Omar v Republic (Criminal Appeal 87 of 2015)
[2016] KEHC 6752 (KLR) (29 February 2016) (Judgment)

Mwanakombo Omar v Republic [2016] eKLR

Neutral citation: [2016] KEHC 6752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 87 OF 2015

SJ CHITEMBWE, J

FEBRUARY 29, 2016

BETWEEN

MWANAKOMBO OMAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal originating from the conviction and sentence by Hon. A. M. Obura-SRM in Kilifi CR NO.1018 of 2011)

Referring to an offence as child prostitution in a charge instead of benefiting from child prostitution does not prejudice an accused where there was no variance in the evidence

The appeal was against the conviction and sentence of the appellant for the offence of child prostitution. The court found that the fact that the offence was called child prostitution instead of benefiting from child prostitution did not prejudice the appellant. The charge and the particulars subverted each other and there was no variance in the evidence. The court further held that since the maker of the medical report was absent, the trial court correctly allowed PW5, who was a medical doctor, to testify and explain the medical evidence on record.

Reported by Kakai Toili

Criminal Law *– charge sheets – defective charge sheets – where a charge sheet referred to an offence as child prostitution instead of benefiting from child prostitution - whether referring the offence of benefiting from child prostitution as child prostitution in a charge sheet was fatal – Sexual Offences Act (cap 63A), section 15.*

Evidence Law *– medical evidence – production of medical evidence - whether in the absence of the maker of a medical report another doctor could be called to testify and explain the medical evidence on record, P3 form and post rape care form.*

Brief facts

The appellant was charged with the offence of child prostitution contrary to section 15(a) of the Sexual Offences Act No 3 of 2006. The trial court convicted the appellant and sentenced her to serve ten years in

prison. Aggrieved, the appellant filed the instant appeal on among other grounds that; the offence of child prostitution did not exist; the ingredients of the alleged offence were not proved beyond reasonable doubt; and that the medical evidence was not produced by the maker of the documents.

Issues

i. Whether referring the offence of benefiting from child prostitution as child prostitution in a charge sheet was fatal.

ii. Whether in the absence of the maker of a medical report another doctor could be called to testify and explain the medical evidence on record, P3 form and post rape care form.

Held

1. The appellant was charged under section 15(a)of the of the Sexual Offences Act. That section provided that if someone knowingly permitted a child to remain in some premises so that the child was sexually abused committed the offence of benefiting from child prostitution. Although section 15 defined the offence as benefiting from child prostitution, the side notes indicated that section 15 provided for child prostitution. The offence ought to be one of benefiting from child prostitution, the defects in the charge sheet did not cause any miscarriage of justice or prejudice the appellant.
2. The charge sheet indicated that the appellant was charged under section 15(a) of the Sexual Offences Act. The particulars of the offence elaborated what the appellant was being accused of. The fact that the offence was called child prostitution instead of benefiting from child prostitution did not prejudice the appellant. The charge and the particulars subverted each other and there was no variance in the evidence. The appellant knew what she was being accused of.
3. The evidence showed that the complainant's (PW1) apparent age was below 18 years old. She was a child. The evidence sufficiently proved that PW1 was a child. The absence of birth certificate or age assessment report did not make PW1 to be an adult.
4. PW1 was defiled. She was 14 years old and had no reason to lie to the court. The medical evidence proved her allegations. Her hymen was broken and she had foul discharge from her vagina. The examination was done the following day September 13, 2011. Since the maker of the medical report was absent, the trial court correctly allowed PW5 to testify. PW5 was a medical doctor and all what he did was to explain the medical evidence on record in the treatment notes, P3 form and post rape care form. The medical evidence was consistent.
5. The prosecution had not proved its case beyond reasonable doubt. The conviction was proper and safe. Section 15 of the Sexual Offences Act provided for a ten-year minimum prison sentence. The report from the Children's Department indicated that the appellant had two children aged 6 and 2 years. The children were left with their father who in turn left them with his brother. One of the children was barely two years old in 2013.

Orders

i. *A probation officer's report to be prepared which should also include the current wellbeing of the two children.*

ii. *The matter should be mentioned after the probation report was done.*

Citations

Cases

None referred to

Statutes

Kenya

Sexual Offences Act (cap 63A) section 15(a) —(Interpreted)

Advocates

Mr Shujaa for the appellant.

Mr Fedha for the state/respondent.

JUDGMENT

1. The appellant was charged with the offence of child prostitution Contrary to section 15(a) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that the appellant on September 12, 2011 in Kilifi District within Coast Province, knowingly permitted EK, a child aged 14 years to remain in her house to be sexually abused.

2. The trial court convicted the appellant and sentenced her to serve ten (10) years in prison. The grounds of Appeal are that the offence of child prostitution does not exist, that the ingredients of the alleged offence were not proved beyond reasonable doubt, the prosecution evidence was contradictory and not consistent, that the medical evidence was not produced by the maker of the documents and that the appellant's mitigation was not considered.

3. Mr Shujaa, counsel for the appellant, submitted that the charge did not exist in law. The proper charge was one of benefiting from child prostitution. Secondly, counsel maintains that the complaint's age was not proved. There was no age assessment report or evidence as to when she was born. No birth certificate was provided. Further, counsel contends that the appellant did not knowingly allow the complainant to remain in her house to be sexually abused. The complainant's conduct after the alleged incident raises issues. The complainant did not raise any issue against the appellant when she met PW2. She also did not tell her father the same day. She only revealed to her father after he threatened to beat her. She also alleged that she was forced to wash her clothes.

4. Finally counsel submit that the appellant objected to the production of the witness report as the witness was not the maker but she was erroneously overruled.

5. Mr Fedha, counsel for the state, opposed the appeal. Counsel submitted that section 392 cures any alleged defects to the charge sheet. The ingredients of the offence were proved. The victim was school going child in class five. The trial court took judicial notice of the age and demeanour of the child. The evidence was credible and did prove the charge.

6. The record of the trial court shows that PW1 was the complainant. She told the court during voire dire examination that she was 14 years old and in class five [particulars withheld] Primary School. She testified under oath and stated that the appellant is her neighbour. On September 12, 2011 at about 5.00 pm she was at home when the appellant asked her to go to her house. She went there and upon entering her house the appellant locked the house from outside. PW1 saw a man inside the house who threatened her not to scream. The man claimed he was called Moris and a brother to the appellant. He defiled PW1. It is PW1's evidence that she had not had sex before and she bled. Once Morris was done the appellant opened the door. PW1 was not walking properly and her clothes had blood stains. The appellant gave her a lesso to cover herself.

7. The following morning her father came from work and she told him what had happened. She was taken to Coast General Hospital and the appellant was arrested.

8. PW2 C M was a neighbour to the appellant. She testified that on September 12, 2011 she saw the appellant leaving with PW1. Later at about 5.00 pm she saw PW1 crying. Upon asking PW1 what was wrong, PW1 informed her that the appellant's brother by the name Morris had defiled her inside the appellant's house. PW1 told her that she was bleeding. PW2 had a sick child that time and did not follow up the matter.

9. PW3 NK is PW1's father. He works as a watchman. On September 13, 2011 he went home in the morning after a night shift. PW1 narrated that what had happened to her. He took PW1 to Coast General Hospital and reported the matter to the police. PW4 PC Christine Mugune was based at Mtwapa Police Station. The case was reported at the station by PW3 on 13th September 2011. PW4 investigated the case and caused the appellant to be charged with the offence. The police tried to arrest the appellant's brother but he disappeared.

10. PW5 Dr Malik was based at Kilifi Districk Hospital. He produced the P3 form and post rape care form filled by his colleague, Dr Rashida who was pursuing further studies in Nairobi. He testified that PW1's hymen was perforated and there was foul smelling discharge from PW1's vagina. There were lacerations on PW1's vaginal wall.

11. The appellant was put on her defence. In her unsworn statement she testified that she did not do anything. She did not know what happened.

12. The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. Counsel for the appellant contends that the offence of child prostitution does not exist. The appellant was charged under section 15(a). That section provides that if someonEKnowingly permits a child to remain in some premises so that the child is sexually abused commits the offence of benefiting from child prostitution.

13. Although section 15 defines the offence as benefiting from child prostitution, the side notes indicate that section 15 provides for child prostitution. It is true that the offence ought to be one of benefiting from child prostitution, I do find that the defects in the charge sheet did not cause any miscarriage of justice or prejudice the appellant. The charge sheet clearly indicate that the appellant was charged under section 15(a) of the *Sexual Offences Act*. The particulars of the offence clearly elaborate what the appellant was being accused of. The fact that the offence was called child prostitution instead of benefiting from child prostitution did not prejudice the appellant. The charge and the particulars subverted each other and there was no variance in the evidence. The appellant knew what she was being accused of.

14. It is PW1's evidence that shEKnew the appellant. Their houses are within the same area and one can hear someone talking from either house. PW1 testified that she was 14 years old. The offence occurred in September 12, 2011. By March 17, 2012when PW3 was testifying, he told the court that PW1 had turned 15 years old. The trial court saw PW1 and opted to conduct a voire dire before she testified. The evidence shows that PW1's apparent age was below 18 years old. She was still a child. She told the court that she was in class five. The father explained that he had to go to work for money and buy books for PW1. I do find that he evidence sufficiently proved that PW1 was a child. The absence of birth certificate or age assessment report does not make PW1 to be an adult. The trial court saw PW1 and concluded that she was a child.

15. With regard to the evidence on the alleged defilement incident, it is PW1's evidence that the appellant took her to her house and closed the door from outside the house. PW2 saw the appellant going with PW1. The defence evidence does not raise any doubt on the prosecution case. I do find that indeed PW1 was defiled. She was 14 years old and had no reason to lie to the court. The medical evidence proved her allegations. Her hymen was broken and she had foul discharge from her vagina. The examination was done the following day September 13, 2011. Lastly, since the maker of the medical report was absent, the trial court correctly allowed PW5 to testify. PW5 is a medical doctor and all what he did was to explain the medical evidence on record in the treatment notes, P3 form and post rape care form. PW1 and PW3 testified that the incident was reported to the police and PW1 was taken to hospital. The medical evidence was consistent.

16. Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The conviction is proper and safe. Section 15 provides for a ten (10) year minimum prison sentence. The appellant informed the court that she had two children. The trial court sought a report from the children's department. The report indicate that the appellant has two children, BW aged 6 years and FW aged 2 years. The children were left with their father who in turn left them with his brother. One of the children was barely two years old in 2013.

17. I do order that a probation officer's report be prepared which should also include the current well being of the two children. This matter should be mentioned after the probation report is done.

DATED AND DELIVERED IN MALINDI THIS 29TH DAY OF FEBRUARY 2016.

S.CHITEMBWE

JUDGE