Bakari v Republic (Criminal Appeal 31 of 2020)
[2022] KEHC 16910 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 31 OF 2020

WM MUSYOKA, J

DECEMBER 23, 2022

BETWEEN

HASHIM NYONGESA BAKARI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From Original Conviction and Sentence in Mumias PMCCRC (SO) Case No. 35 of 2019, by TA Odera, Senior Resident Magistrate, of 22nd July 2020)

JUDGMENT

1. The appellant was convicted by Hon. TA Odera, Senior Principal Magistrate, of defilement contrary to Section 8(1), as read with section 8(4), of the *Sexual Offences Act* No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge against the appellant were that on 28th August 2019 within Kakamega County, he unlawfully and intentionally caused his penis to penetrate vagina of VOK, a child aged 17 years.

2. He had 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 particulars of the alternative charge were that on the same date and the same place stated in the main count, he had intentionally caused his penis to touch the vagina of VOK, a child aged 17 years.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a trial. The prosecution called 4 witnesses.

4. VOK, the complainant testified as PW1. She explained that on the material day she hailed the appellant, who was a motorcycle operator, and mounted his motorcycle, with instructions to take her to Shianda. Instead to taking her to Shianda, he rode to Ekero, where he locked her up in a room, and left her there. He later came at night, forcibly removed her clothes, and inserted his penis into her vagina. She reported the matter to the police at Shianda the following morning, and was taken to the hospital. She

later took the police to the house at Ekero where she was defiled and pointed out the appellant to the police and he was arrested.

5. NO, testified as PW2. She was the mother of PW1. She testified that she was 17 at the time, having been born in 2002. She explained that when she went home, following her daily chores, she did not find PW1 at home, and when she enquired from her siblings, she was informed that she had left to see a friend. She did not come home that night. The next morning, she was informed by a neighbor that PW1 was in police cells at Shianda. She went there and PW1 narrated to her what had transpired. She was taken to a health centre, and she led the police to Ekero and the appellant was arrested.

6. Brenda Atieno Opiyo testified as PW3, and was a clinical officer, at Shianda Health Centre. She was the one who examined PW1. She found her labia to be swollen, her black underpants had a white stain, her vaginal discharge was bloody and she had a linear cut on the gentilia. She had a broken hymen, and suffered from general pain. She formed the opinion that she had been defiled.

7. PW4 was Police Constable Florence Omukada, service number 231335, the investigating officer. PW1 reported to her about the assailant, and she took her to the heath centre. PW1 also led her to a house in Ekero, where she arrested the appellant.

8. The court found that the appellant had a case to answer and put him on his defence. He gave a sworn statement. He denied committing the offence. He only testified on how he was arrested.

9. After reviewing the evidence, the trial court convicted appellant of the main charge of defilement contrary to section 8(1), as read with section 8(4), of the *Sexual Offences Act*, and sentenced him to 15 years imprisonment.

10. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal, being that the conviction was based on the testimony of a single witness which was not corroborated; that the victim was 17 and he 18 at the time, and therefore she was not a minor; that PW1 allegedly mounted his motorcycle at daytime and there should have been other witnesses apart from the police and the doctor; that semen was not extracted from him to prove penetration; the evidence adduced was not enough to justify the penalty given; and that the sentence imposed was harsh.

11. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno v Republic* [1972] EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

12. The appeal was canvassed only on the written submissions of the appellant, 2nd April 2022. The prosecution opted to leave the matter in the hands of the court.

13. In his written submissions, the appellant urges several issues. He submits that his fundamental rights were violated. He stated that he was ambushed with evidence on during the hearing, and his pre-

arraignment rights were violated. Secondly, that a witness mentioned by the prosecution was not called to the stand. Thirdly, that there was no medical or forensic evidence linking him to the crime. thirdly, that burden of proof was shifted to him, and his defence was not considered. Fourthly, that the elements of defilement were not proved. He cites the medical evidence, the identification, his age and that of the victim, among others.

14. On whether the fair trial principles, under Article 50 of the *Constitution* were observed, the record shows that he was arraigned on 2nd September 2019. It would appear that the charge was read to him in a mixture of English and Kiswahili, and he responded in Kiswahili. His rights relating to bond, and right to legal representation were explained to him.

15. The record also shows that the prosecution gave to him a copy of the charge sheet, 4 witness statements and the investigation diary. It would appear that largely, there was compliance with the fair trial requirements. He is not specific on the evidence that was presented in manner of an ambush. Perhaps it could be the medical evidence, for PW3 produced medical treatment notes, P3 form and the PRC form. PW1 also referred to a birth certificate, the same was marked for production, but would appear that the same was not produced as an exhibit.

16. When plea was taken, the prosecutor only availed the charge sheet, the witness statements and investigation diary. Strictly speaking these do not amount to evidence. The charge sheet is a pleading, not evidence. The investigation diary is not evidence, it a record of the steps taken by the investigator in the course of his investigations. The witness statements are a record of what the witnesses would tell the court. The statements are never produced as exhibits. The concrete evidence would be the material that is placed on record for consummation by the court, such as birth certificates, treatment notes, P3 forms, medical reports, among others. It is such material that the prosecution must provide to the accused person in advance, so that he or she can consume the contents, and possibly find alternative evidence to counter the same. Furnishing the accused with the charge sheet, the witness statements and the investigation diary is not enough. Every other documentary material, particularly that which the prosecution intends to place on record as its evidence ought to be availed to the accused person, because that is the real evidence. Produce of P3 forms, treatment notes, medical reports and other such documents on the date when the witnesses testifying on those documents give evidence amounts to ambush, for the accused would not have had time and facilities to prepare his defence. In that respect, the appellant herein was not provided with the concrete evidence in advance, and, therefore, his trial amounted to an ambush, and was not fair.

17. On violation of Article 49 of the *Constitution*, again he is not quite clear on what exactly he complains about. Article 49 is about the rights of an arrested person. Violation of the rights under Article 49 does not usually vitiate a trial. They are about the arrested person being told why he was being arrested, and being taken to court within 24 hours, and being released on bond should it not be feasible to have him produced in court at the earliest. The redress for being held in detention beyond 24 hours is compensation in monetary terms, in civil proceedings initiated for that purpose. Violations under Article 49 would be critical where they are so gregarious as to render the trial a farce, such as where a person is held in pre-arraignment detention for a lengthy period, say in excess of six months. The charge sheet shows that the appellant was arrested on 30th August 2019 and was presented in court on 2nd September 2019. He was not presented in court within 24 hours of arrest, within 36 hours instead. No explanation was given for exceeding the 24 hours, but then again the time exceeded was not excessive. The violation demonstrated cannot vitiate the trial, and damages are available as recompense, in the terms stated above.

18. On the issue of a witness that was referred to in the evidence but not called, the driver of the matatu that took her to the police station, the position is that not every other person who is remotely connected to

the facts in issue ought to be called. In this case, the matatu only conveyed her to the police station, the driver was not privy to the alleged offence, unless PW1 informed something about it, which does not appear to be the case, and therefore his testimony would have added little value to the case.

19. On the medical or forensic evidence not being adequate to link the appellant to the offence, the legal position is that proof of a sexual offence need not be dependent on medical evidence or forensics. The trial court can convict on the basis of the testimony of the victim, so long as it finds such witness to be truthful and reliable. It is not mandatory that the suspect be subjected to medical examination, so as to link him to the offence.

20. On the burden of proof being shifted, the appellant has not demonstrated how that was so, and I have not come across any incidence of the same from the record. on his defence not being considered, the appellant did not offer any defence, for he merely denied the offence. His sworn statement in defence, does not offer any concrete defence, he only gives a narration of the circumstances of his arrest. There was nothing to consider by way of a defence.

21. The elements of defilement not being proved, what ought to be proved is the age of the victim and penetration by the accused person. In this case, the age of PW1 is not disputed. Her mother, PW2, testified, that she was 17 at the time. No evidence on the age of a child can be better than that of the mother of the child in question. I find that the age of the victim was proved. On penetration, the victim herself, PW1, testified on how her assailant removed her clothes, and his own, and took his penis and inserted into her vagina, and that the experience was painful. She was the victim, and she gave a clear account of the penetration. The law says that that account is enough, if the trial court finds it truthful and reliable, and can convict on the basis of it alone, without any corroboration. However, in this case there was corroboration. PW1 went straight to the police after the incident. She reported to PW4, who put her in the cells, and later took her to hospital. PW3 treated her in hospital, and found that she was defiled. She produced documents to support those findings. That was corroboration enough. Was the penetration by the appellant? There was no medical evidence to support the claim by PW1, but then the law does not make such evidence mandatory. What matters is that PW1 convinced the trial court that she was truthful and her testimony reliable. She took the police to the house where she was defiled, and she pointed out the appellant, out of the 2 individuals found in that house, as the person who had defiled here. The trial court found her to be a reliable witness. I did not have the benefit of seeing her and the appellant testify, but the trial court had that opportunity. I cannot fault the trial court in the circumstances.

22. On the age of the appellant being considered at sentencing, seeing that the victim was 17 and the appellant 18. It is a relevant factor, for technically the appellant would himself be a child, having just attained age of majority. The two would have been in more or less the same age bracket. I note from the pre-sentence report, dated 4th August 2020, his age was put at 21 years, meaning that he was about 20 years old at the material time. However, he was a young person for all purposes, and that is a factor that could be considered at sentencing. However, such consideration, in my view should be considered in cases where the sexual connection was consensual, although consent is not a factor in defilement. Where the facts otherwise amount to rape, such as where the assailant forced himself on the victim, as in this case, then the fact that the offender was a young person should be an irrelevant consideration.

23. On the sentence being excessive, I note that the same is subject to a mandatory provision, for defilement of a child of that age, the minimum is fifteen years, and the trial court gave him the minimum available, and that the hands of the court were tied in the circumstances. Of course, thereafter there have been developments. For example, in 2022, in *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga J), the court extended the principle stated in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP,

Ojwang, Wanjala, Njoki & Lenaola SCJJ), to offences under the *Sexual Offences Act*, by holding that minimum mandatory sentences are unconstitutional. Consequently, the appellant herein ought to benefit from Philip Mueke Maingi & others v Director of Public Prosecutions & another Machakos HCPet. No. E017 of 2021 (Odunga J), and the court, at this level, can exercise discretion, and award appropriate sentences without regard to the minimums provided for under the *Sexual Offences Act*.

24. What should I do in the circumstances? The appellant was not given a fair trial, to the extent that he was not supplied with the concrete documentary evidence that the prosecution relied on: the P3 form, the PRC, treatment notes, among others. The charge sheet, the witness statements and the investigation diary were not enough. His trial amounted to an ambush. He was not given adequate facilities to prepare for his defence. There was a mistrial, as the constitutional safeguards were not adhered to. That being the case, I hereby allow the appeal, and quash the conviction, and set aside the sentence. The appellant shall be set free, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23rd DAY OF December 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Hasim Nyongesa Bakari, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.