David v Republic (Criminal Appeal E057 of 2023)
[2024] KEHC 17 (KLR) (11 January 2024) (Judgment)

Neutral citation: [2024] KEHC 17 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E057 OF 2023

KW KIARIE, J

JANUARY 11, 2024

BETWEEN

JUSTUS MATIVO DAVID ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O case NO. E014 of 2020 of the Principal Magistrate's Court at Msambweni by Hon. S.A. Ogot–Principal Magistrate)

JUDGMENT

1. Justus Mativo David, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 0f 2006.

2. The particulars of the offence are that on diverse dates between February 2020 and May 2020 at [Particulars withheld] village of [Particulars withheld] location, within Kwale County, intentionally and unlawfully caused his penis to penetrate the vagina of G.C.B., a child aged 14 years.

3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:

    a) That the learned trial magistrate erred in law and fact by convicting the appellant without seeing that the prosecution failed to establish the age of the complainant.

    b) That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.

    c) That the learned trial magistrate erred in law and fact by failing to consider that the prosecution failed to adduce sufficient evidence to prove their case.

d) That the learned trial magistrate erred in law and fact for not noticing that the medical evidence did not corroborate the complainant's evidence.

e) That the learned trial magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.

f) That the learned trial magistrate erred in law and fact for dismissing the defence without any legal basis.

4. The appeal was opposed by the state through M/s. Nyawinda Kernael learned counsel. She raised the following grounds of opposition:

a) That the prosecution proved the case to the required standards.

b) That the sentence was reasonable in the circumstances.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.

6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:

a) Whether there was penetration;

b) Evidence must show that the accused is the perpetrator; and

c) The age of the victim must be below eighteen years.

In the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR Joel Ngugi J. said:

> Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they were proven.

7. The complainant (PW1) testified that in the year 2020, the appellant had sexual intercourse with her severally. As a result, she became pregnant and gave birth to a child, S.B.

8. In his defence the appellant pleaded an alibi and contended that he was falsely implicated due to an existing grudge over his wife's lost wallet which was found with the complainant. When confronted about it, she said it was given to her by her mother. He further said that he was implicated to cover for the man who impregnated the complainant.

9. When an accused person raises an alibi defence, the onus is on the prosecution to prove the defence false. In the case of Victor Mwendwa Mulinge vs. R [2014] eKLR the Court of Appeal while addressing the alibi defence stated:

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the

case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

10. In his defence, the appellant contended that he was admitted to Msambweni Hospital on 19th December 2019 and discharged in March 2020. The documents he produced did not have anything to suggest that they were from Msambweni Hospital. Secondly, even if they had, they only covered part of the period he is accused of having defiled the complainant. This alibi was therefore false.

11. His other defence that he was falsely implicated over a wallet and also to protect the man who had impregnated the complainant was hollow. When the complainant and her mother testified, they were not cross-examined on these issues. It is worth noting that at the time of these witnesses' testimony, the appellant had a defence counsel. The learned trial magistrate was therefore justified to dismiss it.

12. The medical report was produced by Peter Ngeti (PW3) a nursing officer at Shimba Hill Health Centre. When she was examined on November 27th, 2020, she was found to be six months pregnant.

13. A DNA report concerning samples taken from the appellant, the complainant, and baby S.B. was produced by Mwidani Omari (PW3). The report confirmed that the complainant was the mother of baby S.B. and the appellant was 99.99+% the father of the baby. This therefore confirmed that the appellant had sexual intercourse with the complainant.

14. A Copy of the birth certificate of G.C.B. was produced. It indicates that the complainant was born on the 15th day of April 2006. At the time of the offence, she was between thirteen years and eight months and fourteen years old. Section 8 (3) of the *Sexual Offences Act* provides:

> 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.

15. The prosecution therefore proved the age of the complainant.

16. From the evidence on record I find that the prosecution proved its case to the required standards. The conviction was safe.

17. Though the appellant contended that a material witness was not called, he did not indicate which witness he had in mind. It is worth noting that such a material witness becomes crucial when the prosecution evidence is barely adequate. The Court of Appeal for Eastern Africa in the case of Bukenya vs. Uganda [1972] EA 549, (Lutta Ag. Vice President) held:

> The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, the evidence was overwhelming against the appellant.

18. The argument by the appellant that the prescribed sentence under section 8(3) is the maximum sentence and that the court can impose a lesser sentence is simplistic and misguided reasoning. It does not require any interpretation.

19. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE