PGM v Republic (Criminal Appeal E053 of 2021)
[2024] KEHC 7363 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7363 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E053 OF 2021

AM MUTETI, J

JUNE 20, 2024

BETWEEN

PGM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, in this appeal was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offence Act* No. 3 of 2006. In the main count, he was also charged in the alternative with the offence of indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

2. The appellant invoked the appellate jurisdiction of this court vide his memorandum of Appeal dated 23rd August 2019 in which he raises six grounds of appeal.

   The appellant basically contends that:

   a. the learned Honuorable magistrate failed to analyse and evaluate the whole of the evidence,

   b. the learned Honourable magistrate convicted the appellant on the basis of evidence that was contradictory and dangerous to convict,

   c. the charge was defective thus the conviction was unsafe,

   d. essential elements of the offence of defilement were not proved.

   e. the magistrate erred in dismissing his alibi defence.

3. The appellant at the hearing of the appeal informed this court that he had filed his submissions on 22nd January 2024 and a further set of submissions on 15th May 2024. This court after confirming form the record that the two sets were on record invited the appellant to make any oral submission if he

so wished. He was emphatic that his submissions as filed were adequate and he did not wish to add anything else.

4. The prosecution counsel Ms Kabutha undertook to file her submissions in the course of the day on 3rd June 2024. As at the time of writing the judgment the state had not yet filed.

5. The prosecution called the victim to the stand on the 7th March 2017 and the learned Honourable magistrate conducted a voire dire examination at the conclusion of which the trial court stated:

> " witness composed of good understanding of oath. she is intelligent and answers questions posed clearly and confidently. She is to give a sworn statement."

6. In her testimony the victim maintained that she was in class 3 and stated her age to be 9 years. She narrated that on the night of 6th May 2016 she was asleep with her brothers MM and AG. According to the witness the father (appellant) came and took her to his bed removed her uniform. A dress, stocking and a bicker. She states further: -

> " He took his *"dudu"* put it in my *"dudu"* and did *"tabia mbaya"*.

The record reflects the witness pointing to her private parts. The witness went further to state that the appellant took long. She went further to state that she bled from her vagina. According to the witness as this was happening she kept screaming but the accused did not stop. The victim went further to state that the appellant warned her against telling her mother or anyone else otherwise he would strangle all of them to death. She was emphatic that by "us" the appellant meant the victim, her brothers and mother.

7. The victim went further to state that after the incident she put on her clothes and went to sleep. It is clear from the evidence of the witness PW 1 that she was able to positively identify the accused (now appellant) who was her father. That evidence of identification cannot be faulted for it was the evidence of recognition. At the time of the incident according to the witness the mother was not at home for she had been chased away from home by the appellant.

8. The victim according to her testimony was taken to Githunguri police station and subsequently to Githunguri Hospital before being taken to Nairobi Women's Hospital. The victim and her mother were escorted to hospital by the police.

9. The witness from the record was able to identify her assailant even in court.

10. It is important for me to point out that when the victim PW 1 completed her testimony and the appellant was invited to cross-examine her, the appellant claimed to be unwell immediately after she testified in chief and the learned

11. Hon. magistrate graciously allowed him time and adjourned the matter to 14th March 2017 for cross examination. The witnesses was recalled on the 14th March 2017 and the appellant indicated that he had no questions for the witness.

12. It therefore follows that the Evidence of PW 1 remained unchallenged and therefore the contention by the appellant in his submissions filed on 15th May 2024 that the offence was not proved cannot stand. the victim clearly testified to connect the appellant with the offence and gave credible evidence of the events of the night of 5th May 2016.

13. Medical evidence in this matter was tendered by PW 2 Kinuthia Edward Mbugua a clinical officer.

14. He testified that he was familiar with Dr. Njoroge'shandwriting who handed over the case to him. According to the witness Dr Njorogecould not be found thus the witness laid a basis as to why he was producing the PRC form on his behalf. The evidence of this particular witness indicated that the time the victim had been examined the assailant had been identified as the father. The witness narrated the evidence on penetration and largely corroborated the evidence of bleeding from the vagina that was given by PW 1. The witness confirmed that there was penile vaginal penetration with 3rd degree tear attributed to secondary to defilement. He went further to state that the doctor recommended admission for repair of tear. The PRC form was produced as P. Exhibit 1. The Evidence of this witness establishes the fact of penetration which is key to proving the offence of defilement.

15. In the discharge of my duty as the first appellate court I have closely analysed the evidence and evaluated every bit of it with a view to arriving at my own conclusions. The duty of the court as ably stated in the celebrated case of *Okeno v Republic* [1972] EA 32.

16. I have also addressed my mind to the fact that the brothers of PW 1 were not called as witnesses. The prosecution did not explain why they were not called but in my scrutiny of the record I have established from the Defence Evidence tendered by the appellant that M was 6 years old whereas A was 5 years and 2 months old. It cannot therefore be argued that the failure to call the two as witnesses in this matter out of a desire to conceal the truth. As a matter of Law the two being children of tender years their evidence would have required corroboration thus the exclusion of them cannot be said to be fatal to the prosecution's case. The ground raised by the Appellant that vital witnesses were not called must therefore fail. In the instant case section 124 of the *Evidence Act* would apply as was done by the magistrates.

17. I however hasten to point out that the magistrate ought to have recorded the reasons for believing the Evidence of the complainant PW 1. However, I find and hold, considering the totality of the facts and evidence in this case, the failure to record the reasons for believing the complainant did not in any way occasion a failure of justice to the appellant so as to vitiate the trial. The omission is in my view curable under Section 382 of the *Criminal Procedure Code* Cap 75 of the Laws of Kenya. The fact of the appellant not cross-examining the victim in my view militates against any other finding in regard to the failure by the trial court to record reasons for believing in the evidence of the minor. The appellant had the opportunity to challenge the evidence but did not.

18. The evidence of the victim being the only evidence identifying the perpetrator of the crime, I have found that there was no possibility of error in identifying the appellant as this was a case of recognition of a father by his own daughter and during the ordeal he talked to the victim warning her of the danger she faced should she reveal what had transpired. I have closely analysed the evidence of the victim, the mother and the doctor and the same in toto leaves no iota of doubt in my mind that the magistrate was right in arriving at the conclusion he reached that the Appellant was guilty.

19. In my evaluation of the entire evidence I have taken into account the length of time the victim spent with the appellant, the fact of him talking to her and the history she gave of her injury to her vagina when she got to hospital and I am satisfied that the degree of care set out in the case of *Charles O. Maitanyi v Republic* [1985] 2 KAR 75 regarding the evidence of a single identifying witness. This is not one of those cases that would require an identification parade in order for the court to be satisfied that the accused was properly identified. The case of *R v Turnbull* [1976]3 ALL ER 549 emphasises the need to examine closely the circumstances in which identification by each witness came to be made. In the present case the appellant's identity was adequately proved, the age and the element of penetration. The evidence was sufficient and the offence was proved beyond a reasonable doubt.

20. In the end I find the appeal by the appellant has no merit, the same is dismissed on both conviction and sentence.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI THIS 20TH DAY OF JUNE 2024.

A. M. MUTETI

JUDGE

In the presence of:-

Court Assistant: Yussuf

Ms Kabutha for the Respondent

Appellant in person