Onduro v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 9466 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E014 OF 2023

WA OKWANY, J

JULY 25, 2024

BETWEEN

JAMES ORINA ONDURO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Sentence in the Chief Magistrate's Court at Nyamira Criminal Case (SO) No. E038 of 2021 delivered by Hon. W.K Chepseba, Chief Magistrate on 13th February 2023)

JUDGMENT

1. The Appellant was charged with 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 charge were that on the 6th day of June 2021, at (particulars withheld) Sub-location, (particulars withheld) Sub-County within Nyamira County intentionally and unlawfully caused his penis to penetrate the vagina of P.B.H (particulars withheld), a child aged 11 years.

2. The 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 particulars of the charge were that the 6th day of June 2021, at (particulars withheld) Sub-location, (particulars withheld) Sub-County within Nyamira County intentionally and unlawfully caused his penis to come into contact with the vagina of P.B.H, (particulars withheld), a child aged 11 years.

3. The Appellant pleaded not guilty to both charges after which a trial was conducted in which the prosecution called a total of four (4) witnesses.

The Prosecution's Case

4. PW1 P.B.H. (particulars withheld), testified that she was, on 6th June 2021, on her way home from the Posho Mill when she met the Appellant who he held her by the neck, tore her sweater and took her to

the house where he threatened her with a knife and defiled her for about an hour. She stated that the Appellant threatened to kill her if she exposed him. The victim's mother later noticed that she (victim) was walking with difficulty. She identified her attacker as Orina who brought avocados to their estate.

5. PW2 M.K. (particulars withheld), the victim's mother testified that PW1 returned home from the posho mill crying. The victim went to sleep and refused to talk to her but she later learnt that she had been defiled. She escorted the victim to the hospital and police station where she filed a report. The victim informed her that the Appellant had defiled her in his house.

6. PW3, Enock Onyancha, the Clinical Officer, examined the victim on 8th June 2021 and noted that her hymen was broken but that there were no spermatozoa seen and no acute bleeding. He concluded that there was penetration and produced the Clinic Attendance Card (P.Exh1), Treatment Notes (P.Exh2a), the Prescription (P.Exh 2b), Lab Test Results (P.Exh2c) and the P3 Form (P.Exh3).

7. PW4 No. 233072 P.C. Belinda Okang', the Investigating officer received PW2 on 8th June 2021 who reported that her daughter (PW1) had been defiled. She recorded the witness statements and sent the minor for age assessment (P.Exh5) which revealed that she was 11 years old. PW4 testified that the complainant also brought a Birth Certificate which indicated that the minor was born on 20th March 2012 (P.Exh6). She produced the minor's torn clothes purple sweater (P.Exh7a) and red dress (P.Exh7b).

8. At the close of the Prosecution's case, the trial court found that the prosecution had established a prima facie case against the Appellant who was consequently placed on his defence. The Appellant elected to give an unsworn statement and did not call any witnesses.

The Defence Case

9. The Appellant testified that he was not sexually active due to a dysfunction caused by a blockage. He stated that he had been taken for an operation while in the cells and that he had not fully recovered. He denied the allegation that he had defiled the victim.

10. At the conclusion of the case, the the trial court found the prosecution had proved its case against the Appellant to the required standards, beyond reasonable doubt. The Appellant was thereafter convicted and sentenced to serve 20 years imprisonment.

The Appeal

11. Dissatisfied with the decision of the trial court, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -

    1. That he was charged with the offence of defilement contrary to Section 8 (1) and during the whole trial process, he was found guilty and sentenced to serve 20 years imprisonment.

    2. That he was totally remorseful and regretted the commission of the offence.

    3. That he has been mentally tortured by the events surrounding the offence and wished to seek an apology from the State.

    4. That he was the only breadwinner in his family who fully depended on him.

    5. That it was his humble prayer to the Honourable Court to have empathy and be pleased to consider him for sentence reduction only.

    6. That he was extremely pertinent and warned himself from various aspects which he had undergone while in prison and humbly entreated this Honourable Court to be pleased to

overhaul the 20 years imprisonment and substitute the same with a lesser jail term within its jurisdiction.

7. That his natural urination has totally blocked as for now and was using an artificial urinary system to pass urine.

8. That for the time spent in custody, he had learned and understood the law well and if he would be given a second chance, he had learned how to live with people without causing any problem. He requested for leniency.

12. The Appeal was canvassed by way of written submissions which I have considered. I find that the main issues for determination are; firstly, whether the conviction was safe and secondly, whether the sentence meted by the trial court was just and legal. This means that the court will have to determine whether the prosecution proved the charge of defilement to the required standard.

Analysis and Determination

13. Section 8 (1) and (2) of the *Sexual Offences Act* (the Act) stipulates as follows on the offence of Defilement: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

14. The prosecution was required to prove that the victim was a minor, that there was penetration and that there was positive identification of the perpetrator. (See Charles Wamukoya vs. Republic [2015] eKLR)

15. On proof of age, I note that PW1 testified that the victim was born in April 2012. The age assessment report produced by the investigating officer (P.Exhibit 1) revealed that the victim was 11 years at the time of the defilement. The victim's birth certificate also indicated that she was born on 20th March 2012. The Court of Appeal stated as follows in *Richard Wahome Chege vs. R, Criminal Appeal No. 61 of 2014* regarding the manner in which the age of a victim in sexual offences can be proved: -

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."

16. I am satisfied that the minority age of the victim was proved beyond reasonable doubt.

17. On penetration, I note that Section 2 of the Act defines it as:-

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

18. The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In Bassita Hussein vs. Uganda, Supreme Court criminal appeal No. 35 of 1995, the court stated: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

19. The victim narrated the circumstances under which she was defiled as follows: -

> " ....My mother sent me to the posho mill and I went, it was around 2 pm. I came back and met the accused who greeted me and asked me for the name of my mother. Immediately he held me, put down the posho unga tore my sweater and held me by my neck and took me to his house and he removed the knife. He told me not to scream. He pushed me to the chair. He tore all my clothes and started doing bad manners. He removed his trousers. Removed my pant and full dress, lifted my legs. He used his organ for peeing to my private part organ (vagina). The incident took about one hour....I was limping...."

20. The above narration, by the victim, points to the fact that she was penetrated by her assailant on the said date. I note that the victim used the euphemism 'bad manners' to describe her ordeal. The use of euphemism has generally been accepted by the courts to refer to penetration. (See Daniel Arasa vs. Republic, HCCRA 1035 of 2013 [2014] eKLR).

21. PW4, the Clinical Officer, testified that he examined the victim and found that her hymen was broken but that there was no acute bleeding. The lab results also indicated that there were no spermatozoa in her urine. A perusal of the Treatment Notes (P.Exh2a) and the P3 Form (P.Exh3) reveals that the age of the broken hymen was not indicated. It is therefore not possible for this court to determine if the hymen was freshly broken or if the same was an old tear. It is also noteworthy that the medical evidence revealed that there were no visible signs of injuries on the victim's genitalia. The Treatment notes recorded that victim's genitalia were normal and that there were no bruises and no active bleeding.

22. My finding is that the medical evidence does not conclusively support penetration. It is possible that the trial court arrived at the verdict that the victim was defiled because of the absence of hymen. Courts have however taken the position that the mere absence of hymen does not necessarily connote that the victim was penetrated. This was the finding by Maraga and Rawal, JJA, (as they then were), in P. K.W vs. Republic [2012] eKLR on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more.

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. 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 a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

23. This court is of the view that the it was important for doctor who examined the victim of alleged defilement to specify the age of the broken hymen so as to inform the court on its nexus with the particulars of the charge. As I have already stated in this judgement the medical evidence does not support penetration.

24. The Appellant in this case testified that he could not have committed the offence because he suffered erectile dysfunction. This court is of the view that the trial court should have interrogated the Appellant's line of defence with a view to determining if it was true and if it impeached the prosecution's evidence on penetration. It is instructive to note that the Appellant maintained his innocence, even on appeal, when he implored the court to note that he could not have penetrated the minor as he suffered from erectile dysfunction.

25. On 6th June 2024, this Court ordered that a medical examination be conducted on the Appellant and that a report filed concerning the Appellant's medical status. A medical report dated 1st July 2024 was subsequently filed. I have perused the said report and I note that it indicates that the Appellant has had undergone four surgeries since 2017 in respect to the blockage of his urinary tract following failure to pass urine. The medical report also indicates that the Appellant, who is currently 66 years old, has as a result of the surgeries been using a suprapubic catheter which was infected and painful.

26. My finding is that the Appellant's medical report supports his defence that he was could not have committed the offence in question due to the erectile dysfunction caused by the multiple surgeries. I find no reason to doubt the Appellant's defence. I find that the doubts created in the prosecution's case must be resolved in favour of the Appellant.

27. I am minded of the standard of proof that is expected in criminal cases as was elucidated by Lord Denning in Miller vs. Minister of Pensions (1942) A.C. wherein it was held: -

> "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

28. Having found that the ingredient of penetration was not proved to the required standard, I find that the charge was altogether not proved since each of the three ingredients of defilement must be established beyond reasonable doubt. Failure to prove one ingredient negates the charge against an accused person.

29. In the final analysis, I find that the instant Appeal has merit and I hereby allow it. Consequently, I quash the conviction by the trial court and set aside the sentence. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

30. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 25TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE