Abdala v Republic (Criminal Appeal E044 of 2023)
[2024] KEHC 7685 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E044 OF 2023

DO OGEMBO, J

JUNE 20, 2024

BETWEEN

MOHAMMED BASHIR ABDALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the Judgment, Conviction and Sentence of the Hon. G.P. Omondi, PM in Sexual Offence No. E054 of 2022 at Mumias Law Courts delivered on 4/8/2023 and sentence on 28/8/2023)

JUDGMENT

1. The Appellant, Mohammed Bashir Abdala , was charged before the lower court with the offence of Defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act*, No 3 of 2006. That on diverse months between October 2021 and August 2022 at [Particulars withheld] within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of M.M.W, a child aged 13 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No 3 of 2006. That on diverse months between October 2021 and August 2022 at [Particulars withheld] within Kakamega County, he intentionally caused his penis to come into contact with the vagina of M.M.W, a child aged 13 years without her consent.

3. After a full hearing of the case, the appellant was convicted of the main charge and sentenced to serve 20 years imprisonment. He has now appealed before this court against the conviction and sentence. In the petition of appeal of the Appellant dated 6/9/2023 and filed in court on 7/9/2023, the appellant has listed the following grounds of appeal:

1. That the learned trial magistrate grossly erred in law and facts in convicting the appellant on evidence which did not meet the required standard and the constitutional threshold of fair hearing under Article 50 (2) (c and j) of the *Constitution*.

2. That the learned trial magistrate grossly erred and or misdirected himself in law and facts by failing to consider the defence of the appellant.

3. That the learned trial magistrate grossly erred in law and in facts by failing to consider and observe that the age of the victim was not conclusively proved.

4. That the learned trial magistrate erred in both law and facts by failing to consider that there was no penetration.

5. That the learned trial magistrate erred in both law and facts by failing to consider that there was a very crucial witness left out and did not testify.

6. That the learned trial magistrate erred in law and facts by assisting the prosecution in proving the case with a very weak evidence.

7. That the learned trial magistrate erred in both law and facts by convicting the appellant with evidence that was inconsistent and contradictory.

4. The appellant prays that this appeal be allowed, conviction quashed the sentence be set aside and that he be set at liberty. The prosecution opposes this appeal.

5. This court is sitting over this appeal as a first appellate court. The jurisdiction of the first appellate court is to re-assess, re-evaluate and reconsider the evidence tendered by both sides and to itself come to its own conclusion Okeno v R, (1972) EA 32). This court shall therefore venture into the act of considering the said evidence on record.

6. From the record of proceedings, the case of the prosecution commenced with the evidence of PW1 SWA, that on 15/12/2022, the complainant herein (M.M) was taken to her by her parents with a complaint of defilement. That the defilement had been on an unknown dates by a person known to her. That the incidents happened three times. The witness examined the complainant and noted she was 5 months pregnant. She concluded she had been defiled. This witness produced the treatment notes and P3 form as exhibits (PEXH – 1,2).

7. PW2, MM, 14 years, testified that she is in class 6 at [Particulars withheld]. That she knows the appellant as Mohammed Bashir Abdala. That in the month of October 2021, the appellant would call her and send her to the shop to buy him chapatti and beans. Then the appellant would hold her andclosethe door, lay her on the bed and lie on her. That appellant removed her dress and pant and also removed his cloth. He then did to her “tabia mbaya” using his “susu”. That the appellant then told her that if she told anyone, he would kill her and run away. He did the same thing to her in an incomplete house. She reported the incidents both to her mother and to the chief and later to the police. She was then taken to hospital. She identified the appellant as the one who had defiled her.

8. On cross examination, this witness confirmed that she knows the appellant and that she was pregnant.

9. PW3 GAW, mother of the complainant, confirmed that she was born on 10/11/2010 and produced the certificate of birth of the complainant (EXH-3). She confirmed that appellant is her neighbour and that the child told her that accused did bad things to her. And PW4 Jafeth Njebeni Mukamba, a member of the Community Policing assisted in the arrest of the accused and took him to Ekero Police Station.

10. Lastly the investigating officer, CPL Joseph Marwa, was PW5. He took the report of the incident and issued the P3 form to the victim. He later traced the appellant whom he had charged in court.

11. The trial court found appellant with a case to answer and put him to his own defence.

12. In his defence under affirmation the appellant testified that on 28/12/2022 at about 2.00 pm, he was arrested and taken to Ekero Police post. He denied ever staying in Shianda. He still denied the charges. He called no witness.

13. Both sides have filed written submissions in support of their respective cases. The appellant has submitted that the prosecution were duly bound to prove 3 elements of the offence *Charles Wamukoya v R*, Appeal No 53/2013,) being age of the complainant, proof of penetration and positive identification of the assailant. He contested the birth certificate produced as exhibit by mother of the complainant showing she was 14 years. With regard to penetration, he submitted that the complainant was already more than 5 months pregnant and that appellant is a scape goat.

14. The State, on the other hand submitted that the prosecution duly proved the 3 elements of the offence as required by the law and that they were not under a duty to call a superfluity of witnesses (*Mwangi v R*, (1984), *Keter v R*, (2007), EA135). The court was urged to dismiss the defence of the appellant, in view of the cogent case of the prosecution.

15. I have considered the evidence herein by the parties and the submissions made. The appellant faced a charge of Defilement contrary to Section (8) as read with 58 (3) of the *Sexual Offences Act*, No 3 of 2006. Section 8 (1) of the Act defines the offence of Defilement on the following terms;

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

16. The definition above of the offence of Defilement in effect gives directions on the element of the offence that the prosecution is under a duty to prove. And these elements are:-

    i. Proof of the age of the complainant.

    ii. Proof of the act of penetration.

    iii. Identification of the penetrator.

17. The appellant has submitted in agreement with this position at law and relied on the authority in *Charles Wamuloya v R*, Cr. Appeal No 52 of 2013. It is therefore the duty of this court to determine if indeed the prosecution proved these elements of the crime.

18. With regard to the first element of the offence, that of age of the complainant, it was the evidence of the complainant herself (PW2) that she was 15 years old at the time of the incident. Mother of the complainant (PW3) corroborated this fact and confirmed that PW1 was born on 10/11/2010. She duly produced the birth certificate to prove her date of birth. The birth certificate is an official record showing the actual date of birth of an individual. With this evidence, this court is convinced beyond any doubt that the prosecution duly proved the age of the complainant at 14 years, and therefore a child.

19. The 2nd ingredient the prosecution was duty bound to prove is the element of penetration. The evidence of PW2, the complainant was that the appellant had sexual intercourse with her and that at the time of examination, she was 5 months pregnant. PW3 corroborated her evidence that PW2 was indeed 5 months pregnant at the time of examination. And PW1, the clinical officer who examined the complainant when she was presented before her confirmed that on conducting pregnancy tests, on her, she found the complainant to be 5 months pregnant. She also noted related pieces of evidence

like the fact that her hymen was non-existent. This witness formed the opinion that indeed there was evidence of penetration. She produced relevant exhibits including the treatment notes and the P3 form (EXH-1 and 2). The appellant has himself admitted that the complainant was pregnant as at the time that this incident came up.

20. How else would the young girl become pregnant if it were not out of being exposed to sexual intercourse and panal penetration? There is no plausible answer to this other than the fact that she was defiled. I am in the circumstances convinced that the prosecution duly proved the act of penetration as an element of the offence of defilement.

21. Lastly, in the element of identification of the perpetrator, it is on record by the prosecution witnesses, PW2, PW3, and PW4 that the appellant was a neighbour to PW2 and her family when this incident took place. They stayed in the same plot of 6 houses. That the complainant knows the appellant too well. It is also on record that this incident occurred when it is the appellant who had sent the complainant to buy him chapatti and beans only for him to lock her inside his house and defile her. This incident took place in broad daylight, removing any possibility of mistaken identity.

22. The sum total of this is that the evidence of the prosecution on the issue of positive identification of the appellant as the perpetrator of the offence was corroborated by at least two witnesses (other than the evidence of PW2). This court is accordingly therefore, convinced that the prosecution proved beyond any doubt, that it is the appellant who defiled the complainant.

23. The appellant's defence to me was a mere denial. The defence was unbelievable when the appellant denied having stayed as a neighbour with the family of the complainant despite the overwhelming evidence to prove the fact. He even denied knowing the complainant and her family begging the question of how he was traced to his new residence away at Ekero. The complainant and PW3 and PW4 must have known him enough as to trace and apprehend him even after he relocated. In any case, the appellant did not call any witness, and his defence remained totally lacking in any form of corroboration. I am in the circumstances convinced that the said defence was a mere denial devoid of any merit. I dismiss.

24. Section 8 (3) of the Act states:

> A person who commits an offence of defilement with a child between the age of 12 and 15 years, is liable upon conviction to imprisonment for a term of not less than 20 years."

25. The appellant herein was sentenced to serve twenty years imprisonment. This sentence is proper and legal as seen above.

26. It is the duty of the prosecution to prove the guilt of the accused person beyond any reasonable doubt. In this particular case, I find that the prosecution duly discharged this burden and proved the case against the appellant beyond any reasonable doubt as required by the law. I therefore find no merit in the appeal of the appellant dated 6/9/2023 and filed on 7/9/2023. I dismiss the same. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.

D. O. OGEMBO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court

Judgment read out in court (Virtually) in presence of:

Appellant (Kisumu) and Ms. Chala for State.