Musiambo v Republic (Criminal Appeal 39 of 2023)
[2024] KEHC 5613 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5613 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 39 OF 2023

DR KAVEDZA, J

MAY 22, 2024

BETWEEN

OLIVER KEVOGO MUSIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the original conviction and sentence delivered by Hon. M. Maroro (SPM) on 3{{^rd}} August 2022 at Kibera Chief Magistrate's Court Sexual Offences No. E855 of 2020 Republic vs Oliver Kevogo Musiambo)

JUDGMENT

1. The appellant was charged with the offence of defilement, contrary to sections 8(1) and (3) of the *Sexual Offences Act* No. 3 of 2006. In the alternative, he was charged with the offence of an indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*. After a full trial, he was convicted on the main charge and the alternative charge. He was sentenced to serve 20 years imprisonment on the main and 15 years imprisonment on the alternative charge.

2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal. The appellant also filed amended grounds of appeal, and both parties have filed written submissions, which I have considered.

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 grounds of appeal and submissions, the Appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the ingredients of the offence of defilement were not proved beyond

reasonable doubt. Further, essential witnesses were not called to testify. Finally, the court failed to consider his mitigation before sentencing. He urged the court to quash his conviction and set aside the sentence.

5. 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 case was as follows. The complainant (PW2) provided sworn testimony. She testified that she was 16 years old and the appellant had been her boyfriend for a long time. In 2019, they started having sex. At the time she was 14 years old. That the sexual activity occurred at the appellant's house for one and a half years. On 22nd August 2020, she disappeared from home for a few days and was at the appellant's house. It was during this period that her mother (PW1) discovered that she had a boyfriend. The matter was reported to the police and she was taken to hospital for examination.

7. In her testimony, PW1 gave clear and vivid testimony of her encounter with the appellant for more than one and a half years. She recalled that she had known the Appellant as who was her boyfriend at the time and they started engaging in sexual activity in 2019. In addition, the appellant was their neighbour and a family friend. After keenly analysing the victim's evidence, it is my finding that there was nothing to indicate that the complainant could have been untruthful. In light of the above, I find that there she was penetrated by the Appellant.

8. PW1's testimony did not require corroboration in accordance with the provision of Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. To this end, the trial magistrate recorded in the judgement that the court was satisfied that the victim, in her testimony, clearly stated that she had been having sex with the appellant at his house in 2019 for over one year.

9. For additional evidence, the prosecution called the complainant's mother, PW2. She testified that her daughter was born on August 16, 2005. On August 22, 2020, the complainant disappeared from home around 1 p.m. after a quarrel, and her mother reported her missing at Kangemi Police Post. The next day, August 23, 2020, the complainant returned home. Upon questioning her, the mother learnt that the complainant had slept at the appellant's premises, who was their neighbour and family friend. She reported this to the police and took her daughter to the hospital for examination.

10. Additionally, the prosecution called John Njuguna, a clinical officer at Nairobi Women's Hospital, produced the medical report and P3 form on behalf of his colleague, who examined the complainant but had since left the hospital. He stated that PW2 was examined on 23rd August 2020 and the findings were that her vagina had a cut wound that had healed. In addition, her hymen was broken. These medical findings were consistent with the testimony of PW2 on penetration.

11. The appellant also faulted the prosecution's failure to conduct a DNA test linking him to the offence. It is a well-established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. (See *AML v Republic* [2012] eKLR)

12. Faced with a similar argument, in *Williamson Sowa Mbwanga v Republic* [2016] eKLR, the Court of Appeal pronounced itself thus:

> "...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has

not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM."

13. I am guided by the above authority to find that it was not necessary in this case for the court to order a DNA test as the same was not necessary to prove penetration. The Appellant's contention in this regard therefore fails. I therefore find that penetration was proved to the required legal standard.

14. On the age of PW2, the trial court considered the birth certificate produced which indicated that the complainant was born on 16th August 2005. The incidents happened on diverse dates between 25th March 2020 and 23rd August 2020. She was therefore 15 years old at the time the offence was committed. There is therefore no doubt that PW1 was a child within the meaning of the law.

15. The appellant complained that essential witnesses were not called. The witness is the police officer who arrested him. 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).

16. It is my finding that given the totality of the evidence, the prosecution evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the *Evidence Act*.

17. In his defence, the Appellant denied having sexual relations with the complainant. He stated he had been framed by the complainant's mother for breaking her heart. The court considered this defence and found it to be baseless. Weighed against the prosecution's evidence, I come to the same conclusion. The conviction on the main charge of defilement is thus affirmed.

18. On the conviction, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error as it is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus: -

> " On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In M.B.O. v Republic, Criminal Appeal No. 342 Of 2008, this Court held,

'The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.'"

19. The charge is an alternative to and not an addition to and therefore once the trial court found that the prosecution had proved the main charge of defilement, she had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.

20. On the appeal against the sentence, the appellant states the sentence was harsh in the circumstances. In addition, the court failed to consider his mitigation before sentencing him. The appellant was sentenced to serve 20 years' imprisonment on the main count of defilement contrary to sections 8 (1) and 8(3) of the *Sexual Offences Act*. Section 8(3) provides that a person who commits an offence of

defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years.

21. The prosecution proved that the child was 15 years old; hence, the court imposed a sentence of 20 years' imprisonment. However, this court is guided by the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR where the court held the mandatory minimum sentences were no longer applicable.

22. That notwithstanding, 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, and was 24 years at the time the offence was committed, the appellant still has a full life ahead of him and needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.

23. For the above reasons, I hereby set aside the sentence of 20 years imposed on the main charge and substitute it with a sentence of ten (10) years imprisonment. The sentence on the alternative charge is set aside. The sentence shall run from the date of the appellant's arrest on 25th August 2020 pursuant to section 333 (2) of the *Criminal Procedure Code*.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Mong'are for the Respondent

Joy Court Assistant