Arwasa v Republic (Criminal Appeal 80 of 2023)
[2024] KEHC 1485 (KLR) (20 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 80 OF 2023

DR KAVEDZA, J

FEBRUARY 20, 2024

BETWEEN

JAMES NYAANGA ARWASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. R. Kitwaga on 28th July 2022 at Kibera Chief Magistrate's Court Sexual Offences Case no. 20 of 2021 Republic vs James Nyaanga Arwasa)

JUDGMENT

1. The Appellant was charged and after a full trial convicted by the Subordinate Court of the offence of defilement contrary to sections 8(1) and 8 (3) of the *Sexual Offences Act*. He was sentenced to serve twenty (20) years imprisonment.

2. He filed an appeal challenging his conviction and sentence. He challenged the totality of the prosecution's evidence, against which he was convicted. He argued that essential witnesses were not called. He urged the court to quash his sentence. Parties filed written submissions in support and opposition to the appeal, which have been duly considered.

3. This is the first appellate court, and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence that was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify. With the above in mind I now proceed to determine the substance of the appeal.

4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. To succeed in a prosecution for defilement, it must prove that the accused committed an act

that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. The prosecution case was as follows. The Complainant (PW1) gave sworn testimony after a *voire dire*. She stated that she doesn't know her age and that she knew the appellant since he was a friend to her mother and visited them often. In 2020, the appellant would visit them while her mother was away. He would lock the door, undress her and defile her by inserting his penis into her vagina. This happened on several occasions but she was afraid to tell her mother who came home in the evening. She told her friend Phanice about the incident who informed her teacher Maureen. She gave a clear narration of her ordeal at the hands of the appellant on several occasions. I therefore hold that the Appellant is the one who committed the act of penetration.

6. The complainant's testimony did not require corroboration in accordance with the proviso to Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. The trial magistrate noted that the complainant had no grudge against the appellant and had been troubled by the whole ordeal. In addition, that she was a wise and intelligent child who decided to tell her friend who advised her to speak to her teacher. She was therefore satisfied that the victim was telling the truth.

7. With respect to additional corroborating evidence, the complainant's mother PW3 told the court that on 26th January 2021, she came home but did not find the complainant. She went to her school and the headteacher informed her that she had been taken to Nairobi Women's Hospital. She went to the Hospital, and her daughter explained to her that she had been sexually assaulted by the appellant. She was treated and discharged the following day. The mother reported the incident to Muthangari Police Station.

8. Lastly, there is the evidence of Dr. John Njuguna (PW2) who carried out the medical examination of PW1 on 26th January 2021 and produced the P3 (medical report) and Post Rape Care (PRC) Forms. He told the court that the outer part of PW1's genitalia was normal but there were lacerations on her vagina and the inner vaginal wall had inflammation and the hymen was broken. He opined that PW1 had been subjected to forceful penetration. I hold that this opinion is consistent with the evidence of penetration and corroborates PW1's testimony that the appellant penetrated her.

9. The appellant complained that essential witnesses were not called and in particular the complainant's sister who was playing outside when the alleged incident took place. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness. (see *Bukenya and others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).

10. From the testimony of PW1, the alleged child who was present was playing outside when then the sexual assault took place. It is my finding that in view of the totality of the evidence, the absence of the evidence of the complainant's sister did not create any doubt into the prosecution's case. It therefore was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with proviso to section 124 of the *Evidence Act*.

11. On the age of the complainant, the trial court considered the age assessment report dated 29th January 2021 which placed the complainant at 14 years old. The trial magistrate also noted the demeanour of the complainant and indicated that she was a child. There is therefore no doubt that PW1 was a child.

12. From the totality of the evidence, the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. I therefore affirm the conviction.

13. On the appeal against the sentence, the Appellant was sentenced to serve 20 years imprisonment. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I am satisfied that the sentence was harsh and manifestly excessive.

14. For the above reason, I hereby set aside the sentence of twenty (20) years imposed by the trial court and substitute it with a sentence of ten (10) years imprisonment. The sentence shall take effect from the date of the appellant's arrest being 28th January 2021.

    It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2024

D. KAVEDZA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Ms. Ntabo for the State

Appellant present in person

Nelson Court Assistants