Mogire v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 1928 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 1928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E035 OF 2023

HI ONG'UDI, J

MARCH 1, 2024

BETWEEN

JACOB NYAMAO MOGIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement delivered on 14th June, 2022 by Hon P. K. Mutai Senior Resident Magistrate in Kisii Chief Magistrate's Court Criminal (S.O) Case No. 27 of 2021)

JUDGMENT

1. Jacob Nyamao Mogire the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on diverse dates between 17th December, 2020 and 13th February, 2021 at Bomakomki sub-location Bomorenda Location in Kisii South Sub-county within Kisii County, intentionally caused his penis to penetrate the vagina of A.N.M a child aged nine (9) years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The Appellant denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave a sworn statement of defence and called one witness. He was finally convicted and sentenced to serve twenty (20) years imprisonment.

4. Being dissatisfied with the Judgment he filed his Petition of Appeal on 12th September, 2023, citing eight (8) grounds which he later amended to read as follows:

    i. That the learned trial magistrates erred in both law and facts by failing to note that the language used by the trial court to swear in the witnesses was not indicated whether it was English or

Kiswahili or the witnesses took their oath under which language hence that amounted to gross violation of the appellant's constitutional rights to fair trial.

ii. That the Judgment of the court was a nullity as the trial proceeded without the court warning that the appellant, had a right to a fair and impartial trial as enshrined in the *Constitution* as per Article 50 (2) (n) i.e the right to be represented by the advocate.

iii. The learned trial magistrate erred in law and in fact by failing to note that the offence before was out of family feud and if it was true that the appellant had committed he was to be charged with incest in that case.

iv. The learned trial magistrate erred in law and in fact in dismissing the appellant's defence.

v. That, the medical report rendered before court was totally fabricated.

5. A summary of the case before the trial court is that PW1 who is a step daughter to the Appellant was in bed with her two younger siblings (brother and sister) when the Appellant came to sleep with them. Their mother (PW2) was away. The Appellant removed her clothes and she found herself naked the following day. On another day when PW2 was away the Appellant took her to PW2's bed and removed her clothes. He placed his penis in her private parts after removing his clothes. It was painful the first time but not the second time.

6. She reported the happening to PW2 after the two incidents. She denied having been told what to tell the court.

7. Stella Okenyuri Moenga who is PW1's mother testified as PW2. She testified that on 3rd December, 2021 she noticed that PW1 appeared disturbed. Later when PW1 was in bed she removed her pant and noticed that her private part was enlarged. On further inquiries the child informed her that she had been defiled by her father (Appellant) on 17th December, 2020 and 13th February, 2021 during her mother's absence. She later took PW1 to hospital and upon examination it was confirmed that the child had been sexually abused and had an infection. She reported the matter on 10th March, 2021.

8. Nahashon Okari (PW3) a Clinician at Iyabe sub county hospital testified that PW1 came to the facility with a history of having been defiled by the step-father. She was upon examination found to have a broken hymen. There was therefore evidence of penetration. He produced the signed PW3 Form as P EEXB2.

9. Mercy Kiprop No. 102618 stated that the defilement report was made on 10th March, 2021 by PW2. Investigations were undertaken including taking the child to hospital.

10. The Appellant elected to give a sworn statement of defence and called one witness. He denied the charges saying he had had issues with PW2 and asked her to leave in peace. She threatened to do him something which he will live to regret. Rhoda Moraa who is the Appellant's grandmother testified that the allegations against the Appellant were false. That PW2 took the child to hospital without their knowledge, as the Appellant was working in a butchery. She later learnt of his arrest

11. The Appeal was disposed of by way of written submissions. In his written submissions the appellant contends that his rights were infringed on during the hearing process. He claims not to have understood what was happening. Further that the record does not show which language was used. He referred to the case of *AMO V Republic* Criminal Appeal V Republic Criminal Appeal No. 44 of 2018 eKLR among others. Thus section 89 *Criminal Procedure Code* was violated.

12. He submitted further that no questions were put to PW1 to test her credibility. It's his submission that PW1's and PW2's conduct is questionable considering the questions PW2 was asking PW1. He also

asks why it took PW2 so long to report the incident. That her evidence contradicts that of the clinician (PW3). Reference was made to the case of *Richard Aspella v Republic* Appeal No. 45 of 1981 (COA) He argues that the reason why PW2 framed him was because he had asked her to leave in order for him to marry someone else.

13. On sentence he submitted that the 20 years sentence was harsh considering what the court stated in the case of *Evans Wanjala Wanyonyi V Republic* [2019] eKLR. Lastly that his right to legal representation was violated.

14. The respondent's submissions dated 3rd November, 2023 were filed by Justus Ochengo, prosecution counsel. Counsel opposed the Appeal on the following grounds:

    i. There exists overwhelming evidence against the appellant.

    ii. Age of the victim was proved by the testimony of the minor who testified and indicated she is 9 years old. A birth certificate was produced as Exhibit 3 by the prosecution and it showed the minor was born on 24/12/2011. The evidence was not challenged by the accused who is the victim's father. That the prosecution proved the age of the victim to be 8 years and three weeks as at the date of defilement.

    iii. Penetration was proved by the testimony of the victim who succinctly testified how the appellant defiled her twice. Her testimony was not challenged or shaken during trial. The victim was consistent in her testimony. Her testimony was corroborated by that of the medical officer who indicated that upon examination of the victim's genital, she found that her hymen was broken. It's our submissions that penetration was proved beyond reasonable doubt.

    iv. This was a case of recognition. The victim and the appellant were step father and step daughter. The victim knew the step father well. During the defilement the appellant told the minor not to tell the mother.

    v. The defence tendered was a mere denial and was rightfully dismissed

    vi. The sentence provided in law is life imprisonment. A sentence of 20 years was very lenient by the trial court considering the perpetrator in the instance case was a father who ought to have protected the daughter.

    vii. The conviction and sentence is proper.

    viii. The appeal lacks merit and ought to be dismissed.

Analysis and Determination

15. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh before arriving at its own decision bearing in mind that it did not see nor hear the witnesses. In *Kiilu & another V Republic* [2005] 1 KLR the Court of Appeal held:

    i. The appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    ii. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence so 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.

Also see *Simiyu & another v Republic* [2005] 1 KLR 192, *Patrick & another V republic* [2005] 2 KLR 162; *Muthoko & another V Republic* [2008] KLR 297;

16. I have carefully considered the evidence on record, grounds of Appeal, submissions and the law. The issues I find falling for determination are:

    i. Whether PW1 was defiled

    ii. Whether the Appellant was identified as the defiler

Issue No. (i) Whether PW1 was defiled

17. Section 8(1) of the *Sexual Offences Act* defines defilement as follows:

    A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

    It goes further under section 8(2) to state the punishment for such defilement as follows:

    A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

18. Under these provisions there must be proof of (i) age and (ii) penetration.

    Age

    PW1 the minor told the court she was aged nine (9) years. The date of birth was not stated. He mother (PW2) in her evidence never stated when the child was born. All she said is that the child was nine (9) years old. The record has a birth certificate issued on 31st March, 2021, showing PW1 as the mother and the Appellant as the father of PW1. To my surprise this birth certificate which was never produced as an exhibit was marked as P EXB3 by the learned trial magistrate when PW1 (a child) identified it. That was very unprocedural.

19. The investigating officer (PW4) who should have produced it never made mention of it in his evidence. The trial magistrate at Pg 3 of the Judgment states:

    > " The complainant indicated she was nine (9) years old. Birth certificate produced shows the date of birth as 24th December, 2011. As at 17th December, 2020 she was eight years and three weeks and therefore a minor".

20. It is clear that the investigating officer (PW4) may not have been aware of the existence of the said birth certificate yet he was the one handling the case. My finding is that the birth certificate was unprocedurally produced and its presence on the record is of no consequence.

21. The charge shows that the offence was committed between 17th December, 2020 and 13th February, 2021. It is PW2's evidence that:

    i. She learnt of the happenings on 3rd March, 2021.

    ii. The next day she went to work. It's during the weekend that she took the child to Iyabe hospital. She did not state the date

    iii. She reported the matter on 10th March, 2021.

22. There appears to be so much confusion about the dates. In his evidence PW3 (clinician) states that the victim came to hospital on 10th October, 2021. The P3 document shows that PW1 was sent to

hospital on 11th March 2020. Secondly the treatment notes which were only marked as PMFI 1 were not produced, as an exhibit.

23. PW1, PW2 and the appellant lived together. The evidence by PW1 is that she was defiled twice. She did not however give any dates. On the other hand, PW2 who received the report from PW1 gave the dates of incident as 17th December, 2020 and 13th February, 2021. All this time she never noticed anything on the child save for 3rd March, 2021 when the child looked disturbed. To make matters worse she never took immediate action on 3rd March, 2021 until much later. Since the treatment notes were not produced no one knows when the child was taken to hospital.

24. In cross-examination by the appellant PW2 stated that she did not take action because the appellant had threatened to leave her. That he had told her to leave his home as he wanted to marry.

25. A perusal of the P3 form (P EXB 3) and the evidence of PW2 reveals that upon examination PW1 was found to have a broken hymen with the laboratory findings showing nothing positive. Infact section C of the P3 Form reads

    2

    (a) Broken hymen, No lacerations, No PVD, No blood stains

    (b) No PVD No blood stains

    5 HVS – No pus cells seen.

    The breaking of the hymen was not fresh.

26. In his sworn defence the appellant explained how he had, had issues with PW2. He confirmed having told her to leave in peace. That she threatened that before leaving she would do something that he would always regret.

27. One thing that is settled is that a broken hymen "per se" is not proof of penetration. Penetration is defined under section 2 of the *Sexual Offences Act* as:

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

28. In the present case there was a lapse of 2½ months between the alleged first incident and 3rd March, 2021 and 18 days from the alleged second incident of 3rd March, 2021. This was too long a time to have any appropriate medical evidence. See Alex Chemwotei Sakong V Republic [2018] eKLR. Therefore, the only evidence available is the oral evidence of PW1 which is unsupported by proof of any sign of penetration.

29. The ingredient of penetration has not been satisfied to the required standards. It would not add any value for this court to delve into the issue of identification of the perpetrator. It was the duty of the prosecution to prove all this to the required standards. The differences between PW2 and the Appellant could not also be dismissed without any consideration.

30. Upon due consideration of all the evidence before this court I find that the prosecution did not prove its case to the required standard. The appellant should have been given a benefit of the doubt raised. The upshot is that the appeal has merit and is allowed, with the following as the orders

    i. Conviction quashed

    ii. Sentence set aside

    iii. The appellant to be released forthwith unless otherwise lawfully held under a separate warrant

31. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE