified as the perpetrator and there was no evidence tendered suggesting that the minors or their parents harboured my motive to case frame him.

48. This court finds that the prosecution's case at the trial proved that the appellant committed the offence of defilement against the minor. The trial court fell into error when it found that the evidence on the main charge was not conclusive and resorted to convicting him on the alternative charge.

49. The evidence tendered by the prosecution overwhelmingly proved all the necessary ingredients of the main offence of defilement. The witness gave consistent evidence in that regard. They may have given inconsistent evidence like whether Kshs 50 was given to PW1 or hidden but that inconsistency was insignificant and did not lessen the credibility of the PW1, PW2 and PW3 in any way. The picture painted by PW2 & PW3 in regard to the past conduct of the appellant is worrying though, there was no clear evidence showing that he was a pedophile or had a history of sexually molesting children, the lessons that should be learnt by parents or guardians is that whatever is reported by children regarding sexual molestation should never be disregarded and must be taken seriously. I will however leave that matter at that but I must say for purposes of clarity that the observations are made in obiter to the decision made in this appeal.

    In view of the above findings, this court finds that this appeal lacks in merit and further that the judgment of the trial court delivered on November 7, 2018 was erroneous in so far as it convicted the appellant on the alternative charge when the evidence tendered fully supported the main count. For that reason this court set aside both the conviction and sentence and in its place the appellant is hereby convicted under Section 8(1) of the Sexual Offence Act and going by the provisions of Section 8 (2) of the Sexual Offence Act he shall serve life sentence in jail which in my view is what he deserves because of what he did to that young child after luring her and giving her 50/= which by the way interestingly, I found the same intact enclosed in an envelope in the proceedings. May be that is either a sign of inflation or the fact that the staff in the registry are good people.

    He has 14 days Right of Appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF SEPTEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE