JM v Republic (Criminal Appeal E182 of 2021)
[2022] KEHC 15523 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E182 OF 2021

TW CHERERE, J

NOVEMBER 21, 2022

BETWEEN

JM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence in Maua Criminal S. O No. 10 of 2020 by Hon. M.Nyigei (SRM) on 23rd September, 2021)

JUDGMENT

1. JM (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The offences were allegedly committed on January 8, 2020 against FM a child aged 9 years.

2. Complainant stated that on the material date at night, she went to sleep and left her mother and Appellant who is her father in the living room. That in the night, she was awoken from her sleep by pain in her vagina only to find Appellant who is her father defiling her. That Appellant then left her bed and went to his bed next to her bed.

3. Complainant's mother stated that on January 10, 2020, he heard Complainant who was in bed threaten to tell her something. That she went to the bedroom and found Complainant on her bed and Appellant who had his trouser open and lower on the bed she shared with him next to Complainant's bed. That Complainant reported that Appellant had uncovered her for which he was subsequently arrested.

4. Complainant was examined on January 13, 2020 and a P3 tendered in evidence revealed that her hymen was hyperemic and torn which was found to be evidence of forceful penetration.

5. Complainant's complaint was subsequently reported to police by the area chief who arrested Appellant and handed him over to PC Kathambi on January 10, 2020 who preferred charges against Appellant.

6. Appellant in his sworn defence denied the offence. He stated that he was framed by Complainant's mother after the quarreled about her drinking habit.

7. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on September 23, 2022 convicted and sentenced Appellant to serve 20 years' imprisonment

8. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and in the amended grounds raised the following issues:

    i. The prosecution case was contradictory

    ii. Crucial witnesses did not testify

    iii. Medical evidence did not link him to the offence

    iv. The time he spent in custody was not considered

9. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] e KLR that:

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

10. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic* [2015] eKLR).

11. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo vs Republic* Criminal Appeal No 504 of 2010).

12. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo vs Republic* Criminal Appeal No 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello vs Republic* Cr App No 203 of 2009[2010] eKLR.

13. Complainant's child health and nutrition card reveals that she was born on December 26, 2011 and was therefore 9 years as at the date she was allegedly defiled

14. Concerning penetration, Section 2 of the Act defines penetration to entail: -

> " partial or complete insertion of a genital organ of a person into the genital organ of another person."

15. The P3 form dated January 13, 2020 tendered in evidence revealed that complainant had a hyperemic and torn hymen and I find that the trial magistrate correctly found that penetration was proved.

16. Concerning Appellant's culpability, there is no doubt that complainant was the sole witness to the offence. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the *Evidence Act* to convict:

> " as a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:
>
> "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." (emphasis added).

17. Appellant was cohabiting with complainant's mother and the fact that Appellant was not a stranger to the complainant was conceded by Appellant. That Appellant and complainant's mother used to share a bed in the same bedroom as Complainant is not denied by the Appellant. That Complainant and Appellant was in the bedroom together has been corroborated by complainant's mother who stated that he rushed to the bedroom when she heard Complainant threaten to tell her something and that Complainant had informed her that Appellant had uncovered her is well corroborated. The evidence on record reveals that there was no possibility of mistaken identity and hence, the trial magistrate's finding that Appellate had been recognized as the perpetrator was well proved beyond any reasonable doubt.

18. Concerning the Appellant's contention that Prosecution failed to call crucial witnesses, Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides:

> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

19. In *Donald Majiwa Achilwa and 2 other v R* (2009) eKLR the Court stated:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

20. In *Keter v Republic* [2007] 1 EA 135 the court held *inter alia*:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

21. In the instant case. the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. One Mama Mercy who Appellant complains was not called as a witness did not witness the incident and was therefore not a necessary witness in this case.

22. Appellant complains that he was not subjected to medical examination to confirm whether he is the one who defiled the complainant. It is trite law that such examination was not necessary. (See *Dennis Osoro Obiri v Republic* [2014] eKLR and *Fappyton Mutuku Ngui v Republic* [2014] eKLR).

23. Concerning whether the prosecution case was proved, I have considered the English case of *Woolmington vs DPP* 1935 A C 462 in *Miller v Minister of Pensions* {1947} 2 All ER 372 where the Court held at page 373:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

24. The trial magistrate cited *Elizabeth Waithiegeni Gatimu vs Republic* [2015] eKLR which reiterated the proposition that a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient and I find as did the trial court that there was no contradiction in the prosecution case and that Appellant's defence did not create a reasonable doubt in the prosecution case.

25. Concerning sentence, Section 333(2) of the *Criminal Procedure Code* provides that:

> "(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

26. Appellant was arrested on January 10, 2020 and remained in custody throughout the trial until the date of his conviction and sentence on September 23, 2021. The record reveals that the learned trial magistrate did not take this period into consideration at the point of sentencing the Appellant.

27. From the foregoing analysis, I make the following orders:

    1. The appeal only succeeds on sentence

    2. The 20-year sentence shall commence from January 10, 2020 when Appellant was arrested.

DELIVERED AT MERU THIS 21st DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)