Halake v Director of Public Prosecutions (Criminal Appeal E085 of 2023) [2024] KEHC 6974 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6974 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E085 OF 2023

TW CHERERE, J

JUNE 6, 2024

BETWEEN

BARAK HASAAN HALAKE ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Being an appeal from judgment and conviction in Isiolo Criminal Case S. O No. E002 of 2020 by Hon.E.Shimonjero (SRM) on 15th June, 2023)

JUDGMENT

1. Barak Hasaan Halake (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 (the *Act*). 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. The offences were allegedly committed between 17th and 19th October, 2020 against BAA a child aged 14 years.

2. Complainant stated that on 17th October,2020 she ran away from home and went to her friend's place where the Appellant whom she had known for three weeks met her and she accompanied him to his house where they slept together on that night. She said "Tulifanya Mapenzi na yeye" meaning had sex. She stated she stayed at the Appellant's house for 3 days when her mother police accompanied by her mother Harufa Botu arrested her.

3. Complainant was examined on 20th October, 2020 which was three days after the incident. The P3 form PEXH 2 reveals that Complainant had an old broken hymen with no bruises, injuries or discharge.

4. Appellant stated that he had only given the Complainant a place to sleep after she was chased away by her mother (PW2). He denied having engaged in any sexual intercourse with the Complainant.

5. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on 15th June, 2023 convicted and sentenced Appellant to serve 10 years' imprisonment

6. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal on grounds:

   a. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standards of proof as required by the law since the evidence of hymen broken is not prove of defilement.

   b. That the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under section 8(4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27(1)(2)(4) of the *Constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.

   c. That the trial magistrate erred in both matters of law and facts by failing to note that the clinical report was questionable

   d. That learned trial magistrate failed to take into consideration the defense of the appellant.

7. This being a first Appeal, this Court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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 demeanor 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. In *Charles Wamukoya Karani v. Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR) 40, it was held that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

9. In this case, the evidence of age was clearly proved by way of a certificate of birth which revealed Complainant was born on 31st March, 2006 and was therefore a minor aged 14 at the material time.

10. 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."

11. The clinical officer stated complainant had an old broken hymen from which he concluded that defilement may have taken place. He also testified on cross examination that it was possible the penetration may have happened before the alleged dates of the offence.

12. The 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.

13. 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."

14. The clinical officer was categorical that he could not ascertain when the complainant hymen was broken but appeared to have been broken in a previous encounter. Appellant having denied the offence, he in my considered view raised a reasonable doubt as to the truthfulness of the Complainant that she was defiled on the dates in issue and not earlier.

15. The fact that Complainant admitted in cross-examination that she was under pressure from Appellant's family to give false evidence against Appellant should have raised judicial antenna in the mind of the trial magistrate that Complainant was either being economical with the truth or untruthful and her evidence ought to have been treated with a lot of caution.

16. The evidence by the Complainant properly evaluated falls in the category of what the Court of Appeal described in *Ndungu Kimanyi v. Republic* [1979] KLR 282 that:

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

17. Consequently, and for the reasons set out hereinabove, I find that the evidence by the victim was doubtful and unsafe to found a conviction.

18. In the end, this appeal succeeds and it is hereby ordered:

    1. The conviction is hereby quashed

    2 The sentence is set aside

    3. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.

DELIVERED AT MERU THIS 06TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For the State - Ms. Rotich (PC-1)