KOI v Republic (Criminal Appeal E033 of 2022)
[2024] KEHC 4338 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E033 OF 2022

M THANDE, J

APRIL 12, 2024

BETWEEN

KOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. B. Kabanga RM delivered on 30.12.21 in Hola Sexual Offence Case No. E008 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on 18.3.21, within Tana River, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina and anus of SS (the Complainant) a child aged 10 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of this offence are that on the same day and in the same place, the Appellant committed an indecent act by intentionally touching the vagina and anus of the Complainant with his penis. Following a full trial, the Appellant was convicted of the charges and sentenced to a life imprisonment.

2. Being aggrieved with both the conviction and sentence the Appellant filed this Appeal. In his amended grounds of appeal, filed on 30.10.23, the Appellant faulted the learned Magistrate for failing to appreciate that the prosecution had not proved its case beyond any reasonable doubt. He further faults the learned Magistrate for imposing a sentence that was manifestly harsh and unconstitutional.

3. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190).

4. The facts of the case according to the prosecution are that the Complainant had gone to her sister's house to watch video. The Appellant, who is her sister's husband directed her to go to the shop with him so that she can return with oil for her sister. She got on to his motorcycle and he took her to a bush and asked her to follow him. He took her and lowered her to the ground, removed his trousers and her underwear. He then inserted his penis into her vagina and anus. Thereafter he took her on the motorcycle and dropped her near her home. When she got home, she informed her father of what had transpired and the matter was reported to the chief and later to the police. The Complainant was then taken to hospital. The Appellant was subsequently arrested and charged in court.

5. Both the Appellant and Respondent filed their submissions which I have duly considered.

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. It is not in doubt that the Complainant was a 10 year old minor at the material time. PW5 a community oral health officer at Hola Referral Hospital conducted the age assessment on the Complainant and concluded that she was 10 years old. This is not contested by the Appellant.

8. The Appellant's main complaint is that penetration was not proved. Penetration is defined in Section 2 of the SOA as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Section 2 proceeds to define "genital organs" to include the whole or part of male or female genital organs and for purposes of the SOA, includes the anus.

9. Upon analyzing the testimony of the Complainant, I am convinced that her evidence was clear enough on the nature of the assault by the Appellant. Her evidence was corroborated by medical evidence given by PW3, Mohamed Ali Mwenje the doctor at Hola Couty Referral Hospital who examined the Complainant a day after the incident. He found that her clothes had dirt and her panty was torn. She had grass in her vagina but was not actively bleeding at 12 o'clock position. He also found that her hymen was partly broken and had watery discharge from her vagina. PW3 also found that the Complainant had injuries in her anus and could not close her sphincter muscles. He testified that he had filled the treatment notes, P3 and Post Rape Care forms.

10. The Appellant has argued that PW3's testimony that the Complainant had grass in her vagina and that her panty was torn is a lie as being at home, she must have taken a shower. Further that the age assessment report, the P3 and PRC forms as well as the treatment notes were manufactured to fix the Appellant and to cause him to languish in prison for 25 years. With respect, there is no basis for this argument and the same is merely speculative and conjecture. The Appellant did not challenge the authenticity of these documents during cross examination. The contention by the Appellant in this regard is therefore untenable.

11. As to the identity of the Appellant, it is not disputed that he is the brother in law of the Complainant. In his submissions, the Appellant concedes that the Complainant positively identified him and that he is married to her elder sister.

12. The Appellant further submitted that the trial Magistrate failed to consider his alibi that he was at home at the material time feeling unwell. In his defence, he attributed his predicament to ill will between him and his father in law who did not want him to marry his daughter and had been threatening him. He stated that the Complainant had never been to his place. The testimony of DW2, the Appellant's wife was that the Complainant had never visited her home and that her father was out to break her marriage to the Appellant.

13. In his judgment the learned Magistrate considered the Appellant's defence and found that the defence had failed to explain why the prosecution witnesses who were independent agreed to testify against the Appellant yet they had no prior differences with him. The learned Magistrate further did not believe that PW2, the Complainant's father would have his daughter injured in order to implicate the accused as alleged.

14. It is clear 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.

15. 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 v 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.

16. I have considered the Complainant's evidence and have found it to be credible. She did not contradict herself despite her tender age. Secondly, the evidence shows that the was penetration of the Complainant's vagina and anus. It is inconceivable that PW2 would subject his 10 year old daughter to such a gruesome experience just to fix the Appellant. If indeed he was opposed to his daughter marrying the Appellant, surely there are other ways of dealing with his opposition other than having his daughter of tender years harmed. In light of this, I concur with the learned Magistrate who found that the defence proffered was too weak to dislodge the prosecution case. I too find the defence farfetched and improbable when contrasted with the prosecution's case which was solid and unshaken in cross examination.

17. In the end 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 AND DELIVERED IN VIA MS TEAMS THIS 12TH DAY OF APRIL 2024

M. THANDE

JUDGE