Ongaga v Republic (Criminal Appeal E013 of 2022)
[2024] KEHC 3629 (KLR) (11 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E013 OF 2022

WA OKWANY, J

APRIL 11, 2024

BETWEEN

DANIEL OANDA ONGAGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the Judgment and Sentence of Hon. B. M. Kimtai (PM) Keroka dated and delivered on 5th May 2022 in the Original Keroka Principal Magistrate's Court Sexual Offence Case No. 47 of 2019)

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* No. 3 of 2006. The particulars of the charge were that on diverse dates between January 2019 and 25th October 2019 at Borabu sub-county within Nyamira county, intentionally caused his penis to penetrate the vagina of CKSM, a child aged 12 years.

2. 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* No. 3 of 2006. The particulars were that on diverse dates between January 2019 and 25th October 2019 at Borabu sub-county within Nyamira county, intentionally touched the vagina of CKSM, a child aged 12 years with his penis.

3. The Appellant pleaded not guilty to the charges after which a trial ensued in which the prosecution presented the testimonies of a total of 7 witnesses as follows: -

The Prosecution's Case

4. PW1, the victim testified that she was, on 25th January 2019, sent to the posho mill when she met the Appellant who lured her into a bush where he defiled her. She later proceeded to the posho mill and did not inform anyone of the incident. She identified the Appellant as their neighbour. She testified that

she had other encounters with the Appellant in April, June and October 2019 when he also defiled in the bush.

5. PW2, D.G,S. (particulars withheld), the Appellant's aunt, testified that she on 25th December 2017 received information that PW1 was found near the Appellant's door. She went to the Appellant's house but did not find the victim. While at the Appellant's door, the Appellant emerged but attempted to escape upon being asked about the victim's whereabouts. She testified that upon interrogation, the Appellant admitted that he had previously engaged in sexual intercourse with the victim. The police were called to the scene where they arrested the Appellant.

6. PW3, Josephine Kerubo, testified that PW1 told her that she engaged in sexual intercourse with the Appellant on 3 ocassions.

7. PW4, Peter Ondieki, testified that he was on 25th December 2019 on his way to the shop when he met PW1 and PW2 and learnt that PW1 had been found inside the Appellant's compound.

8. PW5, Evelyn Sarange, a testified that she was on 25th December 2019 tethering a cow when she saw a girl running away from her compound and on making an enquiry, PW1 told her that she was looking for the Appellant to pay her money for bananas. PW5 reported the incident to the victim's aunt (PW2).

9. PW6, No. 237317 I.P. Samwel Chacha, received the defilement report on 28th December 2019. He arrested the Appellant and took the victim to the hospital for examination where it was established that she had been defiled. He produced the victim's birth certificate (P.Exh1).

10. PW7, Samson Gichaba, the Clinical Officer at Kijauri Health Centre testified that he examined PW1 and found that she had normal external genitalia with no signs of lacerations or trauma, he also noted that there were no fresh signs of penetration and that the labia minora and majora were normal. He further noted that the hymen was not present even though it was not freshly broken. The laboratory tests did not reveal any presence of spermatozoa save for epithelial cells with a negative pregnancy test. PW7 filled the P3 form and found that there was no evidence of penetration. He produced the Treatment Notes (P.Exh2a), P3 Form (P.Exh2b) and PRC Form (P.Exh2c).

11. At the close of the prosecution's case, the trial court found that he had a case to answer and placed him on his defence. The Appellant elected to give a sworn statement and did not call any witness.

The Appellant's (Defence) Case

12. DW1 testified on the circumstances under which he was arrested and that he was, during the arrest, assaulted by a mob over the allegation that he had defiled the complainant. He stated that he was rescued by the police who took him to hospital in the company of PW1. He denied committing the offence.

The Sentence

13. At the end of the case, the trial court found that the prosecution had proved all the ingredients of the offence of defilement. The Appellant was consequently convicted on the main count and sentenced to serve 20 years' imprisonment.

The Appeal

14. The Appellant was aggrieved by the trial court's decision. He instituted the present appeal and listed the following grounds of Appeal in the Petition of Appeal: -

1. Thatthe learned trial magistrate erred in law and fact by entering a conviction against the weight of evidence.
2. Thatthe learned trial magistrate erred in law and fact by not making a finding that the conduct of the complainant was inconsistent with her innocence.
3. Thatthe learned trial magistrate failed to sufficiently consider the Appellant's defence.
4. Thatthe learned trial magistrate erred in law on the issue of minimum sentence.
5. Thatthe sentence meted out was manifestly harsh and cruel under the circumstances.

The Duty of the Court

15. It is trite that the duty of a first appellate court is to subject the entire evidence from the trial court to a fresh analysis and arrive at its own conclusion while bearing in mind the that it neither heard nor saw the witnesses testifying. This principle was aptly stated in Pandya v Republic (1957) EA 336 as follows: -

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence."

Analysis and Determination

16. The appeal was canvassed by written submissions which I have considered. The main issues for my determination are:-
    i. Whether the charge of defilement was proved to the required standard.
    ii. Whether the Sentence was proper and legal.
17. It is trite that the burden of proof in a criminal trial lies with the Prosecution (see Ajwang v Republic [1983] KLR 337). The standard of proof expected in criminal cases is proof beyond reasonable doubt (See Miller v Minister of Pensions 1942 A C.).
18. Section 8 of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows on defilement:-

> 8. Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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.

19. The above provision sets out the ingredients of the offence of defilement as; the age of the victim, penetration and the positive identification of the perpetrator of the offence. This means that the prosecution is required to prove all the above ingredients in order to mount a successful prosecution

of the offence of defilement. In the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, the court outlined the said ingredients thus:-

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. In *Kaingu Kasomo v Republic, Criminal Appeal No. 504 of 2010*, the Court of Appeal pronounced itself as follows on the importance of proving the age of a victim: -

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

21. The age of a victim can be proved in several ways as was stated in *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 where the court rendered itself thus: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ...."

22. In this case, PW6 produced the victim's birth certificate (P.Exh1) which indicated that she was born on 28th June 2007. This means that she was a minor aged 11 years and 7 months old as at 25th January 2019 when she was allegedly defiled. I find that the minority age of the victim was proved to the required standard.

23. Section 2 of the Act defines penetration as the partial or complete insertion of the genital organ of a person into the genital organs of another person.

24. The evidence on penetration was presented by the sole evidence of PW1, the minor, who testified as follows: -

> " ....I met the accused, he told me to follow him to the hill, I followed him. He got into a bush. I followed him to the bush. He removed his trouser and he also removed my clothes, that is my pantie. He had sex with me by inserting his penis into my vagina. I didn't scream. After that he stood up and walked away. I then went to the posho mill.....On April 2019, it was a weekend, it was around 10.00 a.m. he told me to follow him to the hill which I obliged. On reaching the hill he entered into a bush and he removed my clothes and also removed his and we had sex. I did not inform anyone about this. On June 2019 at around 3 p.m., I was going to the shop and the same thing happened. In October 2019 at around 4 p.m. we went to the same hill and we had sex...."

25. PW7, the Clinical Officer, made the following findings upon examining the complainant: -

    i. Normal external genitalia

    ii. No signs of lacerations or trauma,

    iii. No fresh signs of vaginal penetration,

    iv. The labia minora and majora were normal

v. The hymen was not present but was not freshly broken.

vi. Lab investigation no presence of spermatozoa

vii. Epithelial cells presence

viii. Negative pregnancy test

26. The Clinical Officer noted that there were no signs of fresh penetration and concluded that the victim had not been penetrated.

27. The Appellant submitted that the offence of defilement was not proved as the medical evidence indicated that there was no penetration. He added that the mere fact that the hymen was missing did not necessarily prove penetration and that even if it did, there was no evidence linking him to the said act.

28. The Respondent, on the other hand, submitted that the Court should invoke the provisions of Section 124 of the *Evidence Act* and find that the victim's testimony was truthful and that she was able to understand the concept of sexual intercourse. Reference was made to the case of *Muganga Chilejo Saha v Republi*c (2017) eKLR where the Court accepted euphemisms used by the victims in sexual offences.

29. The trial court relied on the provisions of Section 124 of the *Evidence Act* in convicting the Appellant upon observing that the victim was truthful. The Section stipulates as follows: -

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

30. My understanding of the second part of Section 124 of the *Evidence Act* is that it is applicable where the only evidence is that of the alleged victim of the offence. In the instant case, however, I note that besides the victim's testimony, the prosecution also presented medical evidence which did not confirm penetration.

31. The victim testified that the Appellant had sex with her on at least 4 occasions in 2019. The prosecution was required to prove that the Appellant had sex with the minor on the said dates. I note that medical evidence did not support penetration save for the statement that the minor's hymen was not present even though not freshly broken.

32. The P3 form indicated that physical examination of the victim's genitalia did not reveal any evidence or signs of penetration. The P3 form confirmed that there were no physical injuries or lacerations. I have also perused the treatment notes which confirms the findings made in the P3 form. The treatment notes contained a statement that this was a case of 'suspected defilement'.

33. In light of the medical evidence presented by the prosecution, I am not persuaded that the trial court arrived at the right decision in finding that the ingredient of penetration was proved beyond reasonable doubt. It is clear that the medical evidence did not confirm penetration and that there was therefore no

basis for the trial court to conclude that penetration had been proved. Moreover, courts have severally held that the mere fact that a victims hymen is broken or absent is not conclusive proof of penetration and defilement. This is the position that was taken in *PKW v Republic* [2012] eKLR where the court stated as follows regarding the absence of hymen: -

> "[15]. In their analysis of the evidence on record, the two courts below...appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
>
> [16]. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen v Manuel Vincent Quintanila [1999] AB QB 769."

34. Similarly, in *David Mwingirwa v Republic* [2017] eKLR the court of Appeal considered High Court's decision to uphold the trial court's conviction for incest on the basis that the complainant's hymen had been broken and held that: -

> "From that reasoning of the learned judge, it would seem that the certainty or confidence with which she asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor was there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen."

35. Applying the reasoning adopted in the above cited cases to the present case, I find that the trial court erred in arriving at the conclusion that the complainant had been defiled from the fact of broken hymen alone.

36. I have also considered the circumstances under which the Appellant was arrested. PW1 explained that she had been sent to the Appellant's house when PW5, who shared the same compound with the Appellant, spotted her and suspected that she was up to some mischief. It is instructive to note that

the Appellant was not in his house when PW5 saw the complainant as he only came to the scene later only to be arrested on suspicion that he had a sexual relationship with the minor. In my humble view, suspicion, however strong, does not qualify as proof that a crime had been committed.

37. The Prosecution was also required to prove the identity of the attacker. However, having determined that the evidence of penetration did not meet the threshold expected in a defilement case, discussion on the ingredient of identification of the Appellant becomes moot. Suffice only to say that the evidence of PW1, PW2 and PW5 was that the appellant was their neighbour and was therefore well known to the victim who also identified him by name.

38. As I have already stated in this judgment, the burden of proof rested on the prosecution to prove its case against the Appellant beyond reasonable doubt. In Stephen Nguli Mulili v Republic [2014] eKLR: - it was held that: -

> " [I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa v R, [2013] eKLR."

39. In the instant case, while it is clear that one cannot rule out the possibility that the Appellant may have had sexual encounters with PW1, I find that it is this possibility or suspicion that the prosecution was supposed to confirm beyond any shadow of a doubt.

Disposition

40. Having regard to the findings and observations that I have made in this judgment, I come to the conclusion that the prosecution did not prove the case against the appellant beyond reasonable doubt and that the instant appeal is merited. Consequently, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

41. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 11TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE