Uriru v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 6556 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6556 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E014 OF 2023

LW GITARI, J

MAY 23, 2024

BETWEEN

PATRICK MUCOOKA URIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The appeal arises from the Judgment in Criminal Case No. E033/2021 in the Principal Magistrate's Court at Marimanti where 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* No.3/2006. The appellant had pleaded not guilty and after a full trial he was found guilty, convicted and sentenced to serve twenty (20) years imprisonment.

2. He was aggrieved by both the conviction and sentence and filed this appeal based on the following grounds:

    1. That the learned trial magistrate still erred in both matters of laws and facts by failing to note that the prosecution was not proved beyond reasonable doubts.

    2. That the pundit trial magistrate still erred in both matters of laws and facts by failing to consider that the case lacked essential witnesses.

    3. That the learned trial magistrate still erred in both matters of laws and facts by rejecting the appellant's water tight defense without giving cogent reasons.

    4. That the pundit trial magistrate still erred in both matters of law and facts by failing to put into consideration that the case was a frame up as the complainant were just neighbours.

5. That the learned trial magistrate still erred in both matters of laws and facts by failing to record reasons for believing single eye-witness.

6. That since the appellant cannot recall all that transpired during trial, he wishes to be availed with the certified trial proceedings and Judgments so as to draft more cogent grounds.

He prays that the appeal be allowed conviction be quashed the sentence be set aside and he be set at liberty.

3. The State opposed the appeal and filed submissions praying that the appeal be dismissed and the conviction and sentence be upheld.

The Prosecution's Case:

4. The particulars of the charge are that on 20/7/2021 at Tharaka South Sub-County within Tharaka Nithi County the appellant intentionally caused his penis to penetrate the vagina of N.K. a child aged twelve years. The prosecution called four witnesses. PW1, M.K is the complainant. She said she is a pupil at [Particulars Withheld) Primary School. On 20/7/2021 the appellant who is her neighbor went to their home at 8.00 pm and requested for some water to drink as she went for the water the appellant followed her into the house and locked the door behind her. He removed his trouser and under wear. He then removed her biker and raised her dress. He then laid her on the bed and started having sex with her. She stated that the appellant penetrated her vagina with his penis putting her through a painful ordeal. The appellant then left.

5. PW1 went to look for her mother. The matter was reported to the police at Marimanti Police Station. She went for treatment at Marimanti Hospital where she was examined by a doctor and was treated. According to PW1 the appellant was not a stranger to her as he used to visit her home frequently to talk to her mother. She stated that the appellant was well known to her and recognized him as the person who defiled her.

6. PW2 F.K.M is the complainant's mother. She told the court that the complainant was born in 2008 and produced a birth certificate showing that she was born 2/10/2008, see exhibit 2. According to her on 20/7/2021 at 2.00pm she was at Mukothima Market and on returning home the complainant reported that the appellant had gone there and had defiled her. She examined the complainant's genital organs and noted some whitish discharge inside and outside the genital organ, some bruises and lacerations as well as blood stains. She reported to sub-area who told her to go and report to the Sub-Chief and she was told to go to report to the police. The complaint was referred to hospital by the police where she was examined and a P3 form was filled, exhibit 2.

PW2 further told the court that the appellant disappeared after the committing the offence.

PW2 testified that the appellant was his cousin and there was no animosity between the families.

7. PW3 Lilian Klahu, a clinical officer testified that the complaint was examined at Marimanti Level Four Hospital on allegation that she was defiled on 20/7/2020 at their home. On examination, the pant had whitish discharge. The genitalia, the vaginal wall was swollen and red in colour; that is, it had inflammation. The hymen was not intact and there was a lot of pain on viginal examination. The urine had leucocytes (bacteria cells), bacterial spermatozoa- as a result of introduction of foreign substance. She produced the P3 form on behalf of her colleague. Under (Section 77 of the *Evidence Act* (Cap 80 Laws of Kenya).

8. PW4 was Mercy Gakii the Investigating Officer. She received the report and referred the complainant to hospital where she was examined and a P3 form was filled. She obtained the birth certificate of the

complainant and she confirmed that her age was twelve (12) years. She testified that the accused was not arrested immediately as he had escaped. He was arrested on 9/11/2021.

Defence Case:

9. The appellant gave a sworn defence and denied the charge. He told the court that the case was a fabrication due to a land dispute. In cross-examination the appellant could not say who had fabricated the case.

10. DW2 Elizabeth Gichoo Uriru is the appellant's mother. He alleged there was a land dispute but on cross-examination she did not know why there was a grudge, or why the complainant brought the case against the appellant

11. DW3 Luceta Kendi is the appellant's wife. She told the court she wanted to show that the complainant was a problematic person.

12. The learned trial magistrate in his Judgment dated 3/11/2022 held that the prosecution had proved the charge against the appellant beyond any reasonable doubts, convicted him and sentence him to serve twenty years imprisonment.

13. The appeal was disposed off by way of written submissions. The appellant submits that the trial magistrate erred by failing to find that the complainant was not a credible witness, failed to consider that essential witnesses were not called and the charge was not proved beyond any reasonable doubts.

14. For respondent, it was submitted that the charge was proved to the required standard, the appeal lacks merits and ought to be dismissed.

Analysis and Determination

15. I have considered the proceedings before the trial court and the submissions by the parties and the issue that arises for determination is whether the prosecution proved the charge beyond any reasonable doubts.

16. This is the 1st appellate court and its duty is now well settled.

Being the first appellate court, this court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court's own independent finding. The principle has been considered in various decisions of this court and those of the court of appeal. The leading authority on the subject is Okeno versus Republic (1972) E.A. 32.

In this case, the court stated:-

> " The duty of the 1st appellate court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusions on that evidence. However, it must warn itself that it did not have the benefits of seeing the witnesses when they testified and must leave room for that. The Court of Appeal in the case of David Njuguna Wairimu versus Republic (2010) while citing the case of Okeno versus Republic (Supra) stated as follows:-
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> > "The duty of the first appellant court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusions on that evidence without overlooking the conclusions of the trial court. There

are instances where the first appellate court may, depending on the facts and the circumstances of the case, come to the same conclusion as those of the lower court it may reverse those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the bases of the law and evidence to satisfy itself on the correctness of the decision."

The Court of Appeal further stated that-

> "an appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (Padya versus Republic 1975 EA) 336 and to the appellate court's own decision on the evidence. The appellate court must itself weight the conflicting evidence and draw its own conclusions. In doing so to must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter's versus Sunday Post 1978 E.A 424."

17. The appellant was charged with defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*.

The Section provides:-

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

18. From this Section, it is clear that the ingredients of the offence of defilement are-

1. Penetration
2. Age of the victim
3. The identity of the perpetrator

See Moses Mwarimbo Dav- v- Republic (C.A) (2018) eKLR.

19. On identification, the complainant testified that the appellant is the one who defiled her. She was emphatic that she recognized the appellant as he was well known to her and he used to visit their home regularly. This was confirmed by PW2 who was the complainant's mother. The appellant submits that the key witnesses were not called. It is well settled that no particular number of witnesses are required to prove a fact. Section 143 of the *Evidence Act* provides as follows:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

20. This is a Sexual Offence where the court can convict on the evidence of the complainant if the trial magistrate/Judge for reasons to be stated, is satisfied that the witness was telling the truth. Section 124 of the *Evidence Act* provides as follows:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

At page 42 from line 18-22 of the record the learned trial magistrate stated as follows:-

> "I am persuaded by the testimony of the prosecution beyond reasonable doubt, that the accused defiled the victim, a 12 year old girl. Under Section 124, of the *Evidence Act* her evidence is believable and credible because she gave a graphic detailed account of what happened when her mother came to testify."

21. The trial magistrate had the opportunity to see the witness and to observe her demeanor. He made a finding of fact that the witness was credible. The appellant was therefore properly convicted on the evidence of the complainant as the learned trial magistrate was satisfied that she was telling the truth. Offences of this nature are not committed in the open. In most cases it is only the victim who can testify, on the fact of the Sexual Offence like defilement. In this case identification of the appellant through recognition was sufficient and more so because the appellant does not deny that he was well known to the victim.

22. The complainant testified that it is the appellant who penetrated her after he followed her to the house and locked the door from inside with a lock. He removed his trousers, then removed her biker and dress, laid her on the bed then penetrated her vigina using his penis. This testimony proves the fact of penetration. The Act at Section 2 defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another. The testimony of PW2 on the fact of penetration was corroborated by the medical evidence which was adduced by PW3 who testified that the complainant was examined within 24 hours of the commission of the offence. The complainant's genitalia had reddened and was inflamed. The hymen was broken not intact and the complaint was in a lot pain on being examined. The broken hymen noted on a child of twelve years and the visible inflammation and reddening of the genitalia organs is sufficient proof of penetration.

Age of the Victim:

23. This was proved with production of the birth certificate showing that the complainant was born on 2/1/2008 and was therefore thirteen years at the time the offence was committed. The Court of Appeal in the case of Edwin Nyambogo Onsongo –v- Republic (2016) eKLR stated that.....

> The question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents of guardian or medical evidence among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victims age it has to be credible and reliable."

24. The production of the birth certificate was credible and reliable evidence to prove the age of the complaint. She was thirteen years old at the time of the offence was committed which was within the purview of Section 8(3) of the *Sexual Offences Act*.

Conclusion:

25. In view of the above analysis, I find that contrary to the submission by the appellant, the prosecution did tender cogent and well corroborated evidence to prove that the complainant was defiled. The prosecution discharged its burden to prove the charge against the appellant beyond any reasonable doubts. The appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 23RD DAY OF MAY 2024.

L.W. GITARI

JUDGE