Ndeta alias Obadiah v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 2415 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2415 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E007 OF 2023

GMA DULU, J

MARCH 5, 2024

BETWEEN

ELVIS ANJICHI NDETA ALIAS OBADIAH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E011 of 2021 at Voi Law Courts delivered on 25th January 2022 by Hon. C. K. Kithinji (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 8th February 2021 at [Particulars witheld] estate in Voi Sub County within Taita Taveta County intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of AW a girl aged 13 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and place intentionally and unlawfully touched the vagina of AW a a girl aged 13 years.

3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to twenty (20) years imprisonment.

4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal relying on the following amended grounds of appeal:-

    1. The charge sheet as drawn was defective since the particulars revealed information not disclosed during proceedings. The name of the victim of the offence was indicated as AW while the birth certificate adduced as PExhibit 1 contained name AW2.

2. The learned Magistrate erred in law by convicting and sentencing the appellant yet failed to find that the Constitutional rights to a fair trial under Article 50(g)(h) was violated.

3. The learned Magistrate erred in law and fact by failing to find that there was a crucial witness who was mentioned by PW1 but was never called by the prosecution to testify.

4. The learned trial Magistrate erred in law and in fact by failing to find that the victim's age was not proved as required by law.

5. The learned trial Magistrate erred in law and in fact by failing to find that the penetration was not proved to have occurred as required in law.

6. The learned trial Magistrate erred by failing to find that the appellant's identification was not positive and as such cannot safely sustain a conviction.

7. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the state and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.

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 v Republic* (1972) EA 32.

7. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional evidence.

8. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80), the burden was on the prosecution to prove each element of the offence of defilement for which the appellant was convicted.

9. This being a criminal case, the standard of proof was beyond any reasonable doubt – see *Sawe v Republic* (2003) eKLR.

10. The first element of the offence of defilement was the age of the complainant, who should be below 18 years. The complainant testified as PW1 and described herself as AW aged 13 years. She relied on a birth certificate.

11. PW2 LNM her aunt described the complainant as AW2 a daughter of her elder sister PWM. PW3 PW described the complainant as AW2 in examination in chief. In cross-examination however, described the complainant as Anne without any explanation.

12. The medical report refer to the complainant as AW2 and the birth certificate is in the name of AW2.

13. In my view, from the evidence on record, there is an apparent doubt created on whether A or AW and AW2 are one and the same person. This doubt could have been removed if either the charge sheet could be amended to reflect the correct names, or the evidence of witnesses was clear that the two names referred to one and the same person. In the absence of that one cannot be sure if it is one and the same person and the benefit of the doubt should have been given to the appellant.

14. With the above evidence on record, I find that the prosecution did not prove beyond reasonable doubt that AW the victim mentioned in the charge sheet was 13 years or below 18 years. Thus the age of the complainant was not proved to the required standard.

15. I now turn to penetration. The evidence regarding sexual penetration is that of the complainant PW1 and the medical evidence. The complainant testified that she was penetrated sexually in a mud walled house, on a bed. The medical evidence tendered by PW5 Dr. Joyna Valey Nyasta was that lacerations and tenderness were noted in the labia minora, and that it was difficult to ascertain the status of the broken hymen because PW1 had bathed.

16. With the above evidence, in my view, the prosecution proved sexual penetration beyond reasonable doubt.

17. Was the appellant proved to be the culprit? The evidence on the identity of the culprit was that of the complainant PW1 AW alone. In my view, though a person called Lucy said to have led the complainant to the mud house, was not called by the prosecution to testify, the evidence of PW1 was believable, as she had nothing to gain by implicating the appellant falsely as the culprit. Her evidence is thus believable under the provisal to Section 124 of the *Evidence Act*, and it was indeed established that the appellant was the culprit.

18. However, for the reason that I have found that the age of the complainant was not proved, the appeal against both conviction and sentence has to succeed, conviction quashed and sentence set aside.

19. I thus 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 5TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Ms. Moke for State