Steven v Republic (Criminal Appeal 112 of 2019)
[2024] KEHC 9334 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 112 OF 2019

AC MRIMA, J

JULY 25, 2024

BETWEEN

MOKUA OMWENGA STEVEN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.I.G. Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 206 of 2018 delivered on 31st October, 2019)

JUDGMENT

1. Mokua Omwenga Steven, the Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 23rd November, 2018 at [particulars withheld] within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of C.C.C., a child aged 15 years old.

2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act whose particulars were that on 23rd November, 2018 at [particulars withheld] within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of C.C.C., a child aged 15 years old.

3. The Appellant denied the charges and he was tried. After a full hearing, the Appellant was found guilty and convicted on the main charge of defilement and he was sentenced to serve a term of 20 years' imprisonment.

4. The Appellant was aggrieved by the conviction and sentence. He lodged an appeal which is under consideration in this judgment.

The Appeal:

5. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of placing an unsafe conviction pegged on insufficient and scanty evidence. That, the ingredients of the offence of defilement were not proved. He also alleged that crucial witnesses were not called.

6. He urged this Court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

7. The Appellant extensively argued his appeal by way of written submissions. He submitted that the ingredient of penetration had not been established due to paucity of evidence. He was emphatic that he was improperly identified as the perpetrator asserting that had crucial witnesses been called, this question would have been properly addressed.

8. On the part of the prosecution, it relied on written submissions filed on 20th June 2023 in arguing that the conviction was safe and the sentence legal such that the appeal be dismissed.

9. Both parties referred to several decisions in supporting their rival positions.

Analysis:

10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

11. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

12. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

13. On looking at those aspects in this judgment, this Court shall consider each of them singly. I must however confirm that the evidence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

14. In a snapshot, five witnesses testified before the trial Court. The Complainant testified as PW1, Aqueline Chelimo, who was PW1's mother testified as PW2. PW3 was Dr. Muyira Rachel attached at the Kitale County Referral Hospital who assessed the complainant's age. Michael Ngoret Chemningo, a Clinical officer attached at the Endebes Sub- County Hospital testified as PW5 whereas PC (W) Rukia Zahar, the Investigating Officer attached at the Endebes Police Station testified as PW4.

15. Upon close of the prosecution's case, the Appellant was found to have a case to answer. He was placed on his defence.

16. The Appellant gave sworn evidence and did not call any witness. He largely reiterated how he was arrested.

17. A consideration of the ingredients of the offence of defilement now follows.

Age of the victim:

18. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.

19. In this case, the age of the complainant was not contested. However, the same was well settled vide the evidence of PW3, a Dentist practicing at Kitale County Referral Hospital who assessed the complainant based on her dentition formula and an OPJ. She concluded that the complainant was 15 years old.

20. She produced the Age Assessment Report as an exhibit. No objection was raised over the same.

21. Going by the evidence of the complainant and PW3, the complainant was, therefore, a child within the meaning ascribed to the term under the Children's Act.

Penetration:

22. Section 2(1) of the Sexual Offences Act defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

23. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

> ...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

24. Later the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

25. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

26. The issue of penetration was attested to by two witnesses. They were the complainant and the Clinical Officer who testified as PW5.

27. In her evidence, the complainant narrated how she was called by the Appellant who stood by the roadside near the complainant's home at around 7pm. When the complainant was asked to engage the Appellant sexually, she declined and began heading home. Suddenly, the Appellant held her hand and covered her mouth. He took her into a maize plantation where he undressed as he was threatening to kill her if she raised alarm. He laid her on the ground as he also undressed and inserted his penis in the complainant's vagina. The complainant felt pain and after a asexual intercourse, the Appellant left while threatening her of death in the event she disclosed what had just happened.

28. In the course of testifying, the complainant used a male and a female doll to demonstrate what happened. From the complainant's narration and demonstration, there was clarity of the events that took place between the complainant and the Appellant.

29. PW5 examined the complainant on 26th November 2018. That was 3 days after the ordeal. He made the following observations: Firstly, the Complainant had injury marks along her vaginal wall. Secondly, the hymen was torn and old looking. Thirdly, the complainant had whitish vaginal discharge. Lastly, a genital swab showed the presence of many epithelial cells.

30. PW5 concluded that there was evidence of penetration which decision was corroborated by the contents of the P3 Form and treatment notes which PW5 produced as exhibits.

31. The trial Court observed the witnesses as they testified. The Court did not make any adverse inferences on the demeanor of any of the witnesses. It believed their testimonies.

32. Having reviewed the evidence on penetration, this Court hereby finds favour with the analysis and conclusion of the trial Court on this issue. For certainty, the aspect of penetration was duly proved.

Identity of the perpetrator:

33. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.

34. The identification aspect in this matter was attested to by the complainant. The complainant testified in great detail on how he knew the Appellant. He lived in their neighbourhood and passed by their home each day as he went to his farm. PW2 also affirmed that aspect.

35. The complainant further narrated how she interacted with the Appellant over time including on the fateful day. The Appellant also readily gave the name of the Appellant when she disclosed what had happened to her father.

36. When the Appellant was placed on his defence, he gave his evidence on oath. He reiterated how he was arrested as he worked in his farm. The Appellant also brought out the issue of being framed by PW2. He cross-examined the complainant and PW2 on the issue.

37. Both the complainant and PW2 denied there being any grudge between PW2 and the Appellant. In fact, the complainant was very emphatic that it was the Appellant who had her carnal knowledge and denied having been asked by her parents to falsify evidence in order to frame the Appellant.

38. The evidence of identification was, therefore, by a single witness. Such evidence must be treated carefully and cautiously. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> .... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone

whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

39. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the Evidence Act, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences as long the Court believes the victim.

40. This Court has considered both the complainant's testimony as well as the Appellant's defence. The defence raised two sub-issues. The first one was that it centered on the manner he was arrested. The second sub-issue was the aspect of a grudge between him and PW2 and the assertion that the Appellant was framed by PW2 so as to settle scores.

41. Although the Appellant cross-examined the complainant and PW2 on the issue of the grudge, nothing really turned out of it. The allegation was not proved thereby rendering the assertion invalid. The complainant and PW2 were quite steady in refuting the allegation and this Court finds that the Appellant was not framed as he alleged. The defence was, therefore, rightly so, not holding and the trial Court found as much. This Court affirms the trial Court's finding.

42. There was also the argument that some potential witnesses were not called. To this Court, the assertion does not hold. The prosecution has a discretion to call witnesses. (Section 143 of the Evidence Act). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412). The witnesses called were sufficient to prove the offence.

43. As said elsewhere above, the trial Court believed the witnesses as truthful. There is nothing on record for this Court to review that finding. In sum, the prosecution's evidence affirms the position that the identification of the Appellant as the assailant was not in error.

44. Having found that the Appellant was properly identified as the perpetrator, then he was rightly found guilty and properly convicted. As such, the appeal against the conviction is hereby dismissed.

Sentence:

45. The Appellant was sentenced to 20 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

46. The Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

47. There is no doubt the offence is serious and indeed inhumane. It was also committed against an innocent child. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

48. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.

Disposition:

49. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:-

Mokua Omwenga Steven, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.