Okoch v Republic (Criminal Appeal E011 of 2024) [2024] KEHC 7872 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E011 OF 2024

JN NJAGI, J

JUNE 14, 2024

BETWEEN

PETER OGONDI OKOCH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.S. K. Arome, Principal Magistrate, in Marsabit CM`s Court Sexual Offence Case No. E003 of 2022 delivered on 15/2/2024)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 27th June 2022 at [Particulars Withheld] within Marsabit County he intentionally caused his penis to penetrate the vagina of A.R. (herein referred to as the complainant), a child aged 14 years.
2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.
3. The grounds of appeal as amended supplementary grounds of appeal dated 8/3/2024 are that:
   (1) The learned trial magistrate erred in law and fact by failing to note that the charge sheet was defective.
   (2) The learned trial magistrate erred in law and fact by failing to note that the DNA report is questionable since the maker was not called to proof its authenticity.
   (3) The learned trial magistrate erred in law and fact by failing to note that the age assessment report was not marked as exhibit in this case.

(4) That the trial magistrate erred in law by imposing an unlawful sentence.

(5) The learned trial magistrate erred in both matters of law and fact by failing to take into consideration the appellant`s mitigation.

(6) That the trial magistrate failed to take into consideration the defence of the appellant.

4. The prosecution called five witnesses in the case while the appellant was the only witness in his case.

5. The case for the prosecution is that the complainant was at the material time a 14 year-old child and was in class 7 at [Particulars Withheld]. She was living with her parents, PW2 and PW3. The appellant was her neighbour. That on the material day she went to the house of the appellant. She told him that she wanted to spend the night in his house. He refused but she insisted. He gave in to her demands. They slept and they had sex. Early in the morning she went back to her parents` home. After several months her mother PW2 realized that she was pregnant. She and her parents reported at Loyangalani police station on 30/8/2022. PC Gedion Kemei PW4 of DCI Loyangalani investigated the case. He issued her with a P3 form and escorted her to Loyangalani Health Centre where she was examined by a Clinical Officer PW5. PW 5 conducted a pregnancy test that showed that she was 8 weeks pregnant. He completed the P3 form to that end. The appellant was charged with the offence of defilement. The complainant gave birth on the 27/3/2023 as the case was going on in court. During the hearing the clinical officer PW5 produced the P3 form in court as exhibit, P.Exh.1.

6. When placed to his defence the appellant stated in a sworn statement that he was a bod boda rider. That the complainant was his neighbor but he had no relationship with her. He denied that he had sexual intercourse with her. He said that he knew that she had friendship with another man. He said that the child was born on 28/3/2023. He sought for a DNA to be conducted.

Submissions

7. The appeal proceeded by way of written submissions.

Appellant`s submissions

8. The appellant submitted that the charge was defective in that he was charged under section 10 of the *Sexual Offences Act* but that the evidence adduced in court pointed to an offence under section 8(4) of the *Sexual Offences Act*. Therefore, that the charge was defective.

9. The appellant submitted that the maker of the DNA report was not called to prove its authenticity and to be cross-examined on it. That failure to call the maker of the report was prejudicial to the appellant.

10. The appellant submitted that penetration was not proved. That the evidence of the clinical officer only touched on pregnancy and not that the girl was defiled. The appellant in this respect cited the case of *John Mutua Musyoki v R* (2017) eKLR where the clinical officer examined the complainant and did not find any tears, bruises, hymen nor discharge and the court held that there was no evidence of penetration.

11. The appellant submitted that the parents of the complainant did not tell the court the age of the complainant. That the investigating officer told the court that age assessment report was done but the same was not marked for identification. The appellant submitted that the age of the complainant was not proved.

12. The appellant submitted that the trial magistrate did not consider his defence and mitigation. That the court imposed the mandatory minimum sentence of 15 years despite the fact that the

court had discretion to impose a lesser sentence. It was submitted that the minimum sentence was unconstitutional, harsh and excessive.

Respondent`s Submissions

13. The Respondent on the other hand submitted that the three ingredients of the offence of defilement of proof of the age of the complainant, penetration and positive identification of the complainant were proved. That the age was established by the complainant herself that she was 14 years of age. That the P3 form indicated her age as 14 years. The respondent cited the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR where the court stated that age can be proved in various ways including by way of documents, birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of parents or guardian or medical evidence.

14. It was submitted that penetration was established by the testimony of the complainant that the appellant inserted his penis in her vagina and medical evidence confirmed that she was pregnant as a result of that act. It was further submitted that the complainant knew the appellant and identified him as the person who made her pregnant.

15. The respondent conceded that the DNA report was not properly produced as there is no indication on record as to how it was produced. However, that the trial magistrate did not consider it as there was no mention of it in the judgment. The respondent submitted that defilement is proved by way of evidence and not by way of DNA, as was held by the Court of Appeal in *AML v Republic* (2012) eKLR.

16. On sentence, the Respondent submitted that the trial magistrate had discretion to impose a lesser sentence other than the mandatory sentence but that the sentence of 15 years was appropriate.

Analysis and Determination

17. The role of this court as the first appellate court is well settled. It was held in the case of *Okeno vs. Republic* (1972) EA 32 and in *Mark Oiruri Mose vs. R* (2013) eKLR that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion 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.

18. The ingredients of the offence of defilement are: the age of the victim, penetration and proper identification of the perpetrator – see *George Opondo Olunga vs. Republic* [2016] eKLR.

The age of the complainant

19. It is of utmost importance to prove the age of the victim in a case of defilement. In the case of Hadson Ali Mwachongo v Republic, the Court of Appeal held that:

> “ The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”

20. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR that:

> “ ... the question of proof of age has finally been settled by recent decisions 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 or 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 victim's age, it has to be credible and reliable."

21. The appellant in this case was charged with defiling a girl aged 14 years. The parents of the complainant, PW2 and PW3, however did not tell the court during their evidence how old the girl was. I have perused the lower court`s record and I have noted that the age assessment report was not produced in court as exhibit, though the same appears to be contained in some laboratory notes attached to the P3 form. The clinical officer who produced the P3 form PW5 did not mention both the laboratory notes and the age assessment notes. Nor did he produce them in court as exhibits. It is not known who conducted the purported age assessment. Since PW5 did not produce the age assessment notes in court as exhibits, they cannot be used against the appellant as he was not given an opportunity to cross-examine on them. There was thus no age assessment properly produced to prove the age of the complainant.

22. The age of a victim of defilement may be proved by the oral evidence of the child if the child is sufficiently intelligent - see Edwin Nyambogo Onsongo case (supra). In this case the complainant testified that she was aged 14 years. The court conducted a voire dire examination on her and found her sufficiently intelligent to warrant her giving evidence on oath. The complainant was sufficiently intelligent to know her age. I find that the age of the complainant was proved at 14 years.

Penetration on the complainant

23. The trial magistrate in his judgment held that the appellant did not contradict the evidence of the complainant that she on the material night slept with the appellant in his house and that they engaged in sex.

24. The complainant testified that she had sex with the appellant in the month of June 2022 and she later realized that she was pregnant. The clinical officer PW 1 testified that the girl gave birth on 27/3 2023.

25. The investigating officer said that a DNA profile was conducted in the matter but the report was not produced in court as exhibit. There is a DNA report present in the court file but it is not known how it found its way into the court file when it was not produced as exhibit. The report cannot be considered against the appellant.

26. The clinical officer who examined the complainant PW3 did not find any evidence of penetration on the Complainant. His evidence was only limited to the fact that the complainant was pregnant at the time he examined her on the 31/8/2022. There was thereby no medical evidence to corroborate the evidence of the complainant that the appellant defiled her on the 27/6/2022.

27. That means that the only evidence on penetration was from the complainant herself. Section 124 of the *Evidence Act* allows a court to convict where the only evidence in a case of defilement is that of the victim of defilement if:

> "…for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. The only reason the trial magistrate gave for holding that penetration was proved is that the appellant did not contradict the evidence of the complainant that she slept in his house on the material night and that they engaged in sex.

29. It is to be noted that the complainant did not report the alleged defilement to anybody until months later when she was found to be pregnant. She gave birth in March 2023 but the DNA report was not

produced in court to corroborate her evidence that the appellant defiled her on the material night and made her pregnant.

30. The complainant told the trial court that she had a boyfriend with whom she had parted ways in November 2021. She further told the court that she is the one who forced her way into the house of the appellant despite his protestations. That she slept in the house and she had sex with him.

31. Why would the complainant be believed that the appellant defiled her on 27/6 2022 when she kept this information to herself until when she was found to be pregnant? A DNA report would have corroborated her evidence that the appellant defiled her on the material date and made her pregnant yet the prosecution did not produce the same to prove that he was the father to her child. Without that kind of evidence, there was no reason for the trial court to believe the evidence of the complainant that she was telling the truth that the appellant defiled her on 27/6/2022. I find that the trial magistrate did not give sufficient reasons for believing the evidence of the complainant that the appellant defiled her on the material day.

32. In view of the foregoing, I find that there was no sufficient evidence for convicting the appellant for the offence of defilement. The appeal herein is upheld. The conviction of the appellant is thereby quashed and the sentence imposed on him set aside. The appellant is set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 14TH JUNE 2024.

J.N. NJAGI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Otieno for Respondent

Appellant – present in person

Court Assistant – Jarso

14 days R/A.