Taabu v Republic (Criminal Appeal E023 of 2022)
[2024] KEHC 6731 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E023 OF 2022

WM MUSYOKA, J

JUNE 7, 2024

BETWEEN

KENNEDY ABANGI TAABU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate, CM, in Busia CMCSO No. E046 of 2022, of 9th October 2023)

JUDGMENT

1. The appellant, Kennedy Abangi Taabu, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act.* The particulars of the charge were that on 1st April 2022, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of LA, a child aged 5 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.

2. PW1, Edwin Emodo Emwo, a clinical officer, attended to the complainant, PW3, who informed him that the appellant had removed her clothes, and had inserted his penis into her vagina. She reported to her mother. She complained of pain. On examination, her labia majora had reddened, hymen had broken. There was blood and pus, and lemiralysis. The child had a sexually transmitted disease. PW2, MN, was the grandmother of PW3. When she was washing PW3, the latter reported that she was feeling unwell, and that the appellant had defiled her. She said she had pain in her vagina. PW2 took her to the police, to file a report, and they were referred to hospital. PW3, LA, was the complainant. She said she was 5 years old. She identified the appellant as her father, she said that he defiled her, twice. PW4, No. 238806 Police Constable Mang'eni Moses, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 29th May 2023. He made a sworn statement, on 11th September 2023. He denied the charges. He accused his wife of trumping up the charges, after he asked her to return a child, she had brought with her into their marriage, to the child's biological father.

4. In its judgment, delivered on 25th September 2023, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to serve imprisonment for 55 years, on 9th October 2023.

5. The appellant was aggrieved, and brought the instant appeal, revolving around the case not being proved to the required standard; the evidence presented by the appellant not being analysed; the evidence as a whole not being analysed; not carrying out a voir dire examination of the minor; relying on evidence that was founded on theory and conspiracy; not explaining the right of appeal to the appellant, upon convicting him; inconsistency in at once finding that there was attempted penetration of a child under 18 years, and going on to find that the prosecution had proved a case beyond reasonable doubt of defilement; and finding that the charge was defective.

6. Directions were given on 15th March 2024, for canvassing of the appeal by way of written submissions. Only the respondent filed written submissions, on 11th April 2024, of even date. The issues identified for determination are 6: whether the charges were proved to the required standard, whether the defence was considered by the trial court, whether the trial court had failed to analyse the entire evidence, whether a proper voir dire examination was conducted, whether the evidence was founded on theory and conspiracy, whether the right of appeal was explained, and whether the errors on the face of the judgment were fatal to the prosecution case.

7. On the first issue, on whether the case was proved to the required standard, the respondent points at the 3 requirements for establishing the offence of defilement: the complainant being a child, penetration of the complainant, and that the penetration was by the accused. It is submitted that all those facts were proved to the required standard. PW3 said that she was 5 years old, and a birth notification was produced by PW4. PW1, the clinician, also corroborated that by testifying that the person he attended to was 5 years old. On penetration, PW1 examined PW3 and found that she had been defiled, for her hymen had been broken, the labia majora was reddened, and there was blood and pus in her vagina. On penetration being by the appellant, PW3 identified her as her defiler. On whether the defence had been considered, it is submitted that the same amounted to a mere denial, to the extent that the appellant complained that the case arose from differences with his wife. On the voir dire examination, it is submitted that the trial court had noted that PW3 was very young, and argued, in any event, that an improper voir dire examination would not vitiate the case. Section 19 of the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya, *Johnson Muiruri v Republic* [1983] KLR 445 and *Maripett Loonkomok v Republic* [2016] eKLR are cited. On the right of appeal not being explained, it is submitted that the record reflects that the court explained the same. On the errors on the face of the judgment, it is submitted that the errors were not fatal, and section 382 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and *Mark Oiruri Mose v Republic* [2013] eKLR are cited.

8. Was the case proved to the required standard? The standard of proof in criminal cases is beyond reasonable doubt. For defilement, 3 elements have to be established, being that the victim was a person below the age of 18, there was penetration, and the penetration was by the accused person. Were these elements proved beyond reasonable doubt? I believe they were. There was ample evidence that the victim was a child. She testified as PW3, and she said she was 5 years old, which evidence was supported by a birth notification, placed on the record by PW4. PW1, the clinician, also identified her as a child. When she testified in court, the trial court noted that she was very young, and proceeded to take her

statement unsworn, upon being satisfied that a lengthy or exhaustive voir dire examination was not even necessary. So, on the age of the complainant, there was ample proof that she was a person below the age of 18, and even a minor of tender years. On penetration, the testimony of PW1 was critical. He attended to PW3 after the incident, and noted a number of things that pointed to defilement. The hymen was missing, the lips of her vagina (labia majora) were reddened, and she had blood and pus in her vagina. PW3 herself testified that the appellant had defiled her. About the appellant being the perpetrator of the defilement, PW3 herself identified him as the perpetrator. He was her father, so there could not be any mistaken identity. PW2 provided corroboration, for she said that PW3 reported to her what had transpired, and she mentioned the appellant. The material placed on record by the trial court was sufficient to establish the offence of defilement.

9. On the defence not being considered. I note, from the judgment, that the defence case was narrated, at paragraphs *11*, *12*, *13*, *14* and *15*. That would be a pointer that the defence was taken into account. I note, though, that, in the analysis, the trial court did not discuss the defence case. However, that alone is not indication that the same was not in the mind of the court when making the determination. In any event, the said defence did not address the events of 1st April 2022, which placed the appellant together with the child. The appellant merely denied the offence, and claimed that there was an issue between him and his wife, the mother of PW3, which must have had fuelled the matter. However, the mother of PW3 did not testify, and, therefore, the trial court had no basis for evaluating the defence case against the allegations made against her. When PW2, the grandmother of PW3, testified, the appellant did not cross-examine her on the relationship between him and the mother of PW3, and nothing came up on that. So, what was stated in the defence did not, in any way have an effect on what was presented in the prosecution of the case.

10. On whether the trial court did not analyse the entire evidence, I have gone through the judgment of the trial court. I note that it considered the evidence of the 2 critical witnesses, the victim and the bearer of the medical evidence, for the purpose of establishing whether PW3 was a child, and whether, scientifically or forensically, there was material pointing towards defilement, and the court was satisfied on these accounts. The analysis was probably not extensive, as desired, but it was adequate for the court to arrive at the conclusions that it came to.

11. On whether voir dire examination was conducted, to determine whether PW3 was intelligent enough to testify on oath, I note that the trial court did not get into a lengthy examination of PW3. It would appear that she was only questioned on her name, age, and whether she attended both church and school. After that the court concluded that she was too young to give evidence on oath. Voir dire examination was in fact conducted. Voir dire examination amounts to no more than asking the child questions that would assist to evaluate his or her level of intelligence. PW3 was 5 years old. That is a very small age, and the trial court would have been justified not to conduct any voir dire examination at all, but require PW3 to give unsworn evidence, given her tender age. I am not persuaded that the trial court fell into any error, when it did not get into lengthy voir dire examination. The extent of voir dire examination should be determined by the apparent age of the child. If he appears to be too young, say at age 2 or 3, there may be no need to conduct any voir dire examination at all, or to even ask the child to testify. At age 4, 5 and 6, the court may carry out a voir dire examination, or decide to have the child testify unsworn, if it would appear that he is too young to appreciate the essence of an oath.

12. On whether the evidence relied upon to convict was based on theory and conspiracy, I am in difficulty. The appellant did not file submissions, and, so, I cannot tell what this is all about. From the record, the mother of PW3 did not testify. In that circumstance, I am unable to understand the theory and conspiracy she had with PW2. In his defence, the appellant made certain allegations, against both the mother of PW3 and PW2, but when PW2 was presented as a witness, it would appear, from the record,

that the appellant did not push her hard enough on the alleged theory and conspiracy. I see nothing in the record, from which the trial court could conclude that the prosecution case was founded on some theory or conspiracy. There was hard concrete evidence pointing to defilement of PW3 by the appellant.

13. On the right of appeal not being explained, I have perused the record, and it would appear that that right was explained, for after pronouncing sentence, the court recorded "right of appeal." Of course, that was not elegant. The trial court could have done better, by recording that the right of appeal was explained to the appellant. It appears to be a matter of style, where the court is very brief and precise in how it records proceedings. However, the fact that that was recorded would suffice, as proof that that right was explained. Even if the right was not explained, which does not appear to have been the case here, the same would not have been fatal to the prosecution case. The case stands on the evidence presented, and not on what transpires after pronouncement of sentence. The failure or omission to explain the right to appeal would only be relevant where there was a delay in filing an appeal, on account of lack of that knowledge or information, which would be cured by the court extending time to appeal. The appellant herein filed his appeal, within time, 10 days after the conviction and sentence. So, if there was an omission of that kind, it would be of little consequence.

14. For avoidance of doubt, this is what the trial court recorded, after it took mitigation from the appellant, on 9th October 2023:

> " Mitigation noted. I have also considered the time the accused has been in custody and that the accused is a 1st offender. I have also considered the age of the victim. The accused is sentenced to 55 year imprisonment. Fifty five years from the date. Right of appeal."

15. Finally, on errors in the judgment, I have perused the said judgment closely, and I agree with the appellant, that there are items in there whose presence cannot be explained. These are at paragraphs 25, 27 and 28. At paragraph 25, the court said that it was satisfied that there was attempted penetration of PW3, yet at paragraphs *15*, 26 and 27 it concluded that PW3 had been defiled. At the same paragraph, 25, it was said that the appellant was well known to PW3 as her grandfather, which contradicted the evidence recorded, where PW3 identified the appellant as her father. At paragraph 27, it was recorded that PW3 was 11 years old, contradicting paragraphs 6 and 10 of the judgment, and the recorded evidence, where the age of PW3 was put at and proved to be 5. In paragraph 28, it was stated that the prosecution should have amended the charge sheet, to charge the appellant with defilement, yet the trial court record has only 1 charge, that of defilement, which did not require amendment at any time.

16. The question then is, what should be the effect of these inconsistencies or contradictions? These inconsistencies and contradictions are in the body of the judgment, not in the recorded evidence or testimonies. They, therefore, have no effect at all on the culpability of the appellant, for his conviction was based on the recorded evidence. I have already indicated above, that the recorded evidence pointed to a concrete establishment of all the ingredients of the offence of defilement. Errors made in the judgment cannot take away from that. The existence of the said errors, therefore, would be of little consequence.

17. Overall, on the merits of the appeal, I find and hold that there is nothing which points to the appellant being improperly convicted, for the evidence placed on record was adequate to support his conviction for defilement of PW3.

18. The only concern that I have relates to the sentence. Section 8(2) of the *Sexual Offences Act* prescribes a mandatory sentence of life imprisonment, upon a person being convicted of defilement of a minor of tender years. Life imprisonment, as a sentence for sexual offences, and the prescription that it be

mandatory, were declared unconstitutional, in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). *Julius Kitsao Manyeso v Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA) had also declared life imprisonment unconstitutional, in an appeal arising from a defilement conviction, where the victim was 4 years old, and life imprisonment was substituted with 40 years. That declaration then opened it up for the trial courts to exercise discretion to impose definite sentences of imprisonment. The sentence imposed herein, of 55 years, was in that context. In *Evans Nyamari Ayako v Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), which followed *Julius Kitsao Manyeso v Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), it was held that life imprisonment translated to 30 years, meaning that where a sentence of imprisonment is considered, in lieu of life imprisonment, the sentence imposed should not exceed 30 years. The trial court does not appear to have had reckoned with that decision, when it imposed the 55 years. It is a decision of the Court of Appeal, and it binds both the High Court, and the courts subordinate to it. This issue was not raised in the petition of appeal, and did not come up at the hearing of the appeal, but it is a matter of law, where it would appear that the trial court erred in principle, going by what *Evans Nyamari Ayako v Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), has prescribed. The Court of Appeal has prescribed or pronounced on what should happen in these cases, and the courts subordinate to it should fall in line, for consistency.

19. In view of the above, I find no merit in the appeal herein, save on the sentence. The appeal on conviction is dismissed, the conviction is upheld and affirmed. On sentence, PW3 was 5 years at the time the offence was committed. She was of tender years. Guided by *Evans Nyamari Ayako v Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), I do hereby set aside the sentence of 55 years imprisonment, imposed on 9th October 2023, in Busia CMCSO No. E046 of 2022, and substitute it with a sentence of 30 years imprisonment, to run from the date when the appellant was detained in custody, after his arrest on 30th May 2022. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 7TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.