Kibet v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 8735 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E007 OF 2024

DK KEMEI, J

JULY 19, 2024

BETWEEN

NICHOLAS KIBET ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. R K LANGAT (Principal Magistrate) in Sirisia Sexual offence Case No. 10 of 2023 dated 16.1.2024)

JUDGMENT

1. The Appellant herein Nicholas Kibet had been charged before Sirisia Principal Magistrate's Court vide Sexual Offence Case No. 10 of 2023 wherein he was found guilty for the main charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve thirty (30) years' imprisonment.

2. Being aggrieved by the said conviction and sentence, the Appellant raised the following grounds of appeal;

    i. That the learned trial magistrate erred in law and in fact when he convicted the Appellant while the essential ingredients for the offence of defilement had not been proved.

    ii. That the learned magistrate erred in law and fact when he ignored that there were material contradictions in the prosecution's evidence.

    iii. That the learned magistrate erred in law and in fact when he ignored the issue of a dispute regarding a parcel of land and which was acknowledged by PW3 as the reason behind the charges against the Appellant.

    iv. That the learned magistrate erred in law and fact when he shifted the burden of proof to the appellant.

v. That the learned magistrate erred in law when he ignored the Appellant's defence.

3. The Appellant therefore prayed for the appeal to be allowed and that the judgement of the lower court be set aside and he be set at liberty unless otherwise lawfully held.

4. This being a first appeal, the court's duty is well cut out namely to re-evaluate the evidence presented before the trial court and subject it to an independent analysis so as to arrive at its own conclusion but to bear in mind that it did not see or hear the witnesses testify. See *Okeno v Republic* (1972) EA 32.

5. The accused was charged with an offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 30th day of May, 2023 within Bungoma County, he intentionally caused his penis to penetrate the vagina of NCA a child aged 12 years.

6. NCA (PWI) testified through a sign language interpreter. She testified that on the material date, she had gone to the shops to purchase sugar and on her way back she was grabbed by the Appellant who led her to his house and locked it from inside and held her throat and threw her down onto a bed and then tore her skirt and underpants and thereafter inserted his penis into her vagina. She stated that she struggled with him and that her mother later arrived while in company of other people who resecured her and apprehended the appellant. She added that the incident took place at around 3.00 pm.

   On cross examination, she testified that the appellant grabbed her and took her to his house. That he tore her skirt and underpants and thereafter defiled her. That her mother came with other people and rescued her.

7. CVM (PW2) testified that the complainant is her daughter and that she had sent her to the shops to buy some foodstuffs. That she was alerted by her husband that the appellant had dragged the complainant to his house. That she rushed to the Appellant's house where she heard the complainant groaning inside with pain. That the complainant is dumb and deaf. That she knocked on the door and pushed it. That the Appellant opened the door and emerged while half naked and who later went back and pushed the complainant outside. That the complainant came out while holding her torn skirt and had no underpants. That the appellant was assisted and escorted to Kipsigon police station. That she escorted the complainant to Kipsigon sub County hospital. That she identified the P3 form, treatment notes, PRC form and birth certificate. That the complainant was her last-born child. On cross examination, she stated that the appellant came out of his house while half naked. That the appellant hails from the same area and that she lives about 300 meters from his place. That she does not pass through his plot. That the complainant is deaf and dumb and thus only roared. That the complainant emerged from the Appellant's house with a torn skirt but which were not presented to court. That she examined her genitalia and noted that the vagina was reddish and with bloodstains as well as a whitish discharge.

8. EK (PW3) testified that he is the village elder and that he rushed to the scene and found a large crowd. He found the Appellant in his house whom he escorted to Kipsigon police station. He added that he gathered from the appellant that he had a grudge with the father of the complainant.

   On cross examination, he stated that the appellant had earlier reported to him that there were persons passing through his land. On reexamination, he stated that he was not present when the incident took place.

9. Daniel Wattanga (PW4) testified that he examined the complainant and noted several things *inter alia*; broken hymen (bloodstained); swollen and bruised labia; sperm cells; bruises on left labia minora; minimal bleeding on the cervical orifice and whitish discharge. He confirmed that there was penetration. He produced the treatment notes , PRC form and P3 form as exhibits.

On cross examination, he testified that the hymen was not freshly broken and that the labia minora had bruises. He added that there was minimal bleeding but which was not the usual menstrual cycle. He also added that there was whitish discharge and that the initial examination revealed sperm cells.

10. No. 261033 PC Mahra Kango (PW5) testified that he investigated the matter and established that the complainant was born on 3.3.2011 and duly produced the birth certificate as an exhibit.

On cross examination, he stated that the clothes the complainant wore were not produced as exhibits.

11. The appellant was subsequently placed on his defence. He tendered a sworn testimony. His case is that on the material date he was washing clothes outside his house when a neighbor's child passed by and that he gave her water only for her mother to arrive and allege that her daughter had been defiled. He stated that he had earlier ordered the family of the complainant to stop passing though his land and that the clan elder (PW3) had been alerted about it. He maintained that he had been framed up.

On cross examination; he stated that there were no persons when he gave water to the complainant.

12. The learned trial magistrate found the appellant guilty of the main count and sentenced him to serve thirty (30) years' imprisonment.

13. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.

14. I have considered the record of appeal and the submission. I find the issues for determination are firstly, whether the Respondent proved its case against the appellant beyond reasonable doubt and whether the sentence imposed was appropriate in the circumstances.

15. As the offence is one of the defilements, the essential ingredients to be proved by the prosecution are inter alia; proof of the age of the complainant; proof of penetration and proof that the appellant was the perpetrator of the offence.

16. As regards the aspect of the age of the complainant, there was ample evidence which clearly showed that she was aged 12 years. PW2 who was the mother of the complainant testified that she gave birth to her on 3.3.2011. This was coroborated by the birth certificate which was produced by the investigating officer (PW5) as exhibit one. Even though an age assessment was conducted on 13.10.2023 which placed the complainants age as 16 years, the same was an approximation based on her physical features. However, the birth certificate is the conclusive proof of age because the same properly captures the exact date of birth of the complainant and that there is thus no guess work in that regard. As the age is one of below 18 years, then the complainant was a child within the meaning of section 2 of the *Children's Act* 2001. I find this ingredient was duly proved by the prosecution beyond reasonable doubt.

17. As regards the issue of penetration, section 2 of the *Sexual Offences Act* defines the same as the partial or complete insertion of the genital organs of a person into the genital organ of a another person, In the case of *Mark Oiruri Mose v Republic* [2013] eKLR , it was held that during the commission of such offences, the perpetrator may not fully complete the sexual act and that as long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and that penetration need not be deep inside the victim's sexual organ. It is instructive that the complainant was rushed to Kipsigon Health Centre after the incident where she was examined by the clinical officer (PW4) who confirmed that the minor had been defiled and who produced the treatment notes, P3 form and PRC form. The said witness confirmed the presence of bloodstains and a broken hymen as well as swollen labia minora and bleeding on the cervical orifice. He also noticed some whitish discharge.

The complainant stated that the perpetrator inserted his penis into her vagina. I find this ingredient was proved by the prosecution beyond reasonable doubt.

18. As regards the issue of the identity of the appellant as the perpetrator, the complainant identified him as her assailant as he was person who lived near her home. It is noted that the incident took place around 3.00 pm which was in broad day light. The complainant stated that as she returned home from the shops, the appellant grabbed her hand and led her to his house where he locked the house from inside and then defiled her. Apparently, word went round and the complainant's mother (PW2) was alerted and she rushed to the scene and found the appellant's door locked from inside with the complainant groaning inside the house. The village elder and other villagers thronged the scene and who ordered the appellant to open the door. The Appellant emerged while half naked while the complainant emerged with a torn skirt without underpants. The complainant was rushed to hospital while the appellant was escorted to Kipsigon police station. It is thus clear that the incident took place in broad daylight and that the complainant had no difficulty in recognizing and identifying the appellant who had been their neighbour. In fact, the circumstances left no doubt that the appellant was found in flagrant delicto and that it was evident that he had a accomplished his mission of defiling the complainant. The Appellant in his defence evidence claimed that he had been framed up because he had refused to allow the family of the complainant to pass through his land and that the clan elder was aware of the said dispute. Even if that could have been the case, I find it is highly unlikely that the parents of the complainant could use their vulnerable daughter as a victim of defilement so as to settle scores with the appellant over the use of a road of access. I find the defence by the Appellant to be far fetched and unbelievable in view of the fact that he was found red handed (in fragrant delicto) as he emerged from his house half naked while the complainant's skirt was torn and who had no underpants. The question in the minds of the villagers and complainant's parents was "what was the appellant doing with the complainant inside his house (locked from inside) other than engaging in a sexual act with the complainant?". The incident took place in a broad day light and that the appellant was apprehended at the scene of crime. Even if there would have been no other witnesses, the evidence of the complainant could have been sufficient and that the trial court duly complied with the provisions of section 124 of the *Evidence Act*. Consequently, i find this ingredient was duly proved by the prosecution beyond reasonable doubt.

19. In view of the foregoing, the finding on conviction by the learned trial magistrate was quite sound and i see no reason to interfere with it. The appellant's defence was properly rejected by the trial magistrate.

20. As regards sentence, it is noted that the appellant was ordered to serve a sentence of thirty (30) years imprisonment on the main count of defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual offences Act* No. 3 of 2006. Section 8 (3) of the said *Act* provides:

> " A person who commits an offence of defilement with a child aged between twelve and fifteen years shall upon conviction be sentenced to a term not less than twenty years".

21. It is noted that the complainant was then aged 12 years as per the birth certificate produced as exhibit one. As the complainant was born on 3.3.2011, it is clear that at the time of the incident she was aged 12 years two months and 27 days old. The complainant was therefore within the age bracket of 12-15 years as per the provisions of section 8 (3) of the *Sexual Offences Act* and that the term of imprisonment should not be less than twenty years. The learned trial magistrate observed that the appellant had taken advantage of the complainant who was deaf and dumb and that the action was beastly and inhuman. While i appreciate the sentiments of the learned trial magistrate, i note that the appellant was not a repeat offender and therefore ought to be given the minimum possible sentence in law. It is noted that the appellant ought to have known better that the complainant was a special child who deserved special care and protection from all members of the society including the appellant. The appellant was out to

satisfy his lust at the expense of the complainant who was vulnerable. His actions have caused the victim both physical and psychological trauma. Looking at the circumstances, i find that a sentence of twenty years imprisonment ought to have been imposed by the trial court. To that extent, the sentence imposed will be interfered with. As the appellant remained in custody throughout the trial, the sentence should commence from the date of his arrest.

22. In the result, the appeal on conviction lacks merit and is dismissed. The conviction by the trial court is upheld. The appeal on sentence partially succeeds to the extent that the sentence of thirty years imprisonment imposed by the trial court is hereby set aside and substituted with a sentence of twenty (20) years imprisonment which shall commence from the date of arrest namely 30.5.2023.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JULY 2024

D KEMEI

JUDGE

In the presence of:-

Nicholas Kibet Appellant

No appearance Miss Arunga for Appellant

Miss Kibet for Respondent

Kizito Court Assistant