Awasi v Republic (Criminal Appeal E038 of 2021)
[2022] KEHC 14261 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14261 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E038 OF 2021

KW KIARIE, J

OCTOBER 27, 2022

BETWEEN

FRED ODHIAMBO AWASI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case NO. 22 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. Fred Odhiambo Awasi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 0f 2006.

2. The particulars of the offence are that on diverse dates between May and September 6, 2019 at [particulars withheld] location, Rachuonyo North sub county within Homa Bay county, intentionally and unlawfully caused his penis to penetrate the vagina of CAO, a child aged 16 years.

3. The appellant was sentenced to 20 years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was in person and raised grounds of appeal as follows:

    a) That the trial magistrate erred in point of law and fact by failing to observe that there was no DNA test carried out to see if there was any nexus connecting the appellant to the alleged crime of defilement hence an injustice.

    b) That the learned magistrate erred in points of law and facts by basing the conviction on the evidence of speculation and conjecture.

    c) That the trial magistrate erred in law and facts by failure to observe that the appellant was not informed the reasons for his arrest.

d) That the trial learned magistrate flouted both law and facts by basing conviction on shoddy fabricated evidence.

e) That the sentence of 20 years imprisonment is extremely harsh and excessive.

f) That maximum mandatory sentence is unconstitutional.

4. The appeal was opposed by the state through Mr Ochengo, learned counsel on grounds that:

a) That paternity test was not necessary.

b) That the issue of arrest of the appellant was not an issue in the trial court.

c) That the prosecution proved its case to the required standards.

d) That the sentence and the conviction were proper.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

6. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

7. If the offence of defilement under section 8 (4) is proved, the minimum prescribed penalty is not less than fifteen years. The penalty meted out cannot be said to be harsh or excessive.

8. An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

a) That there was penetration of the complainant's genitalia;

b) That the accused was the perpetrator; and

c) The age of the victim must be below eighteen years.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR.

9. The complainant testified that she was born on June 13, 2003. This was confirmed by the copy of her certificate of birth that was produced by pc Willy Ogot (PW4). This would mean that at the time of the alleged offence, she was between fifteen and sixteen years old. The age of the complainant was therefore established.

10. In her evidence CAO (PW1) testified that the appellant invited her to sweep for him in May, 2019 on a date she could not remember. This is when he grabbed her and defiled her. Thereafter, the two continued having sex at least twice a week until September 6, 2019 when her mother noticed that she was expectant.

11. When Fredrick Oyaa Odhiambo (PW5) a clinical officer examined the complainant, he made the following findings inter alia:

a) Hymen was ruptured but the rupture was old.

b) She was 24 weeks pregnant.

c) She had sexually transmitted infection.

He therefore concluded that there was defilement.

12. From the evidence of NAO (PW2) the complainant's mother, GOO (PW3) and that of pc Willy Ogot (PW4) the complainant was having a sexual relationship with the appellant and another man. These witnesses attributed this information to the complainant.

13. In this case just like many other sexual offences cases, there were no eye-witnesses. The proviso to section 124 of the *Evidence Act* provides:

    Provided that where in a criminal case involving a 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.

    Though the trial court said she believed the complainant, this was her word against that of the appellant. The prosecution conducted this case after the complainant's child was born. On January 21, 2020 the prosecution applied for an adjournment and one of the reasons advanced was that they wanted to conduct DNA test. Since the baby of the complainant was born on December 24, 2019, the court allowed the adjournment. When the matter subsequently came up for hearing, the prosecution was silent on the issue of DNA test.

14. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag Vice President) held:

    The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

    Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

15. Since the prosecution did not explain to the court why the DNA report was not produced in court, one can only infer that this evidence would have been adverse to the prosecution case. Given the circumstances of this case, this would have been very material evidence for it could have either implicated the appellant or exonerated him.

16. I therefore find that the prosecution did not prove that the penetration of the complainant's genitalia was by the appellant.

17. The prosecution did not therefore prove its case against the appellant to the required standards. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF OCTOBER, 2022

KIARIE WAWERU KIARIE

JUDGE