**LOO v Republic (Criminal Appeal E179 of 2022)**
**[2024] KEHC 1109 (KLR) (Crim) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1109 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E179 OF 2022**

**LN MUTENDE, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**LOO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. LOO, the appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, particulars being that on diverse dates between March and September, 2020 at Kasarani Sub County, within Nairobi County, he intentionally and unlawfully caused his genital organ (Penis) to penetrate the genital organ (vagina) of T.M. a child aged Fourteen (14) years old.

2. In the alternative he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars were that, on diverse dates between March and September, 2020 at Kasarani Sub County, within Nairobi County, he intentionally touched the genital organ (vagina) and breasts of T.M a child aged fourteen (14) years old. Having been taken through full trial he was convicted for the alternative charge of committing an indecent act with a child and sentenced to serve seven (7) years imprisonment.

3. Aggrieved by the conviction and sentence, the appellant appeals on grounds as follows:

    1. That the learned trial Magistrate erred in law and fact in failing to establish the fact that the prosecution had failed to prove its case beyond any reasonable doubt as required by law and therefore the conviction and the sentence of the Appellant on the alternative count was unsafe, was in error and amounted to grave misdirection.

2. That the learned trial Magistrate erred in law and in fact in entering a judgment against the Appellant that was not supported by evidence

3. That the learned trial Magistrate erred in law and in fact by delivering a judgment that is based on discredited and contradicted pieces of evidence which has no weight in law. The prosecution's case had a lot of doubts that ought to have been resolved in favor of the Appellant

4. That the learned trial Magistrate erred in law and in fact by delivering a judgment based on uncorroborated evidence which evidence ought to have been corroborated by the other pieces of evidence on record.

5. That the learned trial Magistrate erred in law and in fact by convicting the Appellant without considering the evidence tabled by the Appellant in support of an acquittal. The learned trial Magistrate rendered the judgment while ignoring the evidence adduced by the Appellant, which evidence was critical in the determination of the matter.

6. That the learned trial Magistrate erred in law and in fact by convicting the Appellant on the basis of insufficient prosecution evidence and therefore falling into a grave misdirection in the law and evidence and thus leading to an incorrect conclusion.

7. That the learned trial Magistrate erred in law and in fact by rendering a judgment without considering the evidence of a critical witness that was never called by the prosecution for no reason.

8. That the learned trial Magistrate erred in law and in fact by considering the case in its entirety in an unfair and speculative manner against the Appellant.

9. That the learned trial Magistrate erred in law and in fact by failing to consider the submissions and the evidence of the Appellant, and rendered a judgment based on lop-sided evidence which fell in error because the prosecution case contained contradictory evidence and therefore both the main count and the alternative charge were never proved beyond reasonable doubt as required by law.

10. That the learned trial Magistrate erred in law and in fact by failing to take into consideration the mitigation by the Appellant and therefore meted a harsh sentence against the Appellant.

11. That the learned trial Magistrate erred in law and in fact by basing her findings on conjecture, disregarded the Appellant's defence and resorted to filling in the gaps for the prosecution.

4. Briefly facts of the case were that the appellant herein was the complainant's mother's lover. For that reason he used to frequent their house. On diverse dates between the month of March and September, 2020 he would go to the house in the absence of the complainant's mother and molest the complainant. He would give her younger brother money to watch over his car that was outside the house then proceed to molest her. This happened on three occasions. But on the 4th occasion, she declined and told her brother not to leave the house. In the result the appellant left. Thereafter the appellant complained to her mother that she was afraid of him.

5. PW2, SA the complainant's mother did not see her using pads during the month of December 2021, hence on the 10th day of December, 2021 she sought to know why her periods were late. That is when PW1 confided in her that the appellant had penetrative sex with her. To her knowledge, the appellant, her man friend was HIV positive. She took the complainant to Kasarani Health Centre where she was examined and treated. The matter was reported to the police who investigated, effected arrest and caused the appellant to be charged.

6. Upon being placed on his defence the appellant, denied having committed the offence. Through an unsworn statement the appellant stated that he was in a love relationship with the complainant's mother and everything was perfect until 2020 when his business/bar closed down as a result of the corona pandemic.

7. That in July, 2020 he quit the relationship since he could not meet her insistent and peremptory requests. However, following, her request, he continued visiting her children whereafter he would take them to the salon. That the complainant's mother kept sending an intermediary with a view of reconciling with him but it did not happen. That on 29th November, 2021 he went to the Chief's Office to see their mutual friend. He encountered his friend Charles Omollo speaking to her on phone and he mentioned that he (appellant) had just arrived and she purportedly asked to see him. He agreed and went to her house with Charles and Henry Omondi where they found her having prepared chicken. They dined and drank alcohol. Prior to leaving he turned down her request to have him spend a night at her house and he did not see her again until 25th December, 2021 when she passed by his wines and spirits shop and found him with his wife. This encounter was followed by his arrest on 29th December, 2021 without being told the reason for the arrest. Subsequently at the police station it was alleged that he was sleeping with the complainant an allegation that made him laugh as it was laughable and shocking. That had he slept with the girl who was a virgin she would have bled and divulged the information to her mother, and, being HIV positive he would have infected the complainant, considering injuries that are sustained by a virgin.

8. The appeal was canvassed through written submissions, through the firm of MN OukoLaw Advocates. The appellant urged that in reaching the decision to convict the appellant the court only relied on the evidence of the victim whom it found truthful. That the discretion afforded to the trial court by virtue of Section 124 of the *Evidence Act* does not mean that the prosecution does not have to prove the case beyond reasonable doubt. That these were inconsistencies and obvious malice emanating from the victim's mother.

9. That had the appellant had sex with the complainant she could have contracted HIV and had he touched her breasts and vagina, he would definitely have had sex with her.

10. That the court rejected medical evidence of the appellant failing to appreciate that the question of his condition/status was introduced by the complainant, and also rejected evidence of an existing grudge between him and PW2, the mother of the complainant.

11. Further, that failure to call Hope the brother of the complainant as a witness was detrimental to the prosecution's case and the sentence meted out was harsh as the court did not consider the HIV status of the appellant as it should have considered a lesser sentence.

12. It is submitted by the respondent that the appellant penetrated the genital organ of the complainant with his penis. This happened on diverse dates and the medical evidence confirmed that the hymen had an old tear at 3. O'clock. That although the hymen can be broken by any other means other than sexual penetration, evidence adduced by the complainant proved the act of penetration.

13. That age of the child was proved by evidence of a birth certificate and the identification of the appellant as the perpetrator was positive.

14. On the issue of sentence, it was argued that it was proper in law. Reliance was placed on the case of *Ogolla S/O Owuor v Republic* (1954) WACA 270.

15. This being a first appellate court, I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of *Okeno v Republic* [1972] EA 32, it was held that:

> " 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 v R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *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 courts' findings and conclusions; 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] EA 424".

16. The prosecution is faulted for allegedly not proving the case against the appellant. The main charge was defilement. Section 8(1) of the *Sexual Offences Act* provides that:

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

17. From the definition by statute ingredients of the offence of defilement are:

> i. The age of the victim.
>
> ii. The act of penetration
>
> iii. Positive identification of perpetrator.

18. A child is defined by the *Children Act*, 2022 as a person below the age of eighteen (18) years, a definition that is upheld by the *Sexual Offences Act*. In the case of *Hadson Ali Mwachongo v Republic* (2016) eKLR, the court stated that:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim".

19. In the case of *Mwalengo Chichoro Mwajembe v Republic* (2016) eKLR the Court of Appeal stated that :

> " ....the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal Appeal No 19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*,

Criminal Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

20. The burden of proving the case was upon the prosecution and the standard was beyond reasonable doubt. Evidence was adduced of a birth certificate issued to T. M. O. According to the registration information the complainant was born on 15/1/2007. At the time of the incident she was of an apparent age of fourteen (14) years shy fifteen (15) years. This fact is not in dispute, therefore the ingredient of age was proved as required.

21. On the question of penetration, Section 2 of the *Sexual Offences Act* defines the act as:

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person"

22. It is in evidence that the act was committed on diverse dates and it used to happen after the appellant sending the complainant's little brother, Hope, to watch over his car that was parked outside. The complainant narrated how the assailant, stated to be the appellant would caress her before penetrating her private parts with his private parts that she referred to as a "dudu". It was her testimony that at the outset she did not comprehend what was going on. Thereafter she attempted to resist but the appellant took her to the bedroom as usual and told her not to fear him. In the result he committed the act of inserting his genetalia into her genital organs.

23. Medical evidence adduced established the fact of the complainant's hymen having been broken. As correctly opined by the trial court, the question of a broken hymen may have been caused by varying reasons as stated in the case of P.K.W v Republic (2012) eKLR. However each case is treated according to its own circumstances pursuant to evidence adduced.

24. Section 124 of the *Evidence Act* provides thus: Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".

25. It is urged that the evidence of the complainant should have been corroborated. Pursuant to the provision of Section 124 of the *Evidence Act*, the trial court which heard evidence of the complainant and observed her demeanor was supposed to either believe her or disbelieve her for reasons that were to be recorded. The trial court found that the medical examination was conducted a year later therefore it was questionable if penetration did occur.

26. The same court however reached a finding that in respect of the offence of the appellant having committed an indecent act with a child was telling the truth and it had no doubt because the complainant stated that the appellant touched her breasts, sucked them and even touched her vagina.

27. It has been variously held that the fact of defilement and penetration does not necessarily require prove of medical evidences. It can be proved by oral evidence of the complainant and circumstantial evidence. (Also see the case of *AML v Republic* (2012) eKLR).

28. In the case of *George Kioji v Republic*, Criminal Appeal No 270 of 2012 (Nyeri) the Court of Appeal held that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief".

29. The minor testified and was believed by the court. It was erroneous on the part of the trial court to believe the act of the appellant committing an indecent act but doubting the question of penetration.

30. It is urged that some critical witness was not availed to testify. The uncalled evidence was of the minor who would be made to leave the house prior to the complainant being molested. In the case of *Donald Majiwa Achilwa & 2 others v Republic* (2009) eKLR the Court of Appeal held that:

> " The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution".

31. Such an offence can be proved by evidence of the victim if believed by the court therefore failure to call a witness who could not adduce direct evidence as to the fact was not detrimental to the prosecution's case.

32. The appellant complains that the court disregarded contradictory evidence of the act having occurred yet he had broken up with the complainant's mother and that had he violated the complainant she could have contracted the virus. The risk of contracting HIV infection from an act of unprotected vaginal sex with a positive individual like the appellant herein is not 100%. Therefore the incident having occurred must not necessarily mean that proof would have been the complainant having contracted the infection.

33. On the question of the some contradiction having emanated, PW2 stated in cross examination that their relationship started in March 2020 and ended in October 2020. The particulars of the offence refer to the period between March 2020 and September 2020. In the case of *Twehangane Alfred v Uganda*, Criminal Appeal No 139 of 2001 (2003) UGCA 6 it was stated that:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

It is apparent that the alleged inconsistencies do not weaken evidence adduced by the complainant. It is notable that the evidence was not shaken at all.

34. The trial court is also faulted for disregarding the elaborate defence put up. Indeed the court considered the issue of an existing grudge between the appellant and the complainant's mother, rejected the allegation and went on to give the reasons as even after the breakup the two would still communicate and the issue of the alleged grudge was not raised during cross examination. The court did not misdirect itself because had it been the case it would have been interrogated at the earliest possible time through cross examining witnesses which was not the case.

35. From the foregoing it appears that the offence committed by the appellant was defilement and I so hold, but not the alternative count as found by the trial court. For that reason, I do set aside the order of the court convicting the appellant on the alternative count which I substitute with a verdict of guilty in respect of the appellant on the main count of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.

36. Section 8(3) of the *Sexual offences Act* provides thus:-

    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.

    The mitigating factor advanced was the question of the appellant being HIV positive. He was also remorseful and a father of five (5) children. The court wanted to be persuaded by some documentary evidence as to the ailment and also had the victim in mind. This court takes note of the same. In the result the appellant shall serve ten (10) years imprisonment, effective from the date of sentence, the 22nd September 2022 since the appellant was out on bond.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 8TH DAY OF FEBRUARY 2024.**

**L. N. MUTENDE**

**JUDGE**

In the Presence of:

Mr. Achillah for Appellant/ Applicant

Applicant/ Appellant

Ms Wafula for ODPP