SSK & another v Republic (Criminal Appeal E028 & E029 of 2023 (Consolidated)) [2024] KEHC 4348 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4348 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E028 & E029 OF 2023 (CONSOLIDATED)

LM NJUGUNA, J

APRIL 17, 2024

BETWEEN

SSK .... 1ST APPELLANT

WMW .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising from the decision of Hon. Stephen Ngii (PM) in the Magistrate's Court at Siakago MCSO No. E002 of 2020 delivered on 04th July 2023)

JUDGMENT

1. The appellants were jointly charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence against the 1st appellant are that; on 05th October 2020 at 1800hrs within Embu County, the 1st appellant unlawfully and intentionally inserted his penis into the vagina of SKM, a girl aged 14 years. He 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 whose particulars are that; on 05th October 2020 at 1800hrs within Embu County, the 1st appellant unlawfully and intentionally touched the breasts of SKM, a girl aged 14 years

2. The particulars of the charge against the 2nd appellant are that; on 08th October 2020 at 1400hrs in Embu County, the 2nd appellant unlawfully and intentionally caused his penis to penetrate the vagina of SKM, a girl aged 14 years. The alternative charge was the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars for the alternative charge are that; on 08th October 2020 at 1400hrs in Embu County, the 2nd appellant unlawfully and intentionally touched the breasts of SKM, a girl aged 14 years.

3. The appellants have filed a petition of appeal dated 15th September 2023 seeking that the conviction be quashed and sentences be set aside on the grounds that the trial magistrate erred in law and facts:

   a. By convicting the appellants on uncorroborated evidence of the complainant;

   b. In failing to take into account that the complainant's evidence was procured under duress;

   c. When he believed the complainant's untruthful evidence;

   d. In failing to consider the current prevailing judicial decisions and precedents attendant to the nature of the offence and the circumstances under which it was committed;

   e. In convicting the appellant on an offence whose essential elements were not proved to the required standard;

   f. By failing to consider the inconsistencies in the prosecution evidence;

   g. In convicting the appellants on crafted charges aimed at settling scores between the 1st appellant and the complainant's family;

   h. By failing to consider the appellants' defense and dismissing it in its entirety;

   i. By convicting the appellants on a defective charge sheet on account of a misjoinder

   j. In proceeding with the matter without according the appellants legal representation;

   k. By imposing a harsh and excessive sentence upon the appellants given the circumstances of the case.

4. The appellants pleaded not guilty and a plea of not guilty was duly entered for each one of them. The prosecution called witnesses in support of its case.

5. PW1 was the complainant who stated that on 05th October 2020 at around 6PM, she went to Salvation Army Church, Kalisa where the 1st appellant was a pastor. That she was in the company of her cousin and they went to greet the 1st appellant at his house. That he slapped her and then defiled her before demanding to escort her home. That on 08th October 2020, she and her sister volunteered to go to church to make tea when the 2nd appellant asked her if she loved him and she refused. That the 2nd appellant took her to his room and defiled her. That when she returned home, she took a bath but did not tell anyone about what had happened.

6. It was her testimony that when she returned to school, she missed her monthly period and became unwell and her father was called to pick her from school. That she was taking care of goats at home when she met the 2nd appelant in church and he asked her to lend him some Kshs.200/=. That once she returned to school, she communicated with the 2nd appellant through a phone belonging to the school cook and she sent him Kshs.500/=. That when her teacher found out about the said communication, she (PW1) told her everything and the information was relayed to her parents. That the matter was later reported at Makima Police Station.

7. On cross-examination, she stated that when the first incident happened, the 2nd appellant asked her to pick the keys for the church from the house of the 1st appellant but she later learned that the church was already open although she had been asked to collect the keys. That she did not tell her cousin about the incident and that the 1st accused took her home on a motorcycle.

8. PW2, JMB, father of PW1, stated that PW1 was born on 02nd March 2006. That he received a call from her daughter's headteacher informing her that PW1 was unwell and was not getting better. That he

went to the school and took her to hospital and several days later, returned her to school. That once again, the headteacher called him and his wife telling them that PW1 had become suicidal and had been defiled. That when they went to the school, PW1 told them that the accused persons defiled her and they reported the matter to the police station.

9. That they took PW1 to Siagini Dispensary and Kiritiri Health Center for medical examination and treatment. That PW1 told them that she had used CK's phone to send money to the 2nd accused person and the owner of the phone confirmed this. On cross-examination, he stated that the ordeal was narrated to him by PW1 whose statement was written by her mother as she narrated. That PW1 was threatened with death if she disclosed the incident to anyone.

10. PW3, CK- stated that on 17th November 2020, she was at work when PW1 approached her with some money and a piece of paper that had a number on it. That PW1 asked her if she could use her phone to send some money to her brother. That she agreed to help PW1 with the transaction and the money was transferred to the name of the 2nd appellant. She produced a copy of her M-Pesa statement showing the transaction and added that she recorded her statement with the police.

11. PW4, Susan Marui of Kiritiri Health Center produced the P3 and PRC forms on behalf of her colleague Jacinta Nyaga who examined PW1. She observed a whitish discharge with no bleeding, no bruises or lacerations and the hymen was absent. That HIV and pregnancy tests were negative and urinalysis was normal. That the minor was examined one month after the incidents.

12. PW5 IML, mother of PW1 stated that she received a phone call from PW1's teacher informing her that PW1 was unwell and was being taken to hospital. That PW2 went to the school and collected PW1 and later also took her to hospital. That she received another call from PW1's school after a few days, notifying them that PW1 was still unwell. That when she went to the school, the teacher told them that PW1 was planning to commit suicide and that she had been defiled by the appellants. That they took PW1 to Gategi Health Center and then to Kiritiri Health Center where she was examined and treated. On cross-examination, she stated that the incidents were narrated to her by PW1 who said that she was defiled within a church compound.

13. PW6, PC Luka Koros Kangor stated the PW1, PW2 and PW5 went to the police station to report a defilement incident where PW1 was the victim. That he referred them to Kiritiri Health Center for investigations and then summoned the appellants to the police station where they were arrested and charged with the offence. That PW1 also stated that the appellants had touched her breasts before defiling her. On cross-examination, he stated that he issued the complainant with a P3 form to be filled at the nearest hospital.

14. PW7, TMW, a matron at PW1's school, stated that PW1 told her that she had abdominal pains, headache and body pains. That she also had chest pains and had missed her periods. That she gave PW1 painkillers and called her parents. That later, PW1 told her that she had been defiled by the appellants. That she relayed the information to the headteacher who called PW1's parents and told them. On cross-examination, she stated that at the time when PW1 told her about the defilement, she was her class teacher and she had no reason to implicate them.

15. At the end of the prosecution's case, the court found that a prima facie case had been established and the appellants were placed on their defense.

16. DW1, the 1st appellant, stated that on 25th November 2020, he received a letter summoning him to Makima Police Station in relation to allegations of defilement of the 2nd appellant's congregant. That he had been implicated by a faction of the church which did not agree with transparency in the church. That 4 more people had been implicated in the same way before they had to leave the church. On

cross-examination, he stated that PW2 was the church secretary and had interests in the church, which interests would not be fruitful if the appellants were there. That the complainant never visited his house at any given time and he did not send her for any key because he had another key to his house.

17. DW2, the 2nd appellant, stated that on 10th October 2020, the complainant's mother called him to her home to pray for the complainant but he declined. That PW5 also called the 1st appellant to make the same request but he declined. That PW5 demanded that he return a bag belonging to the complainant, which he had borrowed to use and he returned the bag. That on 13th October 2020, he was at his home in Machakos when he was summoned to Makima Police Station where he was arrested and charged with the offence. That he was being framed for the offence and that to his knowledge, it was not the first time that pastors had been implicated for such an offence.

18. That he had questioned misappropriated church funds and some leaders in the church were not happy and so they may have implicated him. On cross-examination, he stated that on 05th October 2020, he had visited the complainant's home and on the day of the alleged incident, he had sent the complainant's cousin Judy to collect the keys. That at the time Judy went to collect the keys, the 1st appellant was in the church and he does not know what happened when Judy went to get the keys. That it is not guilt that made him decline to go to the home of the complainant when he was called upon. He admitted that the complainant indeed sent him money twice, meaning that they had a close relationship.

19. The defense case closed and the court made its determination. In its judgement, the trial court found that the elements of the offence had been proved beyond reasonable doubt and the appellants were convicted accordingly. Each of the appellants was sentenced to 20 years imprisonment as prescribed by the *Sexual Offences Act*.

20. In this appeal, the court directed the parties to file their written submissions and they complied.

21. The appellants relied on the case of Okeno v. Republic (1972) EA 32 and reminded the court of its obligations as a first appellate court to re-examine the evidence at trial. They also relied on section 107 of the *Evidence Act* and the case of Miller v. Minister of Pensions (1947) 2 All ER 372-373 where the standard of proof in criminal cases was defined. That the flow of evidence in the cases of both appellants does not lead to the prosecution proving the case beyond reasonable doubt. Reliance was placed on sections 8(1) and (2) of the *Sexual Offences Act* and they argued that they were not subjected to a medical examination of any sort and that no spermatozoa cells were found in the victim's private parts.

22. They relied on the cases of Badi Hamadi Hamisi v. Republic (2018) eKLR, Julius Kioko Kivuva v. Republic (2015) eKLR and Ndungu Kimanyi v. Republic (1979) KLR 282 and argued that the standard of proof was not attained and, in any event, there was reasonable doubt. It was their submission that regardless of the provisions of section 124 of the *Evidence Act*, the testimony of PW1 was unbelievable and ought to have been corroborated. On this, reliance was placed on the cases of Igbine v The State (1997) 9 NWLR, Solomon Munuve Muthu v. Republic (2020) eKLR and Karanja & Another v. Republic (1990) eKLR. That it was necessary to call Judy and the sister of the victim to testify but the prosecution failed to do so. They relied on the case of DMM v. Republic (2019) eKLR where the court stated that where the prosecution could have called witnesses but it didn't, the result was that the charge was not proven beyond reasonable doubt.

23. Further reliance was placed on the cases of Juma Ngodia v Republic [1982-88] KAR 454 and Joseph Maina Mwangi v. Republic, Criminal Appeal No. 73 of 1993 and they argued that there were grave inconsistencies in the prosecutions case. They also submitted that the appellants were wrongly joined

in the offence which allegedly occurred 3 days apart and that this was a mistake on the part of the prosecution. They submitted that the sentences imposed by the trial court were harsh and excessive in the circumstances and they relied on the cases of Johana Lwebe Muyugo v. Republic (2019) eKLR and Francis Karioko Muruatetu & Another v. Republic (2017) eKLR whose reasoning was applied in the case of Dismas Wafula Kilwake v. Republic (2018) eKLR. They asked the court to consider suspended sentences under Section 15 of the Criminal Procedure Code or non-custodial sentences.

24. In its submissions, the respondent relied on the provisions of section 8(1) and (2) of the *Sexual Offences Act* and the cases of George Opondo Olunga v. Republic (2016) eKLR and Reuben Taabu Anjanoni & 2 Others v. Republic (1980) eKLR. It was its argument that the appellants were properly identified as the perpetrators of the offence as they were persons well known to the complainant. That penetration was sufficiently proved according to the evidence of PW1 who testified that she was defiled and PW4 who testified of a missing hymen.

25. That the victim of defilement was indeed a minor as proved through her birth certificate. Reliance was placed on the cases of Hadson Ali Mwachongo v. Republic (2016) eKLR, Elias Kasomo v Republic, Criminal Appeal No. 504 of 2010 (unreported) and Benard Kiptoo v. Republic (2021) eKLR. It was its argument that the evidence was straightforward and needed not to be corroborated even though it was through all the prosecution witnesses. That the charge sheets were not defective and the same were drawn according to section 134 of the Criminal Procedure Code.

26. It was its argument that according to Article 50(2)(g)&(h) of *the Constitution*, the appellants' right to representation by counsel was not infringed and they fully participated in the trial by cross-examining witnesses. That the right to representation by counsel at the expense of the state still lacks legal framework as there is yet to be enacted a law to guide the process. It relied on the cases of Republic v. Nicholas Wambogo (2022) eKLR and Shadrack Kipkoech Kogo v. Republic Criminal Appeal No. 253 of 2003 and argued that the trial court meted out the sentence that is prescribed under the *Sexual Offences Act*.

27. From a perusal of the petition of appeal and submissions, it is my view that the issues for determination are as follows:

    a. Whether the prosecution proved the case beyond reasonable doubt;

    b. Whether there were inconsistencies in the prosecution's case and if any, whether the same render the evidence unreliable;

    c. Whether the charge sheet was defective;

    d. Whether the appellants were denied the right to legal representation; and

    e. Whether the sentence imposed was harsh and excessive.

28. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it held:

> " 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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

29. Under section 8(1) of the *Sexual Offences Act*, the prosecution bore the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

30. According to the birth certificate of the victim, she was born on 02nd March 2006, meaning that she was 14 years old at the time of the incidences. This is not in question and the trial court rightly determined the same. In the case of In Edwin Nyambogo Onsongo Vs Republic (2016) eKLR the Court of Appeal held that:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

31. On the element of penetration, PW1 stated that on 05th October 2020, she was in church and went to the house of the 1st appellant where he slapped her, removed her skirt and underwear, removed his penis and "put it" into her vagina. She also stated that three days later on 08th October 2020, the 2nd appellant went to her home where she was with her sister and asked one of them to go and make tea in church. That she (PW1) volunteered herself and went to the church and while there, the 2nd appellant asked her if she loved him and she answered in the negative. That he then took her to his bedroom, removed her skirt and underwear and then inserted his penis into his vagina.

32. Under Section 124 of the *Evidence Act*, the testimony of PW1 is enough to sustain a conviction because there is no requirement for corroboration of the victim's evidence. It states thus:

> " ....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."

33. Even so, from the medical examination by PW4, she observed that the hymen was absent, a sign of penetration. With these 2 testimonies, it is possible that there was penetration but the identity of the perpetrator completes the puzzle, thus justifying the conviction. This leads me to the third element.

34. The appellants are known to the complainant. She knows them as pastors at the Salvation Army Church where she worships with her family. She narrated the circumstances under which the incidences occurred. The appellants, in their defense, did not deny that they were present in the church where the alleged incidences occurred. The key to identifying the perpetrators is if they can be placed at the scene of the crime. PW1 stated that on the day of the 1st incident, she was in church in the company of her cousin Judy and they greeted the 1st appellant.

35. In his defense, the 1st appellant stated that on 05th October 2020, the appellant was sent to bring him some keys and she brought the keys in the company of her cousin Judy. That the 2nd appellant was at the home of the complainant and he sent her to bring the keys to him. The 2nd appellant stated that on 05th October, 2020, he was at the home of the complainant and he sent Judy, the complainant's cousin to take the keys to the 1st appellant but he did not know that the complainant followed Judy on the errand. He did not say anything on his whereabouts on 08th October 2020 but he admitted having received money twice from the complainant, an indication of a close friendship between them.

36. There is no doubt that the victim is a minor who was defiled. Throughout the testimony of PW1, DW1 and DW2, there is mention of one Judy, a cousin of the complainant. It was the testimony of DW2 that he gave the keys to Judy to take them to the 1st appellant but he did not know that the complainant had accompanied Judy. PW1, when asked where Judy was at the time of alleged defilement by the 1st appellant, stated that Judy had left.

37. The testimony of PW1 is indeed secured under section 124 of the *Evidence Act* which dictates that the identities of the perpetrators can be revealed through the testimony of the victim alone, without corroboration. Further, both PW1 and DW2 testified that PW1 sent money to DW2 twice and DW2 stated on cross examination that it seemed that they had a close friendship. This, notwithstanding, it is illegal for an adult to have sexual relations with a minor, even when the minor was supposedly okay with it. Therefore, from the recorded evidence, I have no doubt as to the identification of the appellants as the perpetrators.

38. As to whether the charge sheet was defective, section 134 of the Criminal Procedure Code provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

39. I have perused the charge sheets for both appellants and find the same to be above par. They contain the relevant information which communicates the charges and parties involved. They are so clear that they allowed the appellants to participate in their trials and even cross-examine the prosecution witnesses. After arraignment based on a charge sheet, it is upon the accused persons to defend their suit zealously such that they punch holes into the prosecution's case, thereby creating reasonable doubt which would be adjudged in their favour. In the case of MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) the court held thus:

> " The Court of Appeal in Benard Ombuna v Republic (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-
>
> "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.""

40. In any event, if the appellants felt that the charge sheet was defective, the issue should have been raised with the trial court at any time before closing the prosecution's case. To raise it in this appeal is to raise it too late in the day and that line of argument shall not be entertained. In the same breadth, on the issue of whether the appellants were denied the right to legal representation, the same is provided for under

Article 50(2)(g)&(h) of *the Constitution* but there is no legal framework in place to facilitate this right. Therefore, the right was not denied. However, I have noted that the appellants cross-examined most of the prosecution witnesses, showing that they participated in the trial to the best of their abilities. Therefore, I find no basis for this argument at this stage.

41. The trial magistrate, having convicted them, sentenced each of the appellants to 20 years imprisonment, the mandatory minimum prescribed under Section 8(3) of the *Sexual Offences Act*. In their mitigation, the appellants urged the court to be lenient and consider the Supreme Court's decision in the case of Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) where the court addressed the unconstitutionality of mandatory and minimum sentences stating that they curtailed the trial magistrates' ability to exercise discretion during sentencing.

42. In the end, I find that the appeal partially succeeds with orders as follows:

    a. The trial court's finding on conviction of both appellants is hereby upheld; and

    b. The sentence of 20 years imprisonment meted out to each of the appellants is hereby set aside and substituted with a sentence of 15 years imprisonment each.

43. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

……………………………………for the Appellants

……………………………………for the State