Abdi v Republic (Criminal Appeal E147 of 2022)
[2024] KEHC 4029 (KLR) (Crim) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E147 OF 2022

LN MUTENDE, J

APRIL 11, 2024

BETWEEN

MOHAMED ISMAEL ABDI ALIAS HAMALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the original conviction and sentence in Sexual Offences Case No. 285 of 2021 at the Chief Magistrate's Court Makadara, by Hon. M. Kivuti – SRM on 19th August, 2022)

JUDGMENT

1. Mohamed Ismael alias Hamali was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. Particulars of the offence were that on diverse dates between the months of November, 2020 and on the 27th day of October, 2021 at Eastleigh area in Kamukunji Sub-County within Nairobi County unlawfully and intentionally caused his penis to penetrate into the vagina of A. A. M. a child aged 12 years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on diverse dates between the month of November, 2020 and 27th day of October 2021 at Eastleigh area in Kamukunji Sub-County within Nairobi County unlawfully and intentionally touched the buttocks, the breasts and vagina of A.A.M. a girl child aged 12 years.

3. Having been taken through full trial he was convicted for defilement and sentenced to serve 20 years imprisonment.

4. Aggrieved by the conviction and sentence he proffered an appeal on grounds that: the trial court failed to appreciate that identification was by a minor who admitted that lights had been switched off hence unsafe; five(5) people lived in the complainant's house hence voice identification was not without error; evidence of the complainant that doors remained open throughout the night meant that any person could walk in and out; the defence evidence that bruises in the posterior fourchette and reddening of the vagina were an indication of yeast infection was not appreciated; there were numerous contradictions in evidence of the complainant and her mother regarding the account of events on the alleged date of the incident hence the conviction was unsafe; and, that there was no penetration.

5. Briefly facts of the case were that on 27th October 2020 PW2 NMA, the mother of the complainant woke up and went to check on her phone in the room where the complainant and her sister slept. She noticed that the complainant had no pant. PW1 A.A. the complainant claimed that her pant was in the toilet but PW2 saw it on the mattress that she was sleeping on. This prompted her to check her private parts and she saw some whitish discharge. Upon confronting and disciplining her, she stated that Hamali, a person well known to them that she identified as the appellant herein had molested her sexually and it was not the first time.

6. Subsequently PW2 reported the matter to Pangani police station and took PW1 to hospital for treatment. The appellant was arrested and investigations carried out that culminated into the appellant being charged.

7. Upon being placed on his defence the appellant denied having committed the offence. He explained that he lived in the same building as the complainant's family. That he used to eat at PW2's hotel where he would chat with Khale, a girl who worked there and at times she would accompany him home but PW2 disliked their relationship since he was not from their tribe.

8. Further he stated that the complainant's mother's four roomed house was occupied by 10-12 people. Four (4) men lived in one room, PW2 and her husband lived in one room, the house help and hotel worker in one room and the children occupied the fourth room. And, that movement in and out of the building was captured by the (CCTV)that was on the building.

9. The appeal was canvassed through written submissions. It was urged by the appellant that the minor who was beaten by her mother so as to implicate the appellant stated that lights were switched off when the act was committed, evidence that the court did not appreciate. That although she said she recognized the appellant's voice she could not remember what he told her. That conditions obtaining then could not favour correct identification. Reliance was placed on the case of *Vura Mwachi Rumba v Republic* (2016) eKLR where the court stated that:

> " In the case of *Choge v R* [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it..."

10. That since it was acknowledged that other young men lived in the house, there was a possibility of the young men having been involved but not the appellant. That the main door having remained open, any person could walk in and out of the house. These, according to the appellant made the conviction unsafe.

11. The appeal is opposed by the respondent who submits that the victim knew the appellant for a long time as Hamali who used to visit them, their house-help, elder sister and men who occupied one of the rooms at the house. Having not been a stranger he was positively identified by the victim. That it was therefore safe to convict the appellant on voice recognition. Reliance was placed on the case of *Karani v Republic* (1985) KLR 290 where the court held that:

> " Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."

12. That the victim did not interact with other men but the appellant who would approach her during the day and order her to leave the main door open and also threatened to kill her if she failed to do so.

13. That the appellant stated that he had never been to the victim's mother's house but in the same breath shot himself on the foot by giving vivid details of its precise occupancy including where the children slept which explained how he got into the house.

14. This being a first appellate court, it is called upon to reassess and analyze the trial record afresh and to determine whether the impugned decision was well founded, the court has power to come up with its own conclusions but must bear in mind that it did not see or hear the witnesses (See *Okeno v Republic*(1972) EA 32).

15. Regarding the offence, Section 8(1) of the *Sexual Offences Act* provides that:

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

16. The elements of the offence and which must be proved beyond reasonable doubt are: the age of the victim, penetration of genitalia, and, positive identification of the perpetrator.

17. The appellant does not contest the complainant's age which was found to be estimated between 12 and 16 years. The trial court considered the age assessment report and the P3. The court found that minor was 12 years between October and November 2021 when she was defiled.

18. The *Sexual offences Act* adopts the definition of a child as assigned thereto by the *Children Act* which defines a child as person who is below 18 years. Therefore, the victim herein was a child.

19. The main argument by the appellant is that he was not positively identified. He avers that there was a possibility of the victim having been molested by any other person including the men who occupied a room in the house. PW1 testified that the appellant first approached her during the day and told her to leave the door open at night, this happened twice and in both events, the appellant damaged her purity. The first time the lights were on and the complainant was still awake. He switched off the light and defiled her. The appellant went to her room the second time when the lights were off. The complainant could not remember or did not say what he told her but she testified that he knew his voice.

20. In the case of *Wamunga v Republic* (1989) KLR 424 the Court held that:

> " ...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

21. In the case of *Mbelle v Republic* (1984) KLR 626 the Court held:

> "In dealing with evidence of identification by voice, the court should ensure that: a) The voice was that of the accused. b) The witness was familiar with the voice and recognized it. c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

22. It is in evidence that the appellant went to the room where the victim slept on a mattress on the floor while her sister slept on the bed. That he had ordered her to leave the door open and further threatened her if she could not comply. This was a person familiar to the complainant as they used to communicate. Similarly, she identified him by name and also identified him as one of the men who visited the house, particularly as the one who had befriended Khale who also lived with them. The defence also corroborates that fact and that he was not a stranger to the complainant's house and family, he even knew his way around the house.

23. A person's voice is distinguishable and unique such that a person familiar with it would easily identify it. Forgetting words uttered at the spur of such moment would not infer some incorrectness on the part of the one alleging.

24. The appellant argues that anyone could walk into the house / room which had been left open and that the lights were switched off. The defence did not shake the prosecution's case as evidence adduced by the victim was believable as to who violated her sexually. She gave a vivid account of what transpired.

25. The act of penetrationin respect of the victim is challenged. Section 2 of the *Sexual Offences Act* defines penetration as:

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

26. In the case of Bassita Hussein v Uganda, Supreme Court criminal appeal No 35 of 1995, the court held as follows on proof of penetration:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by medical evidence or other evidence."

27. PW3 Doris Kerubo Ongeri a clinical officer filled the Post Rape Care (PRC) form. On examination the victim had undergone clitoridectomy, there were bruises on the vagina at the posterior fourchette (thin fork-shaped fold of skin at the entrance of the vagina), and, reddening of the vaginal wall though the hymen was intact. She also noted white smelly discharge and that no spermatozoa was seen on the swabs taken. A P3 form filled contained the same findings.

28. DW2 Tony James Mbaja a nurse by profession opined that the reddening of the vagina was caused by an infection which was not detected during the first examination. That looking at the PRC form the bruising could not have been caused by only defilement. In cross examination he stated that touching of the genital area can transmit infection.

29. The witness did not examine the victim. his credentials were not given to establish whether or not he was an expert. That notwithstanding, an expert opinion is not binding and the court has discretion to reject the opinion and come up with independent conclusions. (See *Drake v Thos Agnew & Sons Ltd.* [2002] E.W.H.C. 294 cited in Christopher.)

30. Sometimes medical evidence and /or opinion serve the purpose of corroborating the victim's testimony. Notably, in sexual offences cases, the court has discretion to convict on the victim's testimony without need for corroboration.

31. Section 124 of the *Evidence Act* provides thus in respect of corroboration:

> ... 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.

32. PW1's evidence was that the appellant went to the room touched her, removed her pant and inserted his penile organ into her vagina. The medical records indicated that the hymen was still intact, this could mean that there was no complete penetration. Evidence of reddening and bruises presence of some discharge establishes partial penetration of the vagina.

33. The proximity between the perpetrator and PW1 in the course of coitus and the caressing enabled her to positively identify the appellant as the perpetrator.

34. On the sentence, the age assessment placed the child between 12-16 years. Sub-Section (3) (4) of the *SOA* provides:

> (3) 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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

35. The court was justified in meting out the sentence. However, today courts are not hamstrung by the issue of meting out minimum mandatory sentences. Each case's peculiarity is taken into account as restorative justice is emphasized.

36. Further, indefinite sentences fail to capture the objectives of sentence. There is need to give offenders hope to rejoin the family and society so as to benefit from social reintegration after an offender has been rehabilitated.

37. In mitigation the appellant stated that he was 20 years old. This was a first offender who should be granted the opportunity to reflect on his actions, be rehabilitated prior to being reintegrated into the community. In the result I find the sentence having been excessive considering that the court relied on the estimate of the age.

38. From the foregoing I affirm the conviction, set aside the sentence meted out which is substituted with ten (10) years imprisonment. During trial the appellant was in remand custody, taking the period spent in custody into account the sentence shall be effective from the date of arrest, 29/10/2021.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE