Kairi v Director of Public Prosecutions (Criminal Appeal E202 of 2022) [2024] KEHC 6162 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E202 OF 2022

TW CHERERE, J

MAY 16, 2024

BETWEEN

JAMES KAIRI .... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

(Being an appeal against conviction and sentence in Tigania CR.S.O. No. E018 of 2020 by Hon. F.Munyi (PM) on 01st December, 2022)

JUDGMENT

Background

1. James Kairi (Appellant) was charged and convicted for the offence of defilement of contrary to Section 8 (1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006 that was allegedly committed on 21st October, 2020 against a 16-year-old girl N.K and was sentenced to serve 15 years imprisonment.

2. Appellant has appealed the conviction and sentence mainly on the ground that and that the prosecution case was not proved on the grounds that:

    1. That clinical report did not support the allegation of defilement

    2. There was no link between him and the phone number that called complainant on the night she was defiled

    3. There was no evidence concerning the light by which he was identified

    4. The defence was not considered

    5. The sentence is harsh

6. The trial magistrate failed to invoke the provisions of Section 333(2) of the *Criminal Procedure Code*

Prosecution Case

3. Complainant stated that on 21st October, 2020 at about 07.00 pm, Appellant who was working for her neighbor called her on her mother's phone and when they met in the farm he felled and defiled her. She stated she did not inform anyone about the incident until two weeks later when her mother saw text messages that Appellant had sent to her cellphone.

4. According to complainant's mother, he saw the messages Appellant allegedly sent to complainant on 21st October, 2020 and reported the matter to her husband. Her husband upon seeing the messages escorted complainant to the police station after she said Appellant had defiled her.

5. Complainant was examined on 27th October, 2020 and on the basis of an old hymenal scar, the clinical officer filled a P3 form PEXH. 3 on which she indicated that she had formed an opinion that complainant had been defiled.

6. Appellant denied the offence and stated that he was framed. He also denied that phone number 07XXXXXXXX that allegedly called the complainant on the day she was defiled was his.

Analysis and Determination

7. This being a first Appeal, 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 demeanour of the witnesses and hearing them give evidence and give allowance for that. (See *Okeno v Republic* [1972] E.A.32 and *Mark Oruri Mose v R* [2013] eKLR).

8. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR).

9. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo v Republic* Criminal Appeal No. 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello v Republic* Cr. App. No. 203 of 2009[2010] eKLR.

10. That complainant was 16 years was confirmed by a certificate of birth PEXH. 5 that showed she was born on 07th January, 2004

11. Concerning penetration, Section 2 of the Act defines penetration to entail: -

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

12. The clinical officer stated complainant had an old hymenal scar from which she concluded that she had been defiled.

13. Appellant submitted that a broken hymen is not prove of penetration and cited *P.K.W v Republic* [2012] eKLR where the court of appeal stated as follows:

> 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 natural tearing of the hymen. See the Canadian case of The Queen v Manual Vincent Quintanilla, 1999 ABQB 769.

14. In *Michael Odhiambo v Republic* (2005) eKLR, the court held that the rapture of the hymen was not conclusive proof of defilement.

15. In *Daniel Mwingirwa v Republic* [2017] eKLR, the Court of Appeal made reference to *P.K.W v R* (*supra*) and made the following observations;

> "........ 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."

16. The fact that complainant continued to behave normally and did not report the incident to anyone and only implicated Appellant a week later, issues which the lower court does not seem to have addressed its mind to, has raised doubt in my mind as to the guilt of the Appellant.

17. Additionally, complainant stated that the person that called her to meet him on the night she was defiled used phone number 07XXXXXXXX. Appellant denied that the said phone was his and the prosecution failed to lead evidence to the contrary.

18. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of *the Constitution* which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused. (See *Miller v Minister of Pensions* (1942) A.C. and *Bakare v State* 1985 2NWLR).

19. It is worth noting that the offence was committed at about 07.00 pm and it was therefore crucial for the prosecution to lead evidence as to the source of light that enabled complainant identify the perpetrator which evidence they failed to tender.

20. From the totally of the evidence, I have come to the conclusion that the finding of the lower court is not fully supported by the evidence on record.

21. Consequently, and for the reasons set out hereinabove, I find that the evidence by the victim was doubtful and unsafe to found a conviction. I accordingly find that this appeal has merit.

22. Subsequently, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 16th DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present in person

For DPP - Ms. Rotich (PC-1)