Shirumba v Republic (Criminal Appeal 51 of 2023)
[2024] KEHC 2128 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 51 OF 2023

DR KAVEDZA, J

MARCH 5, 2024

BETWEEN

BENSON AMHOYE SHIRUMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. C.K. Mwaniki (SPM) delivered in Chief Magistrates' court (Kibera) S.O. Case No. E002 of 2021 on the 21st day of June 2022)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* (the Act). The particulars were that on 15.12.2020 in Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of M.N.M, a girl aged 14 years old. He was sentenced to serve 20 years' imprisonment.

2. Being dissatisfied, he filed an appeal challenging his conviction and sentence in his petition of appeal. The Appellant has amended his grounds of appeal and both parties have filed written submissions, which have been duly considered.

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 which was before the trial court and itself 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.

4. With the above, I now proceed to determine the substance of the appeal. In his amended grounds and submissions, the Appellant has raised three grounds of appeal. He complains that the trial magistrate failed to appreciate that the ingredients of the offence of defilement were not proven. He further argued that the credibility of the prosecution witnesses was doubtful and that his defence was not considered.

5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. In order to succeed in a prosecution for defilement, it must be proven 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."

6. The prosecution case was as follows. The Complainant (PW1) provided unsworn testimony following a *voir dire* examination. This was after the trial magistrate determined that although she possessed sufficient intelligence to recount the events, she did not fully comprehend the significance and purpose of an oath. PW1 stated that she was 13 years old at the time of the incident.

7. On December 15, 2020, PW1 had gone to visit her friend S (name withheld) when she encountered the appellant at a nearby gate. The appellant then grabbed her, covered her mouth and guided her to a house. Inside the house, he pushed her, causing her to fall over a stool and onto the bed. The appellant then undressed her and proceeded to engage in non-consensual sexual intercourse with her. PW1 specifically described the incident, stating that the appellant "spread her legs and inserted his penis into her vagina and then into her anus," causing her to bleed. Following the act, she left the scene. She later met the chief's wife who inquired why she was crying. PW1 narrated the incident and she was taken to the chief's office and to the hospital the following day.

8. In her testimony, PW1 offered a detailed and vivid account of the events in question. She stated that she was acquainted with the appellant, having encountered him on approximately five occasions prior to the incident in question. Additionally, she mentioned that the appellant would typically engage in conversation with her friend S (name withheld), but not with her specifically. Furthermore, the assault occurred in broad daylight, allowing PW1 to clearly identify the appellant. Based on this evidence, I conclude that it was indeed the appellant who perpetrated the act of sexual assault.

9. PW1's testimony did not require corroboration in accordance with the proviso to 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. To this end, the trial magistrate recorded in the judgement that PW1 was candid in her testimony and that her recollection of the incident was vivid and detailed.

10. Regarding additional corroborating evidence, the prosecution called Henry Ndwaba, who testified as PW4. According to PW4's testimony, on December 18, 2020, he was at the Mugumoini Chief's office when PW1 arrived, having been dropped off on a motorcycle. PW1 was in a distressed state, crying, and she disclosed to PW4 that she had been sexually assaulted and was worried about being punished. PW4, as an independent witness, offered crucial support to PW1's testimony by substantiating her claim that the appellant was the perpetrator. PW4's testimony that PW1 identified the perpetrator as Ben, the appellant in this case, strengthens the credibility of her testimony. Furthermore, PW4 took immediate action upon hearing PW1's report by contacting PW2, PW1's mother. He advised her to take PW1 to the hospital for medical attention.

11. Additionally, the prosecution called Alice Gori, a nursing officer in charge of Gender Based Violence at Tumaini Health Centre Kibera South, PW4, who examined PW1 on 17.12.2020 and produced the Post Rape Care (PRC) form and the P3 form. The findings were that her hymen was broken and painful, presence of a whitish vaginal discharge and painful lacerations at 6 o'clock and 9 o'clock. There was further noted hyperaemia on the vagina, fresh faecal matter on the anus and at the 5 to 6 o'clock region of the anus, there were painful lacerations. These medical findings were consistent with the testimony of PW1 that the appellant penetrated both her vagina and anus

12. The Appellant complains that essential witnesses were not called. Particularly, he contended that as per PW1's testimony, after the incident, she reported to the chief's wife, who was not called as a witness. 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 provision of law, no particular number of witnesses shall be required to prove of 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).

13. From the testimony of PW1, the incident occurred in the appellant's brother's house. The said wife to the chief was not an eyewitness. From the totality of the prosecution's case, I hold the view that her evidence was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with proviso to section 124 of the *Evidence Act*.

14. The Appellant further complains that his defence was not taken into account. In his testimony, he denied the charges. He contended that the charges were fabricated against him and that he was forced to write a statement. When weighed against the prosecution evidence, particularly the testimony of PW1, the defence amounted to a mere denial of the offence and was rightly dismissed by the trial court.

15. On age of PW1, the trial court considered the birth certificate produced in evidence by PW2. She was born on 08.07.2006 meaning that she was 14 years and five months at the time of the alleged offence. This was further corroborated by the PRC form, which indicated PW1's date of birth as 08.07.2006. There is therefore no doubt that PW1 was a child. The conviction on the charge of defilement is therefore affirmed.

16. On the sentence, section 8(3) provides that 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 prosecution proved that the child was 14 years old; hence, the trial court imposed the sentence of 20 years' imprisonment. However, this court is guided by the Supreme Court's decision in *Francis Karioko Muruatetu another v Republic* [2017] eKLR and the decision of the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR where the court held the mandatory minimum sentences were no longer applicable.

17. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the trial court's sentence in this case was lawful, the appellant, being a first-time offender who was 18 years old at the time of the offense, still has a chance for rehabilitation and a full life ahead. Therefore, the sentence was manifestly harsh and excessive.

18. For the above reasons, I hereby set aside the sentence of 20 years imposed on the charge of defilement and substitute it with a sentence of 10 years' imprisonment. The sentence shall be computed less 1 year, 6 months and 26 days, which time the appellant spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 5TH DAY OF MARCH 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Ms. Tumaini for the Respondent

Joy/Omwoyo, Court Assistants.