Hussein Alias Tatizo v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 4337 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E010 OF 2023

M THANDE, J

APRIL 12, 2024

BETWEEN

ABDALLA HUSSEIN ALIAS TATIZO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. B. N. Kabanga, RM delivered on 9.9.21 in Sexual Offences Case No. E005 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on 26.12.2020, at midnight in Tana North Subcounty within Tana River county, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AHA, (the Complainant), a child of 13 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *SOA*. The particulars of this offence are that on the same day and in the same place, the Appellant intentionally touched the vagina of the Complainant with his penis. Following a full trial, the Appellant was convicted of the main charge and sentenced to serve 20 years imprisonment.

2. Being aggrieved with both the conviction and sentence the Appellant preferred the Appeal herein. The summarized grounds as set out in his amended memorandum of appeal are that the trial Magistrate erred in fact and in law in failing to appreciate that the prosecution shifted the burden of proof to him, convicting him on a poorly investigated matter and failing to consider his defence. The Appellant urged the Court to allow the Appeal and quash the conviction and set aside the sentence.

3. Both parties filed their written submissions which I have duly considered. I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due

allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of *Okeno v. Republic* [1972] EA 32 where the Court of Appeal stated:

> An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya Vs. Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R*. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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, See *Peters V. Sunday Post*, (1958) E.A. 434)"

4. The prosecution called a total of 5 witnesses. The Complainant's testimony was that she was 13 years old at the material time. On 26.12.2020, she went to assist her aunt with laundry. Thereafter, she went to the shop and met the Appellant on the way. The Appellant and his friend took her on a motorcycle to Kanal ya Vuvu where there was a wedding ceremony. The Appellant later took her to a bush where he removed his trouser and her underwear, bent her over forward and inserted his penis into her vagina. He was wearing a condom. He later returned her to the ceremony. Later the Appellant's friend also took her to the bush and defiled her. The Appellant and his friend took the Complainant home in the morning. On reaching home, her father caned her for not returning home the night before. When she told him what had transpired, the matter was reported to the police and the Appellant was arrested. The Complainant stated that prior to the material date, she had had sex with the Appellant severally.

5. The Appellant denies having committed the offence of defiling the Complainant, with which he was tried and convicted.

6. The critical elements forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. (See *Dominic Kibet Mwareng v Republic* [2013] eKLR).

7. The Complainant herein was a 13 year old minor at the material time. This borne out by her birth certificate which indicates that she was born on 4.3.07, a fact not contested by the Appellant.

8. As to the identity of the Appellant, it is not disputed that he and the Complainant are known to each other.

9. Besides proof of the age of the Complainant and proof that the Appellant was the perpetrator of the offence, there must be proof of penetration for the offence of defilement to be established. Section 2 of the *Sexual Offences Act* defines penetration thus:

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

10. In her testimony in the trial Court, the Complainant stated that the Appellant later took her to a bush where he removed his trouser and her underwear. He bent her over forward and inserted his penis into her vagina. He was wearing a condom on his penis. The Complainant's evidence was clear that they went to a wedding and the Appellant led her to the bush where he defiled her. She also stated that they had had sex many times prior to this incident. This was corroborated by PW3 Hawa Abdulgaful, a reproductive health officer at Hola County Referral hospital who found that the Complainant's hymen had been broken.

11. The Appellant's main complaint is that there was contradiction in the witnesses' testimony. He submitted that the Complainant stated that she arrived home at 9 am while her mother PW2 said she arrived home at 5 am. The Appellant termed this a sharp contradiction that automatically shows possibility of fabrication to implicate him. A further contradiction pointed out by the Appellant is that the Complainant stated that she went to the shop at around 4 pm while PW2 stated that she sent the Complainant at 10 am to her sister to help with laundry. He further stated that the Complainant did not buy anything as she met the 2 men on her way to the shop, which is a contradiction.

12. I have considered the arguments of the Appellant on the apparent contradictions. However, while the same are acknowledged, they are so insignificant that they cannot render the prosecution evidence unreliable. In this regard, I am guided by the decision in *Willis Ochieng Odero vs. Republic* [2006] eKLR, where the Court of Appeal held:

> As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*.

13. It is noted from the record that the Complainant was the only witness to the alleged offence. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. It provides as follows:

> 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.

14. Where the testimony of a victim of sexual offence is found to be truthful, the same need not be corroborated. The Court must however give reasons for believing such testimony. In the case of *Mohamed vs. Republic* [2006] 2 KLR 138 the Court of Appeal stated:

> It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.

15. The learned Magistrate stated that the Complainant "comes out as transparent and very candid on what transpired on that date. I have not found a single indicator of exaggeration, malice or ill will on her part". I concur with the learned Magistrate. I too have found the Complainant's evidence to be credible. She did not contradict herself. Additionally, the Complainant candidly stated that the Appellant wore a condom and further that she had sex with him many times before the date in question.

16. The Appellant submitted that the trial Magistrate failed to consider his defence. The record shows that the learned Magistrate did consider his defence and found it too weak to dislodge the Complainant's

evidence and the prosecution case. The learned Magistrate observed that the Complainant only disclosed what the Appellant had done after interrogation by her parents for not going home on the material night. The learned Magistrate further considered that there were no differences between the Complainant and the Appellant or vendetta. As such, it cannot be said that the Complainant fabricated evidence and falsely implicated the Appellant. After considering the foregoing, I find that the learned Magistrate did in fact consider the Appellant's defence.

17. From the evidence adduced in the trial court, it would appear to the Court that the Complainant may have willingly engaged in sex with the Appellant. Indeed, what had been going on between her and the Appellant only came to light when she slept out on the material day and was interrogated by her parents. However, as a 13 year old, the Complainant was still a child and had no capacity to consent to sex. The Appellant who is an adult and a married man with a family, ought to have known that it unlawful to engage in sexual conduct with a child. He thus cannot escape criminal liability.

18. In the end and in light of the foregoing, I find that the prosecution proved its case beyond reasonable doubt. Accordingly, both the conviction and sentence are upheld and the Appeal is hereby dismissed

DATED SIGNED AND DELIVERED VIA MS TEAMS THIS 12TH DAY OF APRIL 2024

_____

M. THANDE

JUDGE