Sisa v Republic (Criminal Appeal 112 of 2023)
[2024] KEHC 10784 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10784 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 112 OF 2023

H NAMISI, J

SEPTEMBER 19, 2024

BETWEEN

DANIEL ARATI SISA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. J. Orwa, Senior Principal Magistrate delivered on 16th October 2023 in Kiambu Chief Magistrate Court Sexual Offence Case No. E018 of 2022)

JUDGMENT

A. Introduction

1. This appeal arises from a decision of the trial court in which the Appellant was found guilty of the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*, No. 3 of 2006. The Appellant was subsequently sentenced to life imprisonment.

2. Aggrieved by this decision, the Appellant lodged an appeal, seeking that the conviction be reviewed, quashed and/or set aside on the following grounds:

    i. That the learned trial magistrate erred in law and fact by convicting the Appellant, when the prosecution had not proved its case against the Appellant to required standard in criminal law;

    ii. That the learned trial magistrate erred in law and fact by convicting the Appellant on fabricated and/or manufactured facts;

    iii. That the learned trial Magistrate erred in law and fact in reaching a finding that the victim was a truthful witness from a very shallow and/or incomprehensive examination of the victim;

iv. That the learned trial magistrate erred in law and fact in failing to appreciate that the investigations of the case was shoddy and/or its prosecution was so wanting which could not have resulted or sustained a conviction of the Appellant;

v. That the learned Magistrate erred in law and in fact by failing to appreciate or record the Appellant's evidence and/or consider his testimony which was cogent, truthful and justified thus exhibited bias;

vi. That the learned Magistrate erred in law and fact by failing to appreciate the adverse effect on the prosecution case owing to the fact that the victim was examined several days from the date of the alleged commission of the offence or after the mother of the victim purportedly knew about the incident;

vii. That the learned trial Magistrate erred in law and fact by wholly relying on medical documents which were generated from a treatment from private medical facility and produced in court by a person other than the maker of the documents;

viii. That the learned trial Magistrate erred in law and fact by failing to consider the overwhelming circumstantial evidence which was in favor of the Appellant.

B: Background

3. Before the trial court, the Appellant was charged with the offence of defilement, contrary to section 8 (1) (2) of the *Sexual Offences Act*. The particulars were that on the material day of 24th June 2022 at Kinoo Location, Kikuyu sub-county, Kiambu county, the Appellant caused his penis to penetrate the anus of MB, a child aged 5 years.

4. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

5. The Appellant pleaded not guilty to both counts.

C: Analysis and Determination

6. This being a first appeal, it is the duty of the Court to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should, however, give regard to the fact that it has neither heard nor seen the witnesses testify. In the cases of Pandya v R [1957] EA 336; Ruwalla v R [1957] EA 570 and David Njuguna Wairimu v. Republic [2010] Kisumu Criminal Appeal No. 28 of 2009, the Court of Appeal held that:

> '' The duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

7. I have considered the Record of Appeal as well as the submissions of the Appellant dated 31 May 2024 and the Respondent's submissions dated 3 June 2024. The issue for determination is one; Whether the offence of defilement was proved to the required standard.

8. Section 8(1) of the *Sexual Offences Act* provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Section 8(2) provides that 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.

9. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as:

   i. Proof of the age of the victim;

   ii. Proof of penetration or indecent act;

   iii. Identification of the perpetrator.

Proof of Age

10. On proof of age, PW3, Corporal Jane Atieno, produced the victim's birth certificate, which indicated that the victim was born on 2nd August 2016 to MBO and SN. The offence in question is said to have happened on 24 June 2022, meaning that the victim was about one week away from his sixth birthday. This evidence was not challenged by the accused.

Proof of penetration or indecent act

11. Section 2 of the *Sexual Offences Act* defines penetration as partial or complete insertion of the genitalia organ of a person in the genital organs of another person.

12. In its judgement, the trial court made reference to section 124 of the *Evidence Act*, which provides as follows:

> Notwithstanding the provisions of section 19 of the Oath and Statutory Declarations Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in the proceedings against any person for an offence, the accused person shall not be convicted in the proceedings against him unless is corroborated by other evidence in support thereof implicating him provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if nor any reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

13. In his submissions, the Appellant contended that the voir dire examination of the complainant (minor) was too shallow to pick anything useful to decide if the victim was a truthful witness. The Appellant relied on the principles set out in the case of Japheth Mwambire Mbitha -vs- Republic [2019] eKLR. Further, the Appellant submitted on the fact that the victim gave unsworn testimony.

14. From my analysis of the proceedings, the trial court handled the issue of the voir dire examination properly. The purpose of conducting voir dire examination is for the court to satisfy itself that the child of tender years understands the nature of oath. If the child does not understand the nature of oath, his/her evidence may be received, though not given upon oath, if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

15. In the case of Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal held that:

> " It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;
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> "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

16. A trial court is able to determine if a child of tender years understands the nature of oath by asking particular questions aimed at establishing that fact. In this instance, the Record of Appeal indicates that the trial court conducted the voir dire examination in the manner envisaged under the law.

17. Further, the trial court's analysis of the evidence was proper. The evidence of penetration was provided by the complainant and corroborated by PW4, the medical expert. It was the complainant's testimony that the Appellant inserted his "susu" (penis) into the complainant's "bum bum" (anus). Further, the complainant testified that thereafter, he felt pain in his "bum bum, and that after the incident, the Appellant told the complainant that he would buy him crisps. This could explain why the complainant did not mention the incident to his mother on the same day of occurrence. The Prosecution produced a PRC Form and P3 Form which confirmed that the complainant suffered lacerations in the anus.

18. The Appellant submitted that the person who came to testify as PW4 was not the doctor who attended to the complainant and urged the Court to find that the qualification of the maker of the documents is wanting. The Appellant relied on the case of Kagina -vs- Kagina & 2 Others; Civil Appeal No. 21 of 2017 [2021] KECA (KLR). From my perusal of the record, I note that the Appellant did not raise this objection before the trial court. The Medical Reports were produced by John Njuguna, a clinical officer at the Nairobi Women's Hospital, on behalf of Winfred Mutungi, who has in the USA pursuing further studies.

19. I note from the proceedings that the basis and reason for John Njuguna testifying and producing the medical reports was explained. The witness confirmed that he had worked with Winfred Mutungi for 4 years and was familiar with her signature. Further, the Appellant did not object to the production of the medical reports as evidence. In the premise, I find that there was no miscarriage of justice or error in John Njuguna testifying and producing the medical reports on behalf of his colleague.

20. Consequently, based on the foregoing, I find that the evidence of the complainant, his mother (PW1) and the Doctor was sufficient proof of the ingredient of penetration. I find no reason to interfere with the finding of the trial court.

Identity of the Perpetrator

21. On identity of the perpetrator, various witnesses, including the Appellant himself, testified that the Appellant and the victim were known to each other. PW1, MBO, mother to the victim, testified that the Appellant was her employee. She would pay him a monthly fee. Part of his duties including dropping off and picking the victim from school as well as preparing meals. The victim also positively identified the Appellant, stating that they were previously friends.

22. The Appellant himself admitted that the victim was known to him. At the material time, the Appellant was charged with the duty of picking and dropping the victim in school. In his word, the child was more comfortable with him than with the house help.

23. Based on the foregoing, I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground of the appeal must fail as it surely does.

24. The upshot is that this appeal is unsuccessful and the same is hereby dismissed.

DATED AND DELIVERED IN KIAMBU THIS 19 DAY OF SEP 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of

Mr. Bwoigara..... For the Appellant

Appellant not present in court

N/A.....for the Respondent