Valentino v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 3623 (KLR) (11 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E002 OF 2023

WA OKWANY, J

APRIL 11, 2024

BETWEEN

VALENTINO ALIAS ONSUSU ONGENI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Original Judgment in Nyamira CMCR (SO) Case No. E037 of 2022 in the Chief Magistrate's Court at Nyamira by Hon. B. Okong'o, Resident Magistrate delivered on 29th December 2022)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 16th day of June 2022, at Nyamira South sub-county, intentionally and unlawfully caused his genital organ, his penis, to penetrate the vagina of MGO (particulars withheld), a child aged 17 years.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on the 16th day of June 2022, at Nyamira South sub-county, he intentionally and unlawfully touched the genital organ vagina of MGO (particulars withheld), with his genital organ penis.

3. The Appellant pleaded not guilty to the charges after which a trial was conducted in which the prosecution presented the evidence of 5 witnesses as follows: -

4. PW1, MGO (particulars withheld) the victim, was on 16th June 2022, on her way home from a funeral when it was alleged that the Appellant accosted her, covered her face with a sweater and took her to road leading to a river where he slapped her several times and threated to stab her with a knife. It was

further stated that the Appellant tore off her clothes and defiled her. She raised an alarm and her mother (PW2) and uncle came to her rescue. The Appellant ran away when he saw the rescuers.

5. PW1 was thereafter escorted to the hospital and later to the police station where she recorded her statement. PW1 testified that she was able to identify the Appellant when he uncovered her face because there was electricity light from a nearby building.

6. PW2 BN (particulars withheld), the complainant's mother was on the material evening also on her way from the funeral venue in the company of her neighbour PW3, Ann Nyaboke Obwocha, when they heard screams emanating from the road towards the river. They identified the voice of PW1 as the person in distress. They rushed towards the river where they found PW1 alone and bleeding from her vagina. They did not see the assailant. They escorted the complainant to the area chief where they made a report before taking her to the hospital for treatment.

7. PW4, Rodgers Ongaga, was the Clinical Officer who examined the complainant at Nyamira County Referral Hospital. He noted that the victim's pants were torn and had blood stains. He also noted that the victim had abrasions on her labia minora and majora and bloody discharge from her vagina. He collected samples and made a diagnosis of defilement. He produced the P3 Form (P.Exh2) and the Treatment Notes (P.Exh 3).

8. PW5, PC Eunice Akwa, the investigating officer, received the sexual assault report, recorded witness statements and issued PW1 with a P3 Form. She stated that police officers from Nyaikuro Police station arrested the Appellant on 8th July 2022 and escorted him to Nyamira Police Station where he was interrogated before being charged with the offence of defilement.

9. At the close of the Prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant. The Appellant was consequently placed on his defence. He opted to give a sworn statement in his defence and did not call any witnesses.

The Defence Case

10. The Appellant (DW1) denied the alleged events of the evening of 16th June 2022 and explained that he was arrested while at his home on 7th July 2022. He stated that he did not know the complainant or the reasons for his arrest. His case was that he had been framed by the complainant.

Judgment and Sentence

11. In his judgment, the trial court found that the Prosecution had established its case beyond reasonable doubt. The Appellant was consequently convicted for the offence of defilement and sentenced to serve 15 years' imprisonment.

The Appeal

12. Dissatisfied with the conviction and sentence, the Appellant filed the instant appeal in which he listed the following grounds of appeal: -

    1. That he was found on the wrong side of the law, was arrested, arraigned in court, tried and convicted to serve 15 years' imprisonment having been found guilty of the offence of defilement contrary to Section 8(1) and 8(4).

    2. That he was indeed sorry and remorseful for the involvement in and the commission of the offence.

3. That the punishment that was imposed on him was heavy and deterrent and he wished to pray to the superior court to reduce the sentence and accord him with a lesser jail term.

4. That he was an orphan being brought up in a very poor background and the sentence was psychologically torturous and traumatizing and he regretted ever engaging in the crime.

5. That he was a young man who had just attained the age of 18 years without knowledge of the law and thus prayed to the Court to have mercy and empathy on him and give him another chance to mould his life.

6. That the medical officer who examined the complainant did not examine him to clear doubt that he was the one who defiled her.

7. That he beseeched the Court to consider that he was a first offender and not a criminal therefore he prayed for leniency.

13. The Appeal was canvassed by way of written submissions which I have considered.

14. The duty of a first appellate court was explained in the case of *Mark Oiruri Mose vs. R* (2013) eKLR thus: -

> " This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

Issues for Determination

15. The main issues for my determination are: -

i. Whether the offence of defilement was proved to the required standard.

ii. Whether the sentence was just and legal

Proof of Defilement

1. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs 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 vs. R*, [2013] eKLR."

16. Section 8 (1) of the *Sexual Offences Act* as follows: -

8. Defilement

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

(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.

17. The above provision requires the prosecution to present evidence to prove three key planks/ingredients of the offence of defilement, namely; the age of the victim, penetration and the positive identification of the assailant. The said ingredients were outlined in the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR as follows: -

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

18. In the present case, I note that the victim testified that she was 17 years old at the time in question. She produced her birth certificate (P.Exh1) which showed that she was born on 10th October 2005. The offence occurred on 16th June 2022. I find that the victim was a minor aged 16 years and 8 months at the time of her attack. I am satisfied that the first ingredient of minority age of the complainant was proved to the required standards.

19. Turning to penetration, Section 2 of the *Sexual Offences Act* defines penetration as follows: -

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

20. Penetration can be proved through the victim's sole testimony or through the victim's testimony corroborated by medical evidence. (See *Bassita Hussein vs. Uganda*, Supreme Court Criminal Appeal No. 35 of 1995) In this case, the Prosecution presented evidence that took the latter form as PW1 testified as follows: -

> " ....As I was nearing home, I saw the Accused person emerge from the maize plantation. This was around 7.30pm .....The Accused person covered my face with a sweater and took me to another road that was leading to a river. When we reached there, the accused person removed the sweater from my head, then he started slapping me, then he showed me a knife and told me he would stab me, then he tore my clothes. I was wearing a green dress. The accused tore my pants, then he started doing to me 'bad manners'. He opened his trousers' zip, pulled down his trousers, then he removed his penis and inserted it into my vagina. He did not use a condom. He defiled me from around 7pm to 8pm. ...."

21. From the above extract of the complainant's testimony, it is clear that the assailant penetrated her vagina as she stated that he inserted his penis into her vagina. I note that even though PW1 initially used the words 'bad manners' to explain what was done to her, courts have accepted the use of such euphemisms and found them to mean that the victims described the act of penetration. Indeed, in *Daniel Arasa vs. Republic*, HCRA 1035 of 2013 [2014] eKLR the court held that: -

> " It is common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act.
>
> Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement.

> The learned trial magistrate was therefore correct in his finding that penetration as defined by the *Sexual Offences Act* was proved."

22. PW2 and PW3 also testified that when they found the victim bleeding from her vagina. They added that her dress was stained with blood. PW4, the Clinical Officer, examined the victim and confirmed that she had been penetrated owing to abrasions on her genitalia coupled with bloody external genitalia.

23. I find that the ingredient of penetration was proved through the victim's testimony and corroborated by the medical evidence.

24. Turning to the third ingredient, positive identification of the perpetrator of the offence, I note that besides the complainant, none of the witnesses testified that they saw the Appellant committing the offence of defilement. What then was the complainant's evidence on identification? PW1 testified as follows on her identification of the assailant, during examination in chief: -

> " I saw the accused person emerge from the maize plantation. This was at around 7.30pm. This was the first time I had an encounter with the accused person. ..... I was able to identify the accused person when he uncovered my face from the sweater. There was a nearby building being constructed that had electricity lights. That is how I was able to identify the accused person."

25. On cross examination by the Appellant, the complainant testified as follows: -

> " I have seen you on the road walking. I saw you from the maize plantation where you emerged and defiled me. The maize plantation is near our home area. It was at night. I saw you with my eyes. You removed my sweater and I was able to see you. I can see clearly at night as well. You were wearing a black trouser and a black sweater."

26. The complainant's testimony, during examination in chief, was that it was her first encounter with the assailant. This means that the assailant was a stranger to her. On cross examination, however, she claimed that she had seen him walking on the road. The complainant further stated that the offence was committed at night. The complainant was also the sole eye witness to the offence. Courts have taken the position that the trial court should examine evidence relating to night identification with extra caution in order to satisfy itself that the circumstances of such identification are favourable and free from possibility of error before they can safely make it the basis of conviction.

27. In *Maitanyi vs Republic*, (1986) KLR 196 the court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows: -

> " Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

28. In *Wamunga vs. Republic* (1989) KLR 426 it was held thus: -

> " 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 conviction."

29. I am also aware of the guidelines set by the Court of Appeal in the case of *Mwaura vs. Republic* [1987] KLR 645, wherein it was held, inter alia, that:

> " In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

30. In *Anjononi and Others vs Republic*, (1976-1980) KLR 1566 it was held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

31. In *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 by the Court of Appeal held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

32. In the celebrated case of *R vs Turnbull & Others* (1973) 3 ALL ER 549, the Court held as follows on the factors to be considered when the only evidence turns on identification by a single witness and held that:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

33. Applying the principles expressed in the above cited cases to the instant case, I note that the complainant's testimony on the issue of whether the assailant was a total stranger or a person she had seen before the incident was contradictory. I say so because she initially stated that it was her first encounter with the Appellant but later testified she had seen him walking along the road. I note that this was a case of night identification, by a single witness under very difficult circumstances where she was threatened with a knife and her head reportedly covered with a sweater. I note that even though the complainant testified that the sweater covering her head was removed at some point, she did not state the length of time that she was able to see her assailant.

34. I further note that even though the complainant stated that she was able to see the Appellant using electricity lights from a nearby house, the quality of the lighting and the distance between the scene of the attack and the said house was not disclosed. It is also instructive to note that the complainant did not state that she knew her defiler's name and neither was she present during his arrest. She was also

not called to identify the Appellant at an identification parade. The investigating officer PW5 testified as follows on the circumstances under which the Appellant was arrested: -

> "On 17/07/22, police officers from Nyaikuro traced the accused person in (particulars withheld) and arrested him and escorted him to Nyamira Police Station."

35. The question which arises is how the police were able to trace, identify and arrest the Appellant without the complainant's involvement? As I have already stated in this judgment, the complainant did not testify that she knew the Appellant's name. She merely stated that she had seen him walking on the road without explaining how often or, if occasionally, whether she had any special reason for remembering the Appellant or if she gave his description to the police. The question that the prosecution did not answer is how the police were able to pick out and arrest the Appellant as the perpetrator of the offence. My finding is that since this was not a case of identification by recognition, the police were required to conduct an identification parade in order to allow the complainant to pick out her attacker among several possible suspects. In the circumstances of this case, I am unable to find that the Appellant was properly identified as the person who had sexual intercourse with PW1.

36. I have re-examined the evidence upon which a conclusion was made that the Appellant defiled the complainant and I find that it was not well founded. I note that the trial court rendered itself as follows on the identification of the Appellant: -

> "PW1 stated that she was able to see and identify the accused person when he removed the sweater from her head. She further stated during cross examination, the she had seen the accused before walking in the area and affirmed on re-examination that there was a nearby electricity light from a building that enabled her to see the accused person. Further, PW1 stated that the accused had defiled her from around 7.00pm to 8.00pm which may be for about an hour. This therefore means that she was able to see and recognize the accused person as he was defiling her. Also noteworthy, in his defence, the accused person stated that he was arrested at his home in (particulars withheld). This therefore means that he came in (sic) the same area as the complainant. There would therefore be reasonable circumstances to link the accused with the offence having come from the same area as the complainant."

37. As I have already stated in this judgment, while it is possible that the complainant was able to see/recognize the Appellant during the attack, she did not identify him to the police at the time of his arrest. Furthermore, the mere fact that the Appellant resided in the same area as the complainant did not connote that he was the perpetrator of the offence as was held by the trial court. In sum, I find that the evidence of identification of the Appellant was not satisfactory and does not meet the threshold of proof in criminal matters.

38. Having found that the prosecution did not prove the ingredient of identification of the Appellant as the complainant's assailant, I find that the instant appeal is merited and I therefore allow it. Consequently, I quash the conviction, set aside the sentence and direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

39. It is so ordered.

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

W. A. OKWANY

JUDGE