AKN v Republic (Criminal Appeal E001 of 2023)
[2025] KEHC 4019 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL E001 OF 2023

G MUTAI, J

MARCH 12, 2025

BETWEEN

AKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Vide a Petition of Appeal dated 1st December 2023, the appellant herein challenged his conviction and sentence on 29th September 2023 by the Hon S A Ogot in Msambweni Principal Magistrate Court Criminal S O No. E063 of 2022; Republic Vs A KN on the following grounds:-

    a. That the learned magistrate erred in law and fact in concluding that the prosecution had proved its case beyond reasonable doubt when there was confusion as the complainant could not clearly identify the appellant as her assailant;

    b. The learned trial magistrate erred in law and, in fact, by drawing a conclusion that there was penetration by relying on the doctor's report, which did not conclusively prove or connect the appellant with the alleged penetration and completely ignored the complainant's glaring evidence where she clearly stated that she had a history of sexual activity with two other men not presented before the trial court;

    c. The learned trial court erred in law and by fact by convicting the appellant while relying on the uncorroborated evidence of the complainant, who is mentally challenged, without conducting a test of lucid moments;

    d. The learned trial magistrate erred in law and fact by convicting the appellant while ignoring the glaring fact that the prosecution and the investigating offices failed to call crucial witness who were possible penetrators as named by the complainant in her statement;

e. The learned trial magistrate erred in law and fact by failing to consider the material evidence as provided by the defence to support their alibi;

f. The learned trial magistrate erred in law and fact by convincing the appellant on res gestae evidence despite the same being contentious and lacking any chronology;

g. The trial court exercised its discretion punitively as the sentence was too harsh and excessive as against the weight of the evidence that was presented before the trial court.

2. The appellant prayed that his appeal be allowed and that the High Court quash the trial magistrate's conviction, set aside the sentence, and set the appellant free.

3. The appeal was opposed by the state.

4. On 27th May 2024, this court (per O Sewe, J) directed that the appeal would be canvassed by way of written submissions. Pursuant to the directions of the court, the parties filed written submissions. The written submissions were highlighted on 24th June 2024 before me.

5. The appellant filed written submissions on 7th June 2024 on the CTS/ eFiling platform. The court was, however, unable to access the said submissions. Reliance was, therefore, placed on the oral submissions that the appellant's counsel made in court. I shall refer to the oral submissions below.

6. The submissions of the respondent are dated 21st May 2024. Vide the said submissions, counsel for the respondent urged that the prosecution was able to prove its case beyond a reasonable doubt. That being so, it was urged that the appeal lacks merit and should be dismissed.

7. On the 1st ground of identification, it was urged that the fact the complainant was 15 years old was proved by the production of the clinic card, which was produced as an exhibit before the trial court. Her age at the time of penetration was thus proved as being 15 years old.

8. Regarding penetration Ms Mwaura, learned counsel for the state, submitted that the complainant testified that the respondent penetrated her vagina by putting his body part into the part of the part of the body she used for urinating. It was her submission that the evidence of the complaint was corroborated by the doctor who produced the P3. According to the report, the complainant's vagina could accommodate two fingers which, in that professional's opinion, proved penetration.

9. On the assailant's identity, she submitted that the complainant identified her assailant and described what transpired. She knew the assailant before the incident; therefore, her evidence was recognition.

10. Counsel urged that the doctor contended that there was penetration which corroborated that of the complainant. Ms Mwaura submitted that in arriving at her decision the trial court considered the totality of the evidence.

11. It was denied that the evidence of the complainant could not be relied upon as she is mentally challenged. Counsel for the respondent submitted that although the complainant has mental deficiencies, it did not mean that she was insane or that she could not understand her surroundings or the events that took place. She further urged that the complainant's evidence was clear.

12. It was urged that there was no requirement for a particular number of witnesses to be called. The evidence of the witness called was sufficient to prove the offence. Reliance was placed on the decision of the Court of Appeal in Ngugi vs Republic [2022] KECA 20 (KLR) and Donald Majiwa Achilwa & 2 others vs Republic [2009]eKLR. Ms Mwaura urged that the testimony of the prosecution witnesses during the trial was sufficient and cogent and the same dislodged the evidence of the defence. The court was thus urged to dismiss the said ground.

13. On the alibi defence raised by the appellant, it was urged that the same was raised quite late on the trial and ought, therefore, to be disregarded. Counsel urged that the alibi defence was a fabrication which this court ought to disregard.

14. Counsel for the respondent denied that its witnesses in the court below contradicted themselves. The evidence tendered was direct and admissible. It was urged that the ground of appeal that the appellant was convicted on res gestae evidence be dismissed.

15. On whether the sentence was excessive, it was urged that the same was the minimum sentence under section 8(4) of the *Sexual Offences Act*.

16. In the circumstances, it was urged that the appeal be dismissed.

17. As the oral submissions of the respondent were the same as those in the written submissions, I will not rehash them below.

18. During the oral submissions, Ms Oguna, learned counsel for the appellant, stated that the respondent had to prove the following elements during the trial in the court below: -

    a. Age of the complainant;

    b. Penetration; and

    c. Identify the accused person as the assailant.

19. Counsel admitted that the age of the complainant was proven. She denied that the second element was proved. She urged that the court was wrong to find that the absence of the hymen and the finding that the complainant's vagina could accommodate two fingers was proof of penetration. She urged that the complainant was taken to the hospital within 24 hours when it was possible to test for any fluid or virginal discharge. It was urged that during cross-examination, the complainant admitted to having engaged in sexual activity with two other people. This showed, in her view that the absence of a hymen could not be evidence of penetration.

20. Counsel submitted that it was unsafe for the court below to convict the appellant as there was no evidence of identification. She submitted that the assailant was not positively identified as the complainant first mentioned a Mr Jumaa. Given that she is mentally challenged, counsel submitted that a test of lucidity ought to have been conducted to determine if her testimony was credible or not.

21. Ms Oguna stated that the court below disregarded the alibi evidence raised by the accused person, which placed him at home at the time the alleged offence was committed.

22. Counsel submitted that the sentence on the appellant was too harsh as he was 17 years old when the offence was committed. She thus prayed that the appeal be allowed, the conviction and sentence be quashed, and the appellant released forthwith unless he was otherwise lawfully held.

23. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with second 8(4) of the *Sexual Offences Act*, No 3 of 2006.

24. I have considered the appeal and the evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32.

25. The issues that arise for determination in this appeal are;

i. Whether the prosecution proved its case to the desired threshold; and

ii. Whether the sentence meted upon the appellant was lawful.

26. This court has re-evaluated the evidence in this appeal in light of the submissions made on this appeal.

27. Section 8(1), (2), (3) and (4) of the *Sexual Offences Act* states:-

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. (4) 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. ”

28. it is now settled law that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitals; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

29. Were the said elements proved?

30. It would appear to me that the first element of the offence was proved. In my view, the trial court was right to note that the complainant was 15 years old at the time of the alleged offence on the basis of the clinic card which showed the date of birth as being 2nd November 2007. I am in agreement with the submissions of the respondent's counsel that age could also be discerned through observation and common sense and that the trial court had the opportunity to view the complainant and ascertain her probable age based on experience and common sense.

31. Having determined that the complainant was most probably 15 years old at the time of the alleged offence, was penetration proved?

32. The court notes the testimony of the complainant was not corroborated. The evidence of PW2 and PW3 does not show that they saw the appellant penetrate the complainant, but rather that they saw rusting in the maize plantation and a bicycle, they presumed belonged to the appellant. During her testimony, PW1 stated that when questioned, the complainant initially stated that she was dressing up after taking a short call and that upon being questioned further, she identified “Jumaa” as her assailant.

33. PW5, Dr Joy Nguku, a medical doctor, testified that upon being examined, the complainant was found not to be oriented in time. The clinical officer who examined the complainant found that the hymen was not intact and that her vagina could accommodate two fingers without resistance. Although it was indicated that there were signs of penetration, there was no detail as to what those signs were.

34. The laboratory test done showed nothing remarkable. The tests done on the appellant also showed nothing remarkable.

35. It is trite law that penetration may be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in Bassita vs Uganda S.C. Cr*iminal Appeal No. 35 of 1995* where the court stated;

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

36. Was it safe for the court to make a finding on the basis of such evidence? In the view of this court, the fact that the vagina of the complainant could accommodate two fingers is not necessarily indicative of penetration by the appellant, nor does the absence of the hymen. The complainant testified that she had engaged with sexual intercourse with Ndolo, Malau and Kadumu. She was, therefore, sexually active and could not, therefore, have had a hymen. As earlier stated the examination she was subjected to did not clearly indicate that she had been sexually assaulted. That, coupled with her initial denial of the alleged offence, coupled with the fact that she initially identified the assailant as "Jumaa", only to change her mind and state that it was Amadi who penetrated her, casts doubt on her account and renders, in my view, the conviction exceedingly unsafe.

37. The ineluctable conclusion I draw is that it was unsafe for the court to conclude that penetration had been proved.

38. Was the appellant the assailant? Having made a determination that penetration wasn't proven, it isn't necessary for me to determine this point. The court, however, stated that no one other than the complainant saw the appellant. the victim, as I have indicated, suffers from mental illness, as shown by the reports presented in court.

39. The appellant raised the issue of res gestae. The court notes that when initially questioned by PW2 and PW3, the victim denied that there had been anything unlawful. Later on, she blamed "Jumaa' for the act. These initial remarks may as well have been a more accurate description of what happened. Her initial statements ought, therefore, to have been given due consideration.

40. In the circumstance of this matter I find and held that the appellant's conviction was extremely unsafe. I set aside the conviction and sentence of the appellant. The appellant is to be set free forthwith unless he is otherwise lawfully held.

41. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Ogoti holding brief for Ms Oguna, for the Appellant;

Ms Valerie Ongeti for the State/Respondent; and

Arthur – Court Assistant.