Lobuin v Republic (Criminal Appeal E142 of 2023)
[2025] KEHC 1299 (KLR) (Crim) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E142 OF 2023

CJ KENDAGOR, J

FEBRUARY 24, 2025

BETWEEN

ELAAR IKAALE LOBUIN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence arising in Makadara Law Courts Sexual Offences Case Number 141 of 2018 delivered on 15th November, 2022 by Hon. H. Onkwani, SPM)

JUDGMENT

1. The Appellant was charged in Count I with the offence of defilement contrary to Section 8 (1) (2) of the *Sexual Offences Act*. The particulars of the charge were that between 8th July, 2020 to 10th July, 2018 at [Particulars Withheld], Nairobi area County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of FP, a child aged 11 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars being that on diverse dates between 8th July, 2018 and 10th July, 2018 at [particulars withheld] within Nairobi area County, the Appellant intentionally and unlawfully committed an indecent act with FP, a child aged 11 years by using his genital organ namely penis touched her genital organ namely vagina.

3. In Count II, he was charged with Sexual Assault contrary to Section 5 (1) (a) (1) (2) of the *Sexual Offences Act*. The particulars being that on diverse dates between 8th July, 2018 and 10th July, 2018 at [particulars withheld] within Nairobi area County, the Appellant unlawfully used his fingers to penetrate the genital organ namely vagina of FP, a girl aged 11 years old.

4. The Appellant pleaded not guilty to the charges, and the case proceeded to trial. In a judgment delivered on 15th November, 2022 the Appellant was convicted on Count I and Count II and sentenced to 30 years' imprisonment for each Count, to run concurrently.

5. Being dissatisfied with both the conviction and the sentence, he appealed to this Court vide a petition of appeal filed on 23rd May, 2024 in which he raised four grounds of appeal;

    i. That he was not properly identified as the perpetrator;

    ii. That the complainant is not a credible witness;

    iii. That that there was variance between the report made at the police station and the evidence adduced in court;

    iv. That the trial court did not consider his defence.

6. The appeal was canvassed through submissions. In his written submissions, the Appellant argued that he was not given a fair trial, that the trial Court erred in shifting the burden of proof onto him, and that the conviction was contrary to the weight of the evidence presented. He also urged the Court to find that the sentence meted out was excessive.

7. The Respondent submitted orally that the charges had been proved beyond reasonable doubt and that the Complainant recognized the Appellant, who was familiar to her. They asserted that recognition was more reliable than identification. They also submitted that the sentence was appropriate and within the law.

8. The Complainant informed the Court that on 9th July, 2018, around 6.00 pm, she fled after her grandmother (PW3) scolded her for spilling cooking oil at the kiosk she operated (PW3). She explained how she ended up at the Appellant's house, having been advised by a male neighbour and after unsuccessfully searching for her mother at her mother's place. She reported that the Appellant arranged for her to sleep on the couch while he took the bed. She then recounted waking up in the morning to find herself in the Appellant's bed, where he was touching her, kissed her and inserted his fingers into her vagina. She stated that she spent one night at the home and was found the next day after neighbours stormed the house and discovered her hiding in the toilet. While giving her testimony, the trial Court noted that she was avoiding eye contact with the Appellant on cross-examination.

9. PW2 was a clinical officer at the medical facility where the Complainant was examined and her P3 form was completed. Her evidence was that during the medical examination of the Complainant, her genitalia appeared normal, with an old hymen tear and the presence of spermatozoa. She was stood down to enable the maker to testify.

10. PW3 was the Complainant's grandmother and guardian. She testified that the Complainant had fled and that they had attempted to search for her that night without success. She explained that the Complainant left because she had been reprimanded over a jiko that she had asked her to light but had failed to do. She mentioned that she reported to the village elders when the Complainant did not appear the following day, which prompted a search in the neighbourhood, ultimately leading them to the Appellant's house, where one of the Complainant's friends reported having seen her there and noted that the Complainant often visited.

11. PW4, a nurse at the health facility where the P3 form was completed, was called as a witness with the Appellant's consent after the prosecution could not produce the maker of the medical documents. She testified that the Complainant was examined on 11th July, 2018 and relayed findings similar to PW2's testimony, except that she added the observation that the spermatozoa seen had degenerated.

12. The Appellant was placed on his defence and testified that on 9th July, 2018 he returned home and was confronted by neighbours and members of the public, who referred to him as 'Boss', a name he denied was his. He stated that they confronted him and accused him of defiling the Complainant, who had claimed that a male friend asked her to go to the Appellant's home.

13. This being the first appellate court, I am guided by the principles enunciated in the case of Okeno v Republic (1972) EA 32, where the Court of Appeal set out the duty of the first appellate court as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

14. As an appellate Court, I must reconsider and evaluate the evidence before the trial Court and arrive at an independent conclusion, bearing in mind that I did not hear or see the witnesses.

15. I have considered and analyzed the evidence that was tendered in the trial court by both the Appellant and the prosecution, the grounds of appeal, and the written submissions by the parties herein. The issues for determination are two pronged;

    i. Whether the prosecution proved their case to the required threshold, and;

    ii. Whether the sentence was appropriate.

16. The Appellant was convicted in Count 1 with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are:

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

17. He was convicted in Count II for Sexual Assault contrary to Section 5 (1)(a)(1)(2) of the *Sexual Offences Act*. This Section provides that:

    (1) Any person who unlawfully—

        (a) Penetrates the genital organs of another person with—

            (i) Any part of the body of another or that person; or

            (ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

        (b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

    (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

18. In John Irungu v Republic, (2016) eKLR , the Court of Appeal held that the essential ingredients of the offence of sexual assault are as follows;

> " .... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

19. The Complainant, in her testimony, did not state that the Appellant penetrated her vagina using his penis. This implies that she did not accuse the Appellant of defiling her. She, however, told the court that the Appellant inserted his fingers into her vagina.

20. The prosecution's case contained inconsistencies regarding the incident's dates, particularly whether the Complainant visited the Appellant's house on 8th, 9th, or 10th July 2018. This may explain why the prosecution stated in the charge that the dates ranged from 8th to 10th July, 2018. What is clear is that both the Appellant and the Complainant were taken to the police on the evening of 10th July, 2018, after the complainant was found at the Appellant's house that afternoon. In my view, this assessment of the dates was very critical, as the Appellant insisted that she went to the Appellant's house on the 9th, a Monday, and not on the day she is said to have fled from home after being scolded for fear of reprimand. From her testimony, the Complainant implied that she was at the Appellant's house for one day (and night), and that it was the following day that they were accosted and taken to the police, where they spent the night in the cells, including herself, before being escorted to the hospital the next day. Where, then, was PW1 on the 8th?

21. One male neighbour was mentioned, who was reported to have advised the Complainant to go to the Appellant's house. The Complainant did not disclose this individual's identity. Still, his mention in the case raises some doubt as to whether the aforementioned male accompanied the Complainant to the Appellant's house or if the Complainant was with that male on the 8th, which is the date she is said to have left home.

22. There was no certainty regarding the identity of the person being referred to as Boss, nor did they call Moses, who was mentioned as the principal informer concerning the Complainant's whereabouts. There was also no certainty about the arrest and what may have transpired in between. The Appellant, in his defence, stated that he was not home on the stated dates and that he did not know the person referred to as Boss.

23. While omitting a call to the investigating officer is not fatal, I believe this case exhibited glaring loopholes regarding whether the Complainant was truthful about the incident. It was necessary to call the investigating officer. Aside from her grandmother, there were no other independent witnesses to corroborate the allegation, mainly to clarify what transpired; where was the arrest on 10th July, 2018? Why was the Complainant arrested and placed in the cells as well? She fled her home, fearing punishment for an incident that had various explanations; she provided different reasons, and PW4 also offered different explanations. Was she telling the truth, or was she implicating the Appellant in the incident out of fear of reprimand? The medical documents did not provide evidence of defilement; the spermatozoa observed were described as degenerated, suggesting that their presence may have been over a more extended period than the dates referenced, particularly as she was taken to hospital less than 48 hours after the dates mentioned. The Appellant's and the Complainant's arrest and incarceration in the cells seem to have been utilised as a fact-finding mission.

24. I scrutinised the Complainant's testimony, reviewed the course of the trial, and noted that the trial Court recorded the Complainant's testimony before conducting a voir dire examination, a procedural hearing to determine the admissibility of evidence regarding the testimony of children. I also note that, in examining her demeanour, the trial court observed and recorded that she avoided making eye contact with the Appellant during cross-examination.

25. The law is that the absence of a voir dire examination is not automatically fatal to the evidence of a witness. This was the observation made by the Court of Appeal in Maripett Loonkomok v Republic (2016) eKLR where it was held that:

> " We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014."

26. In Sammy Ngetich v Republic [2018] eKLR where the trial Court took the evidence of a Complainant in the case who was aged 13 years without conducting a voir dire examination, Mrima J. quashed the conviction and said that:

> " 15. The Court of Appeal has also through a long line of cases held that voir dire examination of children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. However, the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person unless there is sufficient independent evidence to support the charge. (See Maripett Loonkomok vs. Republic (2016) eKLR)."

27. The law stipulates that in circumstances where a voir dire examination is not conducted, the evidence provided by a child cannot serve as the sole basis for convicting an accused individual. This requirement is essential to ensure that the child's testimony is not only credible but also corroborated by independent evidence. In the case at hand, after careful consideration of the available evidence, I find that no independent corroborating evidence was presented to support the charges against the Appellant. Therefore, the lack of such evidence undermines the validity of the child's testimony in securing a conviction.

28. In addition to the glaring loopholes in the prosecution's case, it is also evident that after the amendments to the charge on 25th September, 2019 and the subsequent hearing on 16th October, 2019 the Appellant applied to have the Complainant recalled for further cross-examination following the amendment, and this request was granted. Despite this, the Complainant was never made available for the additional cross-examination. The Appellant argued that this situation resulted in prejudice against him, and I concur.

29. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond reasonable doubt. In the case of Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated the following regarding the degree of proof beyond reasonable doubt:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a

> doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

30. The test of proof beyond reasonable doubt was not met in this case on all counts, including the alternative charge. In the circumstances, I find and hold that the Appellant's conviction was unsafe, and the appeal is successful.

31. I hereby quash the conviction and set aside the sentence. The Appellant shall be released unless he is otherwise lawfully held.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 24TH DAY OF FEBEUARY, 2025

C. KENDAGOR

JUDGE

In the presence of:-

Court Assistant: Beryl

Appellant present

Mr Omondi, ODPP for Respondent