Gona v Republic (Criminal Appeal E064 of 2021)
[2022] KEHC 13022 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E064 OF 2021

GMA DULU, J

SEPTEMBER 20, 2022

BETWEEN

FONDO MATHO GONA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.A Mayamba in Makindu Principal Magistrate's Court (S.O) Case No.43 of 2019 pronounced on 7th November 2019)

JUDGMENT

1. The appellant was charged in the magistrate's court with 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 March 26, 2019 at [Particulars Withheld] Market, Kiboko Location in Makindu Sub-County within Makueni County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of FMK (name withheld) a child aged six (6) years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same day and at the same place intentionally and unlawfully touched the vagina of FMK a child aged 6 years with his penis.

3. He denied both charges. After a full trial, he was convicted of attempted defilement and sentenced to 15 years imprisonment.

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

    1) The magistrate erred in holding that the prosecution proved the accusations beyond doubt yet the same did not prove.

2) The trial magistrate erred when he convicted and sentenced him on the testimony of witnesses without credibility which was inconsistent, uncorroborated and lacked the contents needed in criminal cases.

3) The magistrate erred in law and fact by not evaluating the testimonies adduced to the necessary standard needed.

4) The trial magistrate erred in failing to note that the evidence of Pw1 was not voluntary

5) The trial magistrate erred by not considering the evidence of Pw5 which actually lacked merit and proved itself not to be worthy.

6) The learned magistrate erred in failing to note that the prosecution side did not prove its case by bringing to court all needed elements in criminal case like this.

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

6. This being a first appeal, I have to start by reminding myself that 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 *Okeno v Republic* [1972] EA 32.

7. In proving their case, the prosecution called seven (7) witnesses. On his part, the appellant tendered sworn defence testimony and called two additional witnesses.

8. In summary, the prosecution evidence was that on the day in question in the evening, the complainant (Pw1) was walking home from school in company of other children including her brother Pw3 DK, both of whom were standard one pupils at [Particulars Withheld] Primary School.

9. As they passed through a field where goats and cows were being grazed, a person who was grazing animals pushed down Pw1 in an attempt to defile her but did not succeed and then released her and took his animals away.

10. On arrival home, both Pw1 and Pw3 were crying and Pw3 informed their grandmother Pw4 RKK about the incident which was reported to the Government authorities. The appellant was sought and arrested and thus charged with the offences.

11. In his defence, the appellant stated that he was an employed herdsman, but was not at the field where the alleged incident occurred that day. He stated that he was Giriama and did not talk Kikamba as alleged. It was his defence that he was arrested with another person for the same offence, and thus his identification was not positive and was thus mistaken identity.

12. The elements of attempted defilement are the age of the complainant (victim), who should be a minor aged below 18 years. The second element is the attempt to defile. The third element is the identity of the culprit.

13. With regard to the age of the victim (Pw1), a birth certificate was relied upon and produced in court as an exhibit. It was not contested .The learned magistrate also saw the victim who was a young girl, and gave unsworn evidence in court.

14. I find, just like the trial magistrate, that the prosecution proved beyond any reasonable doubt that the victim herein was a young girl aged 6 years at the time of the alleged incident.

15. Did the attempt to defile the victim occur? In this regard, there was the evidence of her brother Pw3 DK, and that of Pw7 KM both minors from [Particulars Withheld] Primary School, who testified that

a person pushed Pw1 in the field near a bush and lay on her. Pw1 the victim also stated so though not particularly clear. A report was immediately made to Pw4 RKK about the incident by both Pw3 and the victim, both of whom were crying.

16. In my view, from the evidence on record, the prosecution proved beyond any reasonable doubt that there was an attempt to defile the victim, as the medical evidence did not establish penetration.

17. I now turn to the identity of the culprit. The prosecution has maintained that the appellant is the culprit. The appellant has stated that he was charged on mistaken identity.

18. It is trite that the prosecution has the burden of proving every element of an offence beyond any reasonable doubt. Pw1 and Pw3 and Pw7 maintain that the appellant was the culprit.

19. I note that none of the alleged three eye witnesses described the culprit to any person before setting out to look for him. Infact the evidence on record is that the search for the culprit started with Pw4 and the victim, together with Pw3 going to several other homes. It appears that the appellant was later arrested merely due to a belief that he owned a muffin cap found in a field. Infact, someone else was also arrested for the same offence and was later released, and the police did not explain the circumstances of the arrest and the release of that person, which created a further doubt on the identity of the appellant as the culprit.

20. In addition to the above, from the evidence on record, the victim Pw1 was brought to court several times and was a reluctant witness to testify in this case. Further, no identification parade was conducted for the eye witnesses to identify the appellant after arrest.

21. Thus the identification of the appellant as the culprit, who was not arrested due to any prior description, and who was not positively identified at an identification parade, falls for short of the standard required in criminal cases. There is a reasonable doubt regarding the identity of appellant as the culprit herein, and in my view, the trial magistrate should have given the benefit of the doubt to the appellant as his sworn defence evidence both from him and his two witnesses, was believable and could be true.

22. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. On that account, the appeal will succeed.

23. 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.

DELIVERED, SIGNED & DATED THIS 20TH DAY OF SEPTEMBER 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE