Wekesa v Republic (Criminal Appeal 56 of 2023)
[2024] KEHC 1559 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1559 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 56 OF 2023

DR KAVEDZA, J

FEBRUARY 21, 2024

BETWEEN

ERICK WEKESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Boke (S.P.M) on 29th January 2020 at Kibera Chief Magistrate's Court Sexual Offences Case no. 46 of 2017 Republic vs Erick Wekesa))

JUDGMENT

1. The Appellant was charged and after full trial convicted for the offence of defilement contrary to section 8 (1) and (4) of the *Sexual Offences Act*. He was sentenced to serve fifteen (15) years imprisonment.

2. Being aggrieved, he filed the present appeal, challenging his conviction and sentence. The grounds of appeal are: He challenged the totality of the prosecution's evidence, against which he was convicted. He complained that essential prosecution witnesses were not called to testify. That his defence was not taken into consideration. Finally, that his sentence was harsh and excessive.

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 analyse and re-evaluate the evidence that was before the trial court to 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, 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, the prosecution 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." The other ingredients are proof of the age of the victim and the positive identification of the assailant. The appellant and the respondent filed written submissions which have been duly considered.

5. The prosecution case was as follows: J.O (PW 2), The complainant testified that her birthdate was May 6, 2001, and she was enrolled in Form Two at the time of the incident. She informed the court that she had befriended the appellant during her Form One year after meeting him at church. On June 3, 2017, while on her way home from school, she encountered him and accompanied him to his residence in area 87. The appellant disclosed that he had an altercation with his wife, resulting in him staying with his brother. On that specific day, she did not return home but stayed with him for a week. Throughout her stay, she asserted that they shared the same bed and engaged in sex. However, she told the court that during the ordeal, she felt pain and urged him to stop.

6. Furthermore, she testified that her mother eventually located her at the appellant's residence. The incident was reported to the police, and she was subsequently taken to the hospital for medical attention.

7. In her testimony, PW 2 gave a clear and graphic testimony of her encounter for a week with the appellant. She knew the appellant, with whom they had a relationship over a year. I therefore hold that the appellant is the one who committed the act of penetration.

8. The complainant's testimony did not require corroboration in accordance with the provision of 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. In addition, her demeanour during the trial was well documented, and the trial court found that there was no reason why she would lie. The trial court was therefore satisfied that the victim was telling the truth.

9. With respect to additional corroborating evidence, PW 1, the complainant's mother, recounted the events of 2017 when her daughter went missing after school. Distraught, she approached her son for information, who disclosed that the appellant had intended to elope with the complainant. Determined to locate her daughter, PW 1 sought out the appellant and persuaded him to reveal the complainant's whereabouts. After some hesitation, he agreed and led her to his residence.

10. Upon knocking on the door, it was the complainant who answered. PW 1 informed the court that she had already reported the disappearance to the Kabete Police Station. Subsequently, she detailed how they took her to Nairobi Women's Hospital for a thorough examination and treatment. Throughout her testimony, PW 1 emphasized her familiarity with the appellant, as they both attended the same church.

11. Dr. Peter Wanyama (PW 3) of Nairobi Women's Hospital testified on behalf of Dr. Ojwang, who had examined the complainant on 11th June 2017 but had since resigned from the hospital. Upon examination, she had a normal external vagina, but her hymen was broken. A urine test was done with no spermatozoa. There were a few pus cells. He produced the Post-Rape Care (PRC) Form. He opined that PW 2 had been subjected to penetration. I hold that the opinion of the medical expert is consistent with the evidence of penetration and corroborates PW 2's testimony that the appellant penetrated her.

12. The investigating officer, PC Pauline Katungi summarised the prosecution's evidence. She produced the complainant's birth certificate.

13. On the age of the complainant, the trial court considered the complainant's birth certificate, which indicated that she was born on May 6, 2001. She was therefore 16 years old at the time the offence

was committed. There is therefore no doubt that PW 2 was a child within the meaning of the *Sexual Offences Act*.

14. The appellant complained that essential witnesses were not called. The witness is the doctor who examined the complainant. 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 the 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).

15. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the *Evidence Act*. In addition, the appellant did not raise an objection to the production of medical report by PW 3 on behalf of Dr. Ojwang' who had since resigned.

16. The Appellant further argued that his defence was not considered. In his testimony, he denied the charges terming them a fabrication. He accused the complainant's mother of fabricating charges against him the appellant was allegedly giving her husband alcohol. When weighed against the prosecution evidence, particularly the testimony PW 1, the evidence of the appellant amounted to a mere denial of the offence and was rightly dismissed.

17. 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 of the trial court.

18. On appeal against the sentence, the Appellant was sentenced to serve fifteen (15) 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 have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.

19. For the above reason, I hereby set aside the sentence of fifteen (15) years imprisonment 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 conviction. In addition, the 2 years, 7 months and 18 days spent in remand custody shall be considered when computing the appellant's sentence.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Ms. Ntabo present for the Respondent

Nelson Court Assistant