ABM v Republic (Criminal Appeal E063 of 2021)
[2024] KEHC 975 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEHC 975 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E063 OF 2021

GMA DULU, J

FEBRUARY 6, 2024

BETWEEN

ABM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. 11 of 2019 at Voi Law Courts delivered on 25th January 2021 by Hon. F. M. Nyakundi (SRM)

JUDGMENT

1. The appellant was tried and convicted in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on 12th February 2019 at around 22:00hours at Voi Sub County within Taita Taveta County intentionally caused his male genital organ (penis) to penetrate the anus of DMM a boy aged six (6) years.
3. On conviction, he was sentenced to thirty (30) years imprisonment.
4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal and relied upon the following grounds:-
    1. The learned Magistrate erred by convicting him yet medical evidence adduced was not authentic.
    2. The learned trial Magistrate erred in convicting him yet failed to note that the provisions of Article 50(2)(c)(i) of the *Constitution* were not complied with.
    3. The trial Magistrate erred in convicting him yet failed to observe that the evidence adduced before the trial court did not meet the threshold of Section 107 of the *Evidence Act*.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

6. This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic* (1972) EA 32.

7. In deciding this appeal, I have to bear in mind that the burden was on the prosecution to prove each element of the offence, as codified under Section 107 of the *Evidence Act* (Cap.80). This being a criminal case also, the standard of proof is beyond any reasonable doubt.

8. The elements of defilement for which the appellant was convicted are the age of the complainant or victim who should be below 18 years. Secondly, sexual penetration even if partial. Thirdly, the positive identity of the perpetrator.

9. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.

10. With regard to the age of the victim or complainant who testified as PW2, a birth certificate was relied upon and produced in court as an exhibit. PW1 TI the mother of PW2 relied on the said birth certificate. The appellant himself in his defence acknowledged the age of the complainant, as they were neighbours. I find that the prosecution proved beyond any reasonable doubt that the victim or complainant PW2 was 6 years old at the time of the alleged incident.

11. I now turn to sexual penetration. The evidence on this element is that of PW2 the complainant who stated that the appellant penetrated him through the anus in his house after the mother (PW1), allowed PW2 to accompany the appellant home that night.

12. PW1 the mother of PW2 on her part, testified that immediately on arrival in the house of the appellant that night around 9:30p.m, the complainant PW2 informed her about the incident and both then proceeded to hospital.

13. In my view, the truthfulness of the evidence of PW2 is in doubt. This is firstly, because it would in my view be improbable that the appellant would do such an act shortly after he was personally handed over the child by the mother, since there was a very high risk of the child (PW2) reporting the incident to the mother (PW1).

14. Secondly, and the more important reason, is the absence of the medical evidence to support the sexual penetration allegation. In this regard, though PW1 and PW2 stated in evidence that they proceeded to hospital immediately that night after the incident, there was no record tendered in court from the hospital of such medical attendance by PW2 that day, even after the Medical Superintendent of Moi Hospital Voi, was summoned to court to explain what had happened. In my view, if the victim had attended hospital that night there would be available internal medical records to indicate so. Thus the evidence of PW1 and PW2 on attendance in hospital that night cannot be said to be true.

15. The available medical records tendered in court show that medical treatment of PW2 happened well after a month from the alleged date of crime, which in my view cannot be connected to the alleged incident herein, and could as well have been fabricated evidence.

16. The above disconnect in the prosecution evidence created a big gap on the alleged sexual penetration incident, whose benefit should have been given to the appellant. I do so, and find that sexual penetration of PW2 was not proved. On that account, the appeal will succeed.

17. With regard to the culprit, as I have already found that the prosecution did not prove sexual penetration alleged, I find also that the prosecution did not prove that the appellant was the culprit or perpetrator.

18. Consequently, and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for State