Anamwetsa v Republic (Criminal Appeal 45 of 2023)
[2024] KEHC 5402 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 45 OF 2023

DR KAVEDZA, J

MAY 6, 2024

BETWEEN

IBRAHIM MAINA ANAMWETSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. R. Kitagwa (SRM) on 23rd February 2023 at Kibera Chief Magistrate's Court Sexual offense No. E094 of 2020 Republic vs Ibrahim Maina Anamewtsa alias Baba Bill)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the subordinate court for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The particulars were that on 03.09.2020 within Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of E.N.K., a child aged 14 years. He was sentenced to serve 20 years' imprisonment.

2. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.

3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. With the above, I now proceed to determine the substance of the appeal. In his undated Memorandum of Appeal and submissions, the Appellant has raised eight grounds of appeal. In a condensed form, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt and that the prosecution's case was riddled with contradictions and inconsistencies. He further complains that

the trial magistrate erred by failing to consider his alibi defence. Additionally, the appellant complains that section 8(3) of the Act is unconstitutional as it takes away the judicial discretion to determine the appropriate sentence.

5. In order to succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. “Penetration” under section 2 of the Act means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

6. The prosecution called four (4) witnesses in support of their case. The complainant, E.K.N., (PW1) gave sworn testimony after voir dire was conducted and stated that she was sixteen years old as of 27.07.2021. She testified that on 03.09.2020 at around 7.00 pm, she was playing with her friend H (name withheld) and some other girl at the field when the appellant called her. She left her friends and proceeded to where the appellant was, thinking that he was going to send her. Upon getting to where he was, the appellant brandished a knife, which was tacked around his waist, and demanded that she follow him. The appellant led her to his brother’s house. While in the house, the appellant, while still holding the knife, asked her to undress. He also threatened that should she scream, he would kill her. He then undressed too, put on a condom and in her words, 'alinibaka’, which this court understands to mean that he sexually assaulted her. After the act, the appellant gave her Kshs. 500/= and warned her from reporting to anyone. PW1 put her clothes back on and left. She was scared of reporting to her mother, PW3, but the mother nonetheless noticed that she was walking abnormally and took her for treatment.

7. In her testimony, PW1 gave clear and graphic testimony of the ordeal. She remained steadfast that it was the appellant who took her to his brother’s house and subjected her to the act of sexual assault. Besides, she knew the appellant as their neighbour and a toilet agent. Additionally, despite the incident happening in the evening at around 7.00 pm, PW1 was able to tell who called her from the field where she was playing with her friends. She added that she unsuspiciously responded to the call, on the assumption that the appellant was going to send her somewhere. I therefore hold that the Appellant is the one who committed the act of sexual assault.

8. The testimony of PW1 did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the child was telling the truth. In this case, the trial magistrate recorded in her judgement that the complainant aptly described the events in question. She added that the complainant was clear on where and how the defilement happened and that she had no reason to doubt her testimony. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, despite being subjected to thorough cross-examination by the appellant.

9. Regarding additional corroborating evidence, the prosecution called PW3, the mother of PW1. She recounted that on 08.09.2020, she was seated outside her house when she noticed that PW1 was not walking properly. She inquired but PW1 told her that she was okay. She nonetheless took her to the hospital, where PW1 confided in the doctor about the incident. She confirmed that the appellant was their neighbour, whom she identified as Baba Billy. PW3’s narration corroborated PW1's testimony that the appellant was well-known to her as a neighbour.

10. The prosecution also called Alice Gori, a nurse at Tumaini Center (PW2), who examined PW1 on 14.09.2020 and produced the P3 form thereof. She stated that upon examination, PW1’s hymen was torn. There was a painful swelling and hyperemia at the 4 o’clock region. In cross-examination, PW2 added that she observed an inflammation margin on the vagina. These medical findings of PW2 corroborate PW1's testimony regarding the incident and conclusively prove penetration.

11. The appellant argued that that the delay in handling the material incident was not explained. The incident happened on 03.09.2020, the mother, PW3, learned of the same on 08.09.2020, when she observed that PW1 was walking abnormally. He submitted that failure to justify the delay meant that the incident never happened and that it was a fabrication. PW1 in her testimony stated that during the ordeal, the appellant brandished a knife and warned her not to scream or else he would kill her. Additionally, she warned her against reporting to anyone. Clearly, from PW1's testimony, she felt threatened before, during, and even after the incident, which scared her from reporting. This is particularly true from the testimony of PW3 who stated that even when she noticed PW1 walking abnormally and inquired about the same, PW1 was adamant that she was okay. Suffice it to note that immediately the mother realized, she did not delay in taking action, that is, taking PW1 for medical examination and reporting to the police. This ground therefore fails.

12. The appellant further argued that essential witnesses were not called. Particularly, he contended that the prosecution did not call the girls whom PW1 was playing with. He also submitted that the neighbours at Lindi were not questioned as to whether they saw the appellant with PW1 on the material date. Additionally, he submitted that the arresting officer was not called to testify.

13. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that, in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see Bukenya and *Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).

14. According to the testimony of PW1, when the incident occurred, there was no one else in the house. The witnesses in question were not eyewitnesses. From the totality of the prosecution's case, I hold the view that their evidence was not necessary to prove the prosecution's case. This ground therefore fails.

15. Additionally, the appellant complains that his alibi defence was not considered by the trial court. The appellant gave sworn testimony in defence and called two other witnesses. In his defence, the appellant testified as DW1 and stated that on the material date, he was at work and got home between 7 pm and 8.50 pm. He denied having committed the offence and alleged that the charges were a fabrication by PW3, with whom she had issues concerning cleaning the toilets which he managed.

16. DW2 could not recall what happened on the material date and so could not testify on the same. DW3 on the other hand, stated that he is the landlord of the plot and testified that on 25.09.2020, a neighbour's child was messing up with the gate so the appellant slapped him when the child insulted him when he told him to stop playing with the gate. The parents of the said child were not pleased and warned the appellant that he would see. He advised the appellant to report the same to the police.

17. From the totality of the appellant's defence, the issues on management of the plot arising between him and the complainant's mother arose on 25.09.2020, about three weeks after the date of the material incident, 03.09.2020. Additionally, the appellant stated that on the material date, he came home at around 7 pm to 8.50 pm, the same period in which PW1 testified to have been defiled by the appellant; around 7 pm. PW1 had no reason to falsely accuse the appellant of defiling her, despite her parent having issues with him. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court.

18. On the age of PW1, the trial court considered the birth certificate produced in evidence by PW3, which indicated PW1's date of birth as 01.12.2005, being fourteen years old at the time of the incident.

There is no doubt that PW1 was a child. The conviction on the main charge of defilement is therefore affirmed.

19. On the appeal against the sentence, the appellant submitted that in light of emerging jurisprudence, section 8(3) of the *Act* is unconstitutional as it takes away the discretion of the court in determining the appropriate penalty. He relied on the case of *Taifa v Republic* (Criminal Appeal E018 of 2022), where the court held that the sentence provided for in section 8(3) of the act is lawful but not necessarily mandatory.

20. The appellant was sentenced to serve to twenty years imprisonment. Section 8(3) provides that a person who commits an offence of defilement with a child between 12 years and 15 years is liable upon conviction to an imprisonment of not less than twenty years.

21. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.

22. For the above reasons, I hereby set aside the sentence of twenty (20) years' imprisonment and substitute it with a sentence of ten (10) years' imprisonment. The sentence shall be run from the date of conviction, 23rd February 2023.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Gladys Omurokha for the Respondent

Mr. Hassan Nandwa for the Appellant

Naomi Court Assistant