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Osoro v Republic (Criminal Appeal E036 of 2023) [2024] KEHC 9336 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9336 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E036 OF 2023

WA OKWANY, J

JULY 11, 2024

BETWEEN

MILTON NYARIEKO OSORO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

({Being an Appeal from the Judgment and Conviction at the Chief Magistrate's Court in Nyamira, Sexual Offence Case No. E021 of 2021 delivered by Hon. C.W. Waswa, Resident Magistrate on 31st May 2022})

JUDGMENT

1. The Appellant herein, Milton Nyarieko Osoro, was charged alongside a co-accused, one Douglas Zephania Moturi alias Riyoyo, for the offence of Gang Defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that Douglas Zephaniah Moturi alias Riyoyo on 5th May 2021, at Nyamira North Sub-County within Nyamira County in association with Milton Nyarieko Osoro and others not before the court, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of D.B.M. (particulars withheld), a girl aged 13 years old.

2. The Appellant also faced the 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 were that Douglas Zephaniah Moturi alias Riyoyo on 5th May 2021, at Nyamira North Sub-County within Nyamira County in association with Milton Nyarieko Osoro and others not before the court, intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of D.B.M. (particulars withheld), a girl aged 13 years old.

3. The Appellant pleaded not guilty to the offence and a trial thereafter ensued in which the prosecution called a total of four (4) witnesses.

The Respondent's (Prosecution) Case

4. PW1 D.B.M, (particulars withheld) testified that she was in the company of her friend, one Eunice, when she met the Appellant at a bus stage two days prior to the incident. She stated she met her said friend, Eunice, on 5th May 2021 while on her way to Ekerenyo when the Appellant and another person known as Alphayo arrived on a motorcycle (boda boda) and told them to board it. Eunice agreed to board the motorcycle but PW1 refused to board and decided to walked away. The Appellant and Alphayo followed the victim, grabbed her and forced her to board the motorcycle despite her protests. The Appellant and his friend (Alphayo) took them to a house where they forced her to take alcohol after which she lost consciousness. She regained consciousness the following day and discovered that she was on the roadside, in a lot of pain and bleeding from her genitals. She was escorted to Nyamira County Hospital for treatment where she was admitted for 3 weeks. She identified the Appellant as her assailant. On cross examination, she testified that she did not know the Appellant's co-accused Douglas Zephania Moturi.

5. PW2, G.K.M (particulars withheld) the victim's mother, testified that she received a phone call from the area chief on the morning of 6th May 2021 who informed her that PW1 had been injured. She proceeded to the hospital where the victim was hospitalized. She produced the victim's birth certificate (P.Exh1).

6. PW3, Justine Geke, was the Clinical Officer who examined the victim on 6th May 2021 at 6.30 a.m. and produced her P3 Form, Hospital Attendance Card, Discharge Summary and Treatment Notes (P.Exhs 2-5).

7. PW4, No. 75171 Sgt. Chepkorir Mengich, was the Investigating Officer who compiled the evidence and charged the Appellant alongside his co-accused Zaphania Moturi alias Riyoyo (the 1st Accused) with the offence of Gang Defilement.

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 were consequently placed on his defence. The Appellant elected to tender sworn evidence and called 1 witness.

The Defence Case

9. DW1, the 1st Accused, testified that he did not know the victim and that he was on 4th May 2021 at his place of work about 150kms away from home. He stated that he was arrested on 5th May 2021 at about 9.30 p.m. over an allegation that he had committed a crime. He noted that the victim had testified that she did not know him.

10. The Appellant (DW2) testified that he was a long-distance truck driver and that he did not know the victim. He stated that he drove to Nairobi on Tuesday where he dropped off some trees and returned with cement on Thursday after which he parked the truck at Ekerenyo Hospital. He was later informed that he had defiled a girl and was taken to Ekerenyo Police Station.

11. DW3, Nancy Nyaboke, was the Appellant's wife. She testified that she was surprised by the allegations made against her husband as she did not think that her husband could commit such an offence. She pleaded with the court to forgive the Appellant.

Judgement and Sentence

12. At the end of the trial, the trial court acquitted the 1st Accused but convicted the 2nd Accused (Appellant) on the main count of Defilement. He was consequently sentenced to serve 20 years' imprisonment.

The Appeal

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

    1. That the Learned Trial Magistrate faulted in both law and facts by failing to comply with Articles 50(2) (g) (h) of *the Constitution*.

    2. That the Learned Trial Magistrate faulted in both law and facts by failing to note that the medical report did not link the Appellant.

    3. That the Learned Trial Magistrate equally erred in both law and facts by not measuring the evidence adduced by the complainant given that all were lies.

    4. That the Learned Trial Magistrate faulted in both law and facts by notwithstanding that the offence of defilement was not proved to the required standard.

    5. That the sentence was harsh and excessive given that the Appellant never committed the alleged crime.

    6. That the Appellant equally prays to be served with certified trial court proceedings and wished to attend the hearing of the Appeal.

14. The Appeal was canvassed by way of written of written submissions which I have considered.

15. The duty of a first appellate court was explained in the case of Kariuki Karanja v R (1986) KLR 190 thus: -

> "On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."

16. I have considered the record of appeal and the parties' respective submissions. I find that the main issues for determination are as follows: -

    a. Whether the trial court accorded the Appellant a fair trial.

    b. Whether the offence of gang defilement was proved to the required standard.

    c. Whether the sentence imposed on the Appellant was appropriate and legal.

Fair Trial

17. The Appellant submitted that he was not accorded a fair trial because he was not informed of his right to legal representation as envisaged under Article 50 (2) (n) of *the Constitution*.

18. The Respondent, on its part, submitted that under Article 50 (2) (g) and (h) of *the Constitution*, the right to fair trial is not absolute as it has the overriding words "if substantial justice would otherwise

result". It was submitted that even though the Appellant was not promptly inform of this right, no prejudice was occasioned to him since he fully participated in the proceedings and cross-examined all the prosecution witnesses.

19. Article 50 (2) (h) of *the Constitution* provides for legal representation by the state where substantial injustice would occur. In Republic vs. Karisa Chengo & 2 Others [2017] eKLR, the Supreme Court considered the issue of legal representation at the state's expense and stated inter alia that:

> " the right to legal representation at state expense, under the said Article, was a fundamental ingredient of the right to a fair trial and was to be enjoyed pursuant to the constitutional edict without more. However, in accordance with the language of *the Constitution*, this particular right was not open ended but only became available "if substantial injustice would otherwise result".

20. There is now an established framework under which an accused person can apply, under section 40 of the *Legal Aid Act* No. 6 of 2016, for legal representation at state expense. Further, section 43 of the said Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. The section provides as follows:

 43.

 (1) A court before which an unrepresented accused person is presented shall —

 (a) promptly inform the accused of his or her right to legal representation;

 (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

 (c) inform the Service to provide legal aid to the accused person.

21. In the instant case, I note that the trial court did not inform the Appellant of his right to legal presentation of his own choice or that he was entitled to apply to the legal aid board for assistance. I however note that the failure to inform the Appellant of his right was not fatal to the Appellant's case as he fully participated in the trial where ably cross-examined all the witnesses.

Defilement

22. Section 10 of the *Sexual Offences Act* (hereinafter "the Act") provides as follows: -

 10. Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.

23. I note that while the Act does not specifically provide for the offence of gang defilement, the definition of gang rape includes defilement conducted in association with others or where there is a common intention. This is the finding that was made in Francis Matonda Ogeto vs. Republic [2019] eKLR where Odunga J. (as he then was) held thus:-

> " Under Section 10 of the *Sexual Offences Act*, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others

> or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist."

24. For the charge of gang defilement to stand, the Prosecution must establish the following elements, beyond reasonable doubt: -

    a. Unlawful sexual act committed in association with another or others; or

    b. Being in the company of another or others who commit the offence with common intention of committing the offence.

25. The offence of defilement is defined under Section 8 of the *Sexual Offences Act* as follows:

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

26. The ingredients of the offence of defilement were outlined in the case of Charles Wamukoya Karani v R (2015) eKLR as follows: -

    i. Age of the victim

    ii. Penetration

    iii. Positive Identification of the perpetrator.

27. In JOA v Republic (2019) eKLR, the court highlighted the various ways in which the age of a victim of sexual offence can be established as follows: -

> " It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

28. In this case, PW2 the victim's mother, produced her Birth Certificate as an exhibit. A perusal of the said Certificate reveals that the victim was born on 2nd October 2006 which means that she was 14 years and 5 months old at the time she was defiled. I therefore find that the victim's minority age was proved to the required standard.

29. Turning to the second ingredient of penetration, Section 2 of the Act stipulates as follows: -

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

30. The victim testified as follows over the ordeal that she went through in the hands of her defilers: -

> " ...Alphayo got hold of me and said that we should drink alcohol. We went to a certain house and Alphayo bought alcohol and I refused. The 2nd Accused forced alcohol down my throat. I took two glasses. Eunice was also present. I felt weak and lost consciousness. I woke up on the road and my clothes had blood. My body was paining. I was bleeding from my private parts....I was facing downwards and she turned me over..."

N.B. Witness cried in court. She appeared to be telling the truth.

31. The evidence of PW1 over the injuries she suffered in the ordeal was corroborated by the evidence of PW3, the Clinical Officer, who examined the victim and testified that she was in physical pain, appeared confused and had blood and mud all over her clothes. PW3 added that the victim had massive pilling of clotted blood on her vagina with 1st degree perineal tear adjacent to the anal orifice. He stated that the victim was in a lot of pain. PW3 also found red blood cells and sperm cells together with puss cells.

32. I have perused the P3 Form (P.Exh2) and I note that it reveals that the the victim had massive pilling of blood clots all over her perineum and thighs and the doctor concluded that there was positive evidence of forceful penetration. I am satisfied that there was ample evidence to show that the victim was forcefully penetrated thus resulting in the serious injuries noted on her genitalia. I find that the evidence of PW1 and PW3 proved the ingredient of penetration beyond reasonable doubt.

33. Turning to the identification of the Appellant as the perpetrator of the offence, I note that the victim testified that she knew the Appellant as she had met him at the stage at Ekerenyo two days prior to the date of the assault. The victim testified as follows over her encounter with the Appellant: -

> " ....I know the 2nd Accused. I knew him for two days prior to the events of this case. I met the 2nd Accused at the stage when I was with my friend.....The 2nd Accused came and another person called Alphayo came with a motor cycle. They told us to board the motor cycle and I refused. They had sent my friend to come and get me. The 2nd Accused and Alphayo told me that they would kill me if I didn't board the motor cycle. I continued walking. The 2nd Accused and his friend followed me and I refused to board the motor cycle., The 2nd Accused got hold of me and placed me on the motor cycle. I started screaming.... The 2nd Accused took us to Nyakongo. The 2nd Accused got hold of me and said that we should drink alcohol and I refused. The 2nd Accused forced alcohol down my throat. I took two glasses...I felt weak and lost consciousness. I woke up on the road and my clothes had blood....I was bleeding from my private parts...."

34. PW4, the Investigating Officer, testified as follows on the circumstances under which the Appellant was arrested: -

> " Zephania and Milton were arrested by members of the public and Dorothy identified them. Dorothy met Eunice along the road."

35. The trial court held as follows on the identification of the Appellant as the perpetrator of the offence: -

> " From the foregoing, it is apparent that the PW1 knew the 2nd Accused prior to the events of 5th May 2021. They had previously met and she even knew that the 2nd accused person was a boda rider. Therefore when they met on 5th May 2021, it was not the first time that PW1 saw the 2nd Accused person. They met during the day time and she even recalled how he had dressed on that day."

36. The only evidence of identification of the Appellant came from the victim. It is however noteworthy that apart from her statement that she had met the Appellant 2 days prior to the incident, at no time did she state that she knew the Appellant by name. The question that lingers in my mind is how the members of the public, who are reported to have arrested the Appellant were able to identify him as the perpetrator of the offence. I say so because the victim was not present at the time of the arrest to point out the Appellant as her assailant in order to rule out the possibility of his being a victim of mistaken

identity. The mystery surrounding the circumstances of the Appellant's arrest further deepens when one considers the fact that none of the alleged members of the public who arrested him were called to testify on what or who informed their decision to carry out the arrest.

37. It did not also escape the attention of this court that certain crucial witnesses who were mentioned as having played a role or interacted with the victim and her assailants were not called as prosecution witnesses. One such crucial witness is the victim's friend, one Eunice, who was with her during the entire ordeal from the time they met the 2 men who literally abducted them and ferried them to the chang'aa den. This court is at a loss as to why the said Eunice did not testify in this case not to mention the women who allegedly witnessed the abduction and thought that the abductees were going for a funeral.

38. The case of Bukenya & Others v Uganda [1972] E.A.549 is the locus classicus on the issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that: -

> " The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

39. In Julius Kalewa Mutunga v Republic [2006] eKLR, the Court of Appeal held that:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. In the case of Bukenya & Others v Uganda (supra), the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court where the evidence, by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. Indeed, under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

41. In the case of Keter v Republic [2007] 1 EA 135 the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

42. In the present case, I have already noted that one Eunice was a crucial witness who should have been availed to shed light on the case as she was not only in the company of the victim all through the ordeal, but was mentioned by the victim as the person who was well acquainted to the assailants. It was reported that Eunice willingly boarded their motorcycle as opposed to the victim who resisted their overtures. I find that the failure, by the prosecution, to call such a crucial witness to corroborate the victim's identification of the Appellant, which identification I have already found to have been wanting, created a serious doubt on the prosecution's case. It is my finding that failure to call the said Eunice leads this court to make an adverse inference that had the witness been called, she could have given adverse evidence against the prosecution. I further find that the failure to call the crucial witness

lend credence to the Appellant's claim that he was arrested because he looked like the person who had defiled the victim.

43. While this court does not doubt the victim's account of the unfortunate events that led to her most disturbing sexual assault and while it is possible that the Appellant may have been among the heartless men who subjected the minor to the trauma of gang defilement before dumping her along the road and leaving her for the dead, I find that the evidence on identification of the Appellant as the perpetrator of the offence was quite wanting.

44. It is trite that the standard of proof in criminal cases is beyond any shadow of a doubt. In the instant case, for the reasons I have stated in this judgment. I am not persuaded that the threshold of proof was met. This court decries the shoddy investigations that was done by the police and is at a loss as to why they did not subject the sperm cells that were recovered from the victim to DNA analysis with a view to linking the same to the Appellant or any other person who was suspected to have been involved in the gang defilement.

45. For the reasons that I have stated in this judgment, I find that the prosecution did not prove the charge of gang defilement against the Appellant to the required standards and I therefore allow the instant appeal, quash the conviction, set aside the sentence and direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

46. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE