Hussein v Republic (Criminal Appeal E037 of 2022)
[2024] KEHC 4736 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E037 OF 2022

JN ONYIEGO, J

MAY 7, 2024

BETWEEN

ABDIHAKIM ALI HUSSEIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. P.Wasike S.R.M. and delivered on 26.01.2022 Sexual Offences Case No. E30 of 2021 SPM's Court at Mandera)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. Particulars were that on 21.08.2021 in Mandera North Sub County within Mandera County, intentionally caused his penis to penetrate the vagina of MM a child aged 15 years.

3. He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on 21.08.2021 in Mandera North Sub County within Mandera County unlawfully did commit an indecent act with MM, a child aged 15 years by rubbing his penis against her vagina.

4. The trial court upon considering the law and facts in the case, reached a determination that the appellant was guilty of the main count and imprisoned him to serve a term of fifteen years with effect from 25.08.2021. The appellant being aggrieved by the conviction and the sentence of the court, filed an undated petition of appeal on the following grounds:

    i. That the trial court erred in law and fact by holding and finding that the prosecution proved its case.

ii. That the trial court erred in law and fact by convicting the appellant on evidence that was contradictory and inconsistence.

iii. That the trial court erred in law and fact by failing to consider his defence.

5. At the hearing of the appeal, the parties filed written submissions to canvass the same.

6. The appellant filed his submissions on 15-02-24 thus submitting that the prosecution did not prove its case to the required standards. That the trial court convicted and thereafter sentenced him yet the evidence by the prosecution was marred with contradictions.

7. That at one instance, the complainant stated that the accused opened a padlock and later changed that the padlock was not locked. In the same breadth, during exam in chief, she stated that it was only the appellant who was in the plot but during cross examination, she changed the narrative to wit that there were three men in the said plot at the material time. The appellant further urged that in as much as no set number of witnesses are required to prove the prosecution's case, in this case, it would have been necessary for the prosecution to present as a witness the alleged other person who informed the complainant's mother of where she was at the material time. He thus urged this court to find that his appeal had merit and as such, his conviction be quashed and the sentence set aside.

8. He went further to state that the alleged motorcycle was not identified hence failure by the prosecution to call crucial witnesses. Further, he contended that the doctor's evidence was doctored and manipulated by the complainant's relatives and that he did not do an independent examination.

9. Mr. Kihara for the respondent while relying on his submissions dated 14.02.2024 stated that to prove the offence herein, it was required of the respondent to establish the age of the victim, penetration and identity of the perpetrator. On age, it was submitted that the age of the victim was a crucial element that determines the sentence of a perpetrator of a sexual offence. The respondent relied interalia on the case of *Hudson Ali Mwachongo v Republic* [2016] eKLR whereby it was held that the age of the victim of defilement cannot be gainsaid and that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian, by observation or common sense.

10. On penetration, it was submitted that the same meant the partial or complete insertion of the genital organs of a person into the genital organs of another person. In reference to identification, it was submitted that the appellant was identified by the complainant as he was a person well known to the appellant.

11. On sentence, the respondent contended that the trial court properly exercised its discretion and sentenced the appellant to life imprisonment having considered the circumstances of the case. This court was therefore urged to dismiss the appeal in its entirety and uphold the sentence by the trial court.

12. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour". [See *Pandya v Pandya* (1957) EA (336].

13. PW1, MM stated that on the material day, she was on her way from the market, when she met the appellant who carried her as a pillion passenger in his motorbike. That before she could board the said motorbike, the appellant put something on her nose thus leading to a temporary loss of memory. She stated that the appellant removed her clothes and thereafter his clothes before inserting his penis to where she urinates.

14. She said that upon completion, she bled from her private parts to an extent that she could not walk thus prompting the appellant to carry her on his motor bike to a place near their plot. That she screamed but there was no one around and further, there was a wedding ceremony nearby and so, there was loud music thus her screams went unheard.

15. On cross examination, she stated that upon meeting the appellant, he told her that he loved her and therefore, she boarded the motor bike willfully. That she once told the appellant that if he desired to marry her, then he ought to inform her grandfather.

16. PW2, Adan Mohamed Osman, a medical officer who examined the complainant stated that the minor presented with a complaint of lower abdominal pain, back pain and pus vaginal bleeding. That speculum revealed active bleeding from the vaginal wall which was as a result of the laceration of the vaginal and cervical walls. According to the doctor, the injuries were fresh as the hymen was completely broken. It was his opinion that the injuries were as a result of blunt force trauma due to erect penis.

17. PW3, KHA testified that the complainant was her daughter. That on 21.08.2021 at 1.00 p.m., she had left the complainant in the market, at her place of selling vegetables. That the complainant returned home at 8.00 p.m., but did not tell her what happened instead shared with a neighbour who later reported to her. She stated that she reported to the chief who advised her to report the matter to the police station. Thereafter, the complainant was taken to Rhamu hospital where she was examined and thereafter treated. It was her evidence that the appellant was a person she knew well as he operated a business as a barber next to her kiosk.

18. PW4, Cpl. Charles Namisi Wasike testified that he was the investigating officer of the case herein. That the Rhamu Police station OCS instructed him to investigate the defilement case. He further stated that the complainant met the appellant at Rhamu when he took her to his residence wherein he defiled her. That he issued her a P3 form which was later filled at Rhamu hospital as the doctor found that the complainant's private parts had been torn thus concluding that indeed, she had been defiled.

19. He stated that he took the complainant for an age assessment at the said hospital where it was found that she was aged fifteen years old. That upon visiting the scene at bulla Shantole, he found the appellant in the alleged house where the complainant had been defiled. Thereafter, he arrested the appellant and subsequently preferred the charges herein. He thus produced the age assessment report as Pex5.

20. The prosecution closed its case and on 26.10.2021, the trial court put the appellant on his defence upon finding that a *prima facie case* had been established against him. In his sworn testimony, he stated that he could recall visiting Rhamu where he met with his former teacher. That he stayed there for 4 days then left for his home in Elwak. That while at Elwak, he received a call from a police officer informing him to report at Rhamu police station where he was told that he had beaten and defiled a minor.

21. He stated that he recalled the mother of the complainant asking him to train her children. That he informed the woman that he would not train her children unless they possessed an identification card. It was his testimony that he had not seen the said children before. That when he ordered those children to leave, one of them (a girl) grabbed him by the collar. He claimed that when he pushed a way the girl, her mother took her away. According to him, he was simply framed as he had slightly beaten the boy (child).

22. I have considered the record of appeal herein and the rival submissions. Issues that germinate for determination are; whether the prosecution proved its case beyond reasonable doubt; whether there were material contradictions in the prosecution case and; whether the sentence meted out was excessive.

23. As already noted above, the appellant was charged with the offence defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that

> " a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

[See *George Opondo Olunga vs Republic* [2016] eKLR].

24. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 as "...any human being under the age of eighteen years."

25. The importance of proving age in a Sexual Offence case cannot be gainsaid. In the case of *Kaingu Kasomo vs Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

> " 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."

26. In the instant case, the complainant stated that she did not know her age while PW2, her mother also testified that the complainant was fifteen years old. The same was corroborated with the age assessment report produced as Pex 3 which showed that the complainant was fifteen years of age. In the same breadth, the P3 form and the treatment notes produced by PW2 also noted that the complainant was fifteen years old at the time when she was allegedly defiled. It is my finding therefore that indeed, the complainant was a minor aged fifteen years.

27. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

28. In the case of *Alex Chemwotei Sakong v Republic* [2108] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJA) in the case of *Mark Oiruri vs Republic* Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
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> > " ...Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed.So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

29. The complainant testified that the appellant inserted his penis into her vagina and thereby defiling her. PW3, the mother of the complainant also confirmed that she observed the complainant and noticed that she was bleeding from her vagina. PW2, corroborated the evidence of PW1 and PW3 in that

the complainant presented with the complaint of lower abdominal pain, back pain and pus vaginal bleeding. That speculum revealed active bleeding from the vaginal wall which was the laceration of vaginal wall and cervical wall. The injuries were fresh as the hymen was completely broken. It was his opinion that the injuries were as a result of blunt force trauma due to erect penis.

30. From the testimony of the complainant and that of the Medical Officer, it is apparent that indeed the complainant was penetrated.

31. On identification, the complainant described in detail the whole episode. She stated that it was the appellant herein who defiled her. She further stated that upon meeting the appellant, he told her that he loved her and therefore, she boarded the motor bike willfully. That she once told the appellant that if he desired to marry her, then he ought to inform her grandfather. From the evidence herein, it was clear that these are people who knew one another well. In my view, there was no element of mistaken identity nor confusion in reference to identity of the perpetrator as the two knew each other before and were even contemplating of marrying. [See *Anjononi & Others vs Republic* [1989] KLR].

32. Why would the complainant fabricate this case against the appellant? She gave quite a detailed story on how the appellant took her to his house and had sex without much resistance in the hope that she was to get married. I have no reason to doubt her testimony. From the injuries sustained out of the broken hymen, which was fresh, it could not be a fabrication. It is trite law that a court can convict based on the evidence of a single witness as long as the court cautions itself on the dangers of convicting based on such evidence.

33. Besides, a court can under Section 124 of the *evidence Act*, convict based on the evidence of a single witness in a sexual offence without corroboration as long as the court is satisfied that the witness is truthful. The trial court trusted the evidence of pw1 as reliable hence truthful witness. See *George Muchika Lumbasi v Republic* (2016) eKLR where the court held that a court can convict under section 124 of the *Evidence Act*. It therefore follows that the prosecution had proved its case beyond any reasonable doubt regrding the identity of the perpetrator.

34. On the ground that the prosecution evidence was marred with contradictions, the appellant urged that the prosecution evidence was marred with lots of inconsistencies. It is my view that the alleged contradictions did not go to the root of the charge as the prosecution proved its case to the required standard and therefore, conviction by the trial court was safe. The issues in relation to the number of the witnesses who testified or witness who effected arrest in my view did not also go into the core of the matter herein. [See the case of *Twehangane Alfred v Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6].

35. On the ground that his defence was not considered, the trial court noted that the prosecution evidence was cogent, concise and well corroborated as opposed to the evidence by the appellant. The trial magistrate noted that in as much as the minor boarded the motor cycle willingly, consent by a minor in defilement charge is immaterial in circumstances of the case herein. It is against that backdrop that I disagree with the appellant that his evidence was disregarded by the trial magistrate.

36. On sentencing, the same was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a

somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.,* (1950) 18 EACA 147:

> " It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case".

37. The appellant contended that the sentence was excessive given the circumstances of the case herein. 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* 2006 which provides that upon conviction the offender shall be imprisoned for a term of not less than twenty years. In the case herein, the appellant was sentenced to serve a period of fifteen years' imprisonment.

38. In the foregoing, and going by the fact that the appellant in his testimony stated that he was a teacher by profession, it is my view the trial magistrate in the given circumstances reached a fair determination having in mind the circumstances of the case. It is against that backdrop that I uphold the conviction and sentence by the trial court noting that the same were founded on sound legal principles.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 7TH DAY OF MAY 2024.

J. N. ONYIEGO

JUDGE