IB v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 6357 (KLR) (7 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6357 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E023 OF 2024

JN NJAGI, J

MAY 7, 2025

BETWEEN

IB ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. E.M Kadima, SRM, in Garsen Senior Principal Magistrate's Court Sexual offence Case No. E002 of 2020 delivered on 5/10/2023)

JUDGMENT

1. The Appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the months of April 2021 and 23rd December 2021 at [Particulars Withheld] in Tana Delta Sub County in Tana River County, he intentionally caused his penis to penetrate the vagina of H.A (herein referred to as the complainant), a child aged 15years.

2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that the prosecution failed to prove the charge against the appellant beyond reasonable doubt; that the trial court used the records and facts of another file to convict the appellant which prejudiced the appellant and violated his right to a fair trial; that the case was marred by contradictions and inconsistencies that cast doubt on the prosecution case; that the case was fabricated and driven by a personal vendetta between the appellant and his in-laws and that the trial court erred in both law and fact by not giving consideration to the appellant`s defence of alibi.

3. The appeal was canvassed by way of written submissions of the appellant and those of the respondent.

Appellant`s Submissions

4. The appellant submitted that it was the duty of the prosecution to prove the case against him beyond reasonable doubt. That the ingredients of the charge of defilement were not proved. That the trial court failed to find that the case was fabricated by his in-laws. More so that the court failed to consider his alibi defence.

Respondent's Submissions

5. The respondent submitted that the age of the complainant was proved by production of a birth certificate. That penetration was proved by the evidence of the complainant and that of the clinical officer PW4 who found the complainant with a broken hymen. That the complainant in her evidence said that the appellant was her step-father and that he used to come to her room at night and defile her. That she identified the appellant as the perpetrator of the offence.

6. The respondent further submitted that the appellant did not show that he was in Garissa all the 8 months that the complainant said that he defiled her. Further that the alibi defence was not brought up during the prosecution case but only during the defence case and therefore the same was an afterthought.

7. On sentence, it was submitted that the appellant was convicted for defiling a child aged 15 years and was sentenced to 20 years imprisonment as provided by section 8(3) of the *Sexual Offences Act*. Therefore, that the sentence was legal and should be upheld.

Analysis and determination

8. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In the case of *Okeno vs Republic* [1972] EA 32 the Court of Appeal set out the duty of a 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 vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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, see *Peters v Sunday Post* [1958] E.A 424."

9. I have perused the grounds of appeal, the record of the trial court, the judgment and the written submissions filed by both parties. The issues arising for determination are:

    1. Whether the prosecution had proved the case against the appellant beyond reasonable doubt.

    2. Whether the trial court considered the appellant`s defence.

    3. Whether the sentence imposed by the trial court was proper.

10. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator – see *Dominic Kibet Mwareng v Republic* (2013) eKLR.

11. The complainant in this case told the trial court that she was aged at the material time aged 15 years. That she was born on 10/3/2006.

12. The investigating officer PW6 produced the complainant`s birth certificate as exhibit in the case, P.Exh. 6 which put the age at the complainant at 15 years at the material time. The trial court considered this evidence and found that the complainant was aged 15 years at the time of defilement. I am in agreement with the finding of the trial court. I find the age of the complainant to have been proved at 15 years.

13. On penetration, the complainant told the trial court that she was at the material time a pupil at [Particulars Withheld] primary school pupil. That she was living with her mother and step-father, the appellant. That sometimes in December 2021, the appellant opened the door to her room at night and entered into her room. He removed her clothes and started caressing her breasts. She was startled and remained paralyzed. He touched her vagina and then inserted his penis into her vagina. She told her mother about it but she did not do anything. The appellant since that day started to have regular sex with her. He always used to go there while armed with a panga. She continued to tell her mother about it but she was not taking any action. That in April 2020 she went and informed the village elder, Mzee Yakubu. She was interrogated by elders. She revealed to them what the appellant had been doing to her. They escorted her to Garsen police station where she made a report. She was taken to Garsen health centre for medical examination.

14. It was the evidence the evidence of YM PW2 that the appellant is his brother. That he was living with him in the same homestead but in different houses. That in the month of December, the appellant married the mother to the complainant. That on a certain day the complainant went to him and told him that the appellant used to go to her room at night and have sex with her. That he summoned elders to his home. The complainant repeated to the elders what she had told him They took her to Garsen police station and later to Garsen health centre whee her P3 form was filled.

15. PC Willi Mugendi PW3 testified that on the 9/1/2022 he and other police officers were led by an informer to the house of the appellant. They arrested him and took him to the police station.

16. A clinical officer at Garsen health centre, PW4, testified that he examined the complainant on the 23/12/2021 and found her with a missing hymen. She was found with an infection. He prescribed drugs. He filled her P3 form, During the hearing, he produced the P3 form and treatment notes as exhibits, P.Exh.1 and 2 respectively.

17. PC Wansulus Odenga PW6 testified that he took over the case for investigations after the officer who was handling it went for a promotion cause. He produced the complainant`s birth certificate as exhibit, P.Exh.6. The same indicated that the complainant was born on 10/3/2006.

18. When placed to his defence the appellant stated in a sworn statement that the complainant is his step daughter. That he married her mother when she was 2 years old. That later on her grandparents started to instigate her to run away. It was his case that he was in Garissa on the days he was accused of defiling the complainant.

19. Having internalized the evidence that was adduced before the trial court, the issues for determination are whether there was penetration on the complainant and that is in answered in the positive whether the appellant was identified as the person who did so.

20. The complainant testified that the appellant started to have sex with her in the month of December 2020. That this continued until the month of April 2021 when she reported to a village elder, PW2.

21. The trial magistrate held in his judgment that the complainant had a missing hymen and a high concentration of epithelial cells in her vagina. That this proved penetration into her vagina.

22. The appellant submitted that absence of hymen is not an indication of penetration. He cited the case of P.K. W. v Republic (2012) eKLR in support of this proposition where the Court of Appeal said that there are manty factors that can lead to loss of hymen including vigorous physical activity.

23. Indeed, the trial magistrate erred in making a finding that loss of hymen and concentration of epitheleal cells proved defilement. As stated in the *PKW case* (*supra*), some girls are born without hymen and even then, it can be lost due to many other factors and not necessarily due to defilement. Upon perusing the evidence adduced before the trial court, I find no medical evidence to support penetration on the complainant.

24. However, lack of medical evidence is not fatal to a charge of rape as the offence can be proved in other ways such as by way of oral evidence of the victim or by circumstantial evidence. This position was fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs Republic* Criminal Appeal No. 661 of 2010 (Eldoret), citing *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 (Mombasa), where the court stated that:

> The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.

25. In the absence of medical evidence to support the charge of defilement, the question is whether there was oral or circumstantial evidence to prove the same.

26. The complainant said that the appellant used to sneak into her house at night to have sex with her. There is then the question as to how the complainant identified the appellant as the person who was sneaking into her room to have sex with her.

27. The law is that evidence of identification especially where it takes place in difficult circumstances should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity. In *Francis Karuiki and 7 others vs. Republic* Cr. Appeal No 6 of 2001 [200] eKLR it was held that;

> " The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error."

28. In *Wamunga v Republic* [1989] KLR 424 at 426 the Court of Appeal had this to say on identification :

    a. "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction."

29. In *Kimea v Republic* (Criminal Appeal 010 of 2020) [2022] KEHC 104 (KLR) (18 February 2022) (Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.

30. The complainant in her evidence stated that the house had an external door that was closed from inside but that her room had no door. The complainant however never told the court how she identified the appellant as the perpetrator of the offence. She did not say whether there was any lighting in the room whenever the complainant used to visit her. She did not indicate whether the appellant used to talk to her such that she identified him by his voice. There was no indication that there was no possibility of another man getting into the house from outside and defiling her. It was a mistake on the part of the prosecutor to fail to bring out such evidence. The trial magistrate was in error in failing to address himself to the issue of identification when the offence was alleged to have been committed at night.

31. It is trite law that a court before convicting on the evidence of a single identifying witness, as in this case, should warn itself of the danger of basing a conviction on such evidence. In *Roria vs Republic* (1967) EA 583 the Court of Appeal stated at page 584 that:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

32. In *Kiilu & Another v Republic* [2005] eKLR, the Court of Appeal held that;

> "Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

33. In *Abdalla bin Wendo and another v Republic* (1953) 20 EACA 166 it was held that:

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

34. Having failed to adduce evidence how the complainant identified the appellant at night, it is my finding that the evidence of the complainant was not free from the possibility of error. I do not find other evidence pointing to the guilt of the appellant. It was therefore not safe to base a conviction on the evidence of the complainant.

35. The upshot is that I find merit in the appeal and hold that the case against the appellant was not proved beyond reasonable doubt. Consequently, the conviction entered on the appellant by the trial court is quashed and the sentence set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 7 TH DAY OF MAY 2025

J.N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant – present in person at G.K.Prison Malindi

Court Assistant - Ndonye