HN v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 13884 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13884 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E029 OF 2023

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

HN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement and Sentence in the Principal Magistrate's Court at Keroka, Criminal (MCSO) No. E004 of 2020 delivered by Hon. B.M. Kimtai, Principal Magistrate on 14th July 2022)

JUDGMENT

1. The Appellant herein, HN, 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 26th October 2020 in Masaba North Sub-county, within Nyamira county, unlawfully and intentionally caused his penis to penetrate the vagina of MB (particulars withheld) a child aged 9 years.

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*. The particulars of the charge were that on the 26th October 2020 in Masaba North Sub-County, within Nyamira county, unlawfully and intentionally touched the vagina of MBO (particulars withheld) a child aged 9 years with his hand.

3. The Appellant denied both charges and a trial was conducted in which the prosecution presented the evidence of six witnesses as follows: -

4. PW1, MBO (particulars withheld), testified that she had taken a needle to the Appellant who lived about 200 meters from her home when the Appellant pulled her up through the window and defiled her. She went back home and informed one Misaro who in turn informed her brother E of what had transpired. She later informed her uncle N (PW3). She stated that the Appellant escaped from the

scene but was later arrested. She was thereafter escorted to the hospital by her parents, PW3 and the Appellant.

5. PW2, FM, testified that the Appellant requested him to give his sister (PW1) a needle to take to him but that the Appellant later denied knowledge of the victim's whereabouts.

6. PW3, FN, testified that the Appellant was his nephew (his brother's son) while the victim was his niece (his brother's daughter). He learnt that PW1 had been defiled and stated that the Appellant admitted that he had defiled PW1. He escorted the victim to the hospital.

7. PW4, JO (particulars withheld), the victim's mother testified that the Appellant was her brother-in-law's son. She stated that the Appellant borrowed a needle from her on 26th October 2020, after which she left for the shamba but later learnt that the Appellant had defiled the victim. She escorted the victim to the hospital and reported the case to the police. She produced the victim's Birth Certificate Serial No. (particulars withheld) (P.Exh1)

8. PW5, Lameck Nyaribo, was the Clinical Officer at Keroka Hospital who examined the victim. He testified that the victim had an old missing hymen and inflammation of the labia minora. He concluded that the victim had been defiled. He produced the victim's Treatment Notes (P.Exh2), PRC Form (P.Exh3) and P3 Form (P.exh4).

9. PW6, No. 71xxx P.C. Andrew Kiane, testified that the Appellant was brought to the police station by members of the public over an allegation that he had defiled a minor. He accompanied the victim and the Appellant to Keroka Sub-County Hospital for treatment and examination. He later charged the Appellant with the offence of defilement.

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

The Defence/Appellant's Case

11. DW1, the Appellant herein, testified that he did not know the victim or anything about the events of 26th October 2020. He explained that his uncle (PW3) arrested him on 28th October 2020 at his place of work at Metamaywa. He stated that PW3 did not give him any reasons for his arrest and that he had differences with his uncle (PW3) who had framed him up in the defilement case.

12. At the close of the case, the trial found that the Prosecution had established its case against the Appellant, beyond reasonable doubt, on the main charge of defilement. The Appellant was consequently convicted and sentenced to serve 40 years imprisonment.

The Appeal

13. Aggrieved by the trial court's conviction and sentence, the Appellant instituted the present Appeal and listed the following grounds of appeal in the Petition of Appeal: -

    1. That the learned trial magistrate erred both in law and facts in holding that there was sufficient evidence to prove the charge of defilement.

    2. That the learned trial magistrate erred both in law and facts in relying on a child (complainant) without corroboration.

    3. That the learned trial magistrate erred both in law and facts in relying on hearsay evidence.

4. That the learned trial magistrate erred both in law and facts in convicting the Appellant on a piece of evidence that was full of contradictions and inconsistencies.

5. That the learned trial magistrate was absolutely wrong in relying on the P3 Form to connect the Appellant to which form was not conducive/authentic in law.

6. That the learned trial magistrate did not properly evaluate the entire evidence on record and if he would have done so, he would have reached a different conclusion.

7. That the learned trial magistrate erred in shifting the burden of proof to the Appellant.

8. That the trial court faulted in law and fact by objecting the Appellant's defence without due cause.

9. That the sentence of 40 years imprisonment was too harsh and manifestly excessive.

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

15. The duty of a first appellate court was discussed in the oft-cited case of Okeno vs. Republic (1972) EA, 32 thus: -

> " That the first appellate court has a duty to carefully examine and analyze afresh the evidence presented from the lower court and draw its own conclusions bearing in mind that it lacks the advantage of seeing the witnesses and observing their demeanor."

Analysis and Determination

16. I have carefully considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether the Prosecution proved the charge of defilement against the Appellant beyond reasonable doubt.

17. Section 8 of the *Sexual Offences Act* (the Act) stipulates as follows: -

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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

18. The elements of the offence of defilement are; proof of age of the victim, penetration and positive identification of the perpetrator of the offence.

19. It was not disputed that the victim was a minor aged 10 years as shown in the Birth Certificate produced as P.Exh1. A perusal of the said Certificate shows that the victim was born on 25th December 2010. The offence is reported to have been committed on 26th October 2020. I find that the minority age of the

victim was proved to the required standard. In the case of *Mwalongo Chichoro Mwajembe vs. Republic, Msa. App.No. 24 of 2015* (UR), the Court of Appeal in Malindi held as follows on proof of age: -

> "...the question of proof of age finally been settled decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decision from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa vs. Republic, Criminal Appeal No. 19 of 2014* and Omar *Uche vs. Republic, Criminal Appeal No. 11 of 2015*....whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable....."

20. Turning to proof of penetration, Section 2 of the Act stipulates as:-

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

21. The victim testified as follows on the circumstances under which she was defiled: -

> "... he pulled me through the window. He then covered my mouth with a cloth of his sister. He then undressed me in a bed inside their kitchen. He then removed my dress by taking it upwards. He then removed his trouser. He took his thing the one for urinating (touching) then he inserted in my urinating thing and he did bad things to me. After he finished, he then took his finger and inserted in my urinating thing (vagina). After he was done, he took me through the window. I felt pain in my genital...."

22. The above extract of the victim's testimony shows that the minor used euphemism to describe the act of defilement. She described her perpetrator's penis as 'the thing for urinating' and stated that she felt pain after the sexual assault. The victim also stated that her assailant inserted his finger into her vagina. Courts have adopted the position that they will accept the use of euphemisms by minors when describing acts of sexual penetration. This was the holding in Muganga Chilejo Saha vs. Republic [2017] eKLR, where the Court of Appeal acknowledged the use of euphemisms and stated thus: -

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel *Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015*), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

23. In the present case, the victim's evidence pointed to penetration as she stated that the Appellant 'did bad manners' to her using his penis. The victim's description of what transpired at the time she was defiled, reveals that she was explaining the act of penetration.

24. I have considered the testimony of the Clinical Officer (PW5) who stated that the victim's clothes were torn and that on examination, he noted that her labia minora was inflamed with an old missing hymen. He estimated the age of the injuries as one day old. He produced the PRC Form and P3 Form as exhibits. The medical evidence, when considered alongside the victim's testimony, may lead to a determination that PW1 was a victim of defilement.

25. There was however one critical aspect of the case that the Prosecution glossed over but which could be the tie breaker in this case in as far as linking the Appellant to the heinous act of defilement is concerned. The Prosecution's case was that both the Appellant and the victim were escorted to the hospital for treatment and examination following the incident. PW3 testified as follows: -

> " Police took you to hospital. We never arranged to frame you."

26. PW6, the Investigating Officer, on his part, testified that: -

> " You were arrested by members of the public and brought to the police station. I took you to hospital for examination."

27. According to the victim and PW6, both the Appellant and the victim were escorted to the hospital for examination on the same day of the defilement incident. The million-dollar question is why the Prosecution did not present the Appellant's medical examination report as part of their evidence during the trial. This court is aware of case case law indicating that medical evidence, in respect to an accused person, is not mandatory or the only evidence upon which an accused person can properly be convicted for defilement. This is the position that was taken in George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012 (unreported) where it was held as follows:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief." (Emphasis added).

28. In the present case, while it is clear that the Appellant was subjected to a medical examination, the report arising therefrom was not presented before the trial court and one may argue that the said report did not support the prosecution's case. It is however trite that under Section 124 of the *Evidence Act*, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. The said section stipulates as follows: -

Corroboration required in criminal cases

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on

behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

29. In the present case, a perusal of the trial court's judgment does not indicate if the trial magistrate relied on the victim's evidence or if he was satisfied that she was telling the truth. The trial court instead relied on the medical evidence presented by the Clinical Officer and rendered himself as follows: -

> " From the evidence of PW5 Lameck Nyaribo a Clinical Officer at Keroka Sub County Hospital stated that he examined PW1 and that on her genitalia she had an inflamed labia minora with an old missing hymen. From the said inflammation he concluded that there was defilement. From the evidence stated above, I am convinced beyond doubt, that indeed there was penetration."

30. My understanding of the above finding, by the trial court, is that the said court mainly relied on the medical evidence by the Clinical Officer and most specifically, the said officer's finding that there was inflammation of the labia minora. The critical question that this Court has to deal with is whether, in medical parlance, sexual penetration is the only factor that can give rise to an inflammation of the labia minora so as to support the Clinical Officer's finding that the minor was a victim of defilement because her labia minora was inflamed. My finding is that the inflammation of labia minora, also known as vulvitis, can result from several causes including: -Infections such as Bacterial vaginosis or yeast infections (e.g., Candida species),Sexually transmitted infections (STIs) such as herpes, chlamydia, or gonorrhoea,Urinary tract infections (UTIs) that cause irritation of nearby tissue.Allergic reactions or irritants; Allergic reactions to soaps, detergents, perfumes, or hygiene products (like scented tampons or pads).Irritation from tight clothing, synthetic fabrics, or prolonged moisture.Hormonal changes, such as menopause that can cause the thinning and dryness of vaginal tissue leading to inflammation.Autoimmune conditions such as lichen sclerosus or lichen planus that can cause inflammation of the vulva, including the labia minora.Poor hygiene; inadequate cleansing of the vulva or build-up of smegma (natural secretions) can lead to irritation and inflammation.Physical trauma or friction; activities like excessive rubbing from sexual intercourse, cycling, or prolonged sitting can irritate the labia minora. (See Medical Journal by Raef S. Haya and Elmariah B. Sarinah, "Vulvar Pruritus: A Review of Clinical Associations, Pathophysiology and Therapeutic Management. (Front Med [Lausanne], [2021]).

31. From the above list containing a wide array of the causes of inflammation of the labia minora, I find that it was erroneous for the Clinical Officer, and indeed the trial court, to conclude that there was penetration merely because the victim's labia minora was inflamed. My finding is that just like in the instances of absence of hymen, where courts have held that there are several factors that may lead to the rapture of hymen apart from sexual penetration, I find that the mere fact that the victim's labia minora was inflamed was not conclusive proof of penetration. This is the position that was taken in the case of P.K.W vs. Republic [2012] eKLR where the Court of Appeal held that a hymen could be raptured due to other factors, other than penetration by sexual intercourse. The court held thus: -

> " In their analysis of the evidence on record the two courts below do not seem to have direct their minds to those 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 raptured by sexual intercourse. Hymen also known as vaginal Membrane found in 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 a prove 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 have 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, musturbation, injury and medical examination can also rapture the hymen, when a girl engages in vigorous physical activities like horseback riding, bicycle riding, there can also be natural tearing of the hymen. See the Canadian case of the Queen Vs Emanuel Vincent Quintanilla (1999) "AB" "QB" 760."

32. Taking a cue from the above cited decision, I find that the mere fact that the victim had inflamed labia minora was not conclusive proof of sexual penetration. The next question is the aspect of Section 124 of the *Evidence Act*. Can this court rely on the evidence of the victim in finding that she was defiled?

33. I am afraid that the answer to the above question is to the negative for the following main reasons. Firstly, I find that there were certain aspects of the prosecution's case that, when considered at holistically, amount to contradictions or discrepancies that cast doubt on the entire case. For example, while the victim claims that the Appellant had borrowed a needle from her mother which he had returned and handed over to her brother one E, she in the same breath states that she again took the needle to the Appellant. This court finds it quite baffling and improbable that the Appellant could once again borrow a needle that he had just returned.

34. Secondly, while the victim states that the Appellant ran away immediately after committing the offence, she at the same time testified that the Appellant accompanied her and her parents to the hospital and later to the police station on the same day of the alleged incident. The police on the other hand claimed that the Appellant was arrested by members of the public who presented him at the Police Station without presenting the evidence of any of the alleged members of the public on the circumstances of the arrest.

35. It did not also escape this court's attention that the Appellant maintained that he had been framed up in the case by the victim's mother and uncle PW3 and PW4 respectively from the very onset of the trial. When placed on his defence, the Appellant stated that there was bad blood between him and the PW3 and PW4 who are also his relatives. My finding is that the discrepancies in the prosecution's case, when considered in totality, lend credence to the Appellant's claim that he was framed up in the case due to differences in the family circles.

36. In sum, I am not persuaded that the prosecution's case met the threshold of proof expected in a defilement case more so in the face of my finding that penetration was not proved beyond reasonable doubt. In Miller vs. Minister of Pensions 1942 A.C. 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."

37. Having regard to the findings and observations that I have made in this judgment, I find that the Prosecution did not discharge the burden of proof beyond reasonable doubt. I further find that the conviction, by the trial court, was unsafe. I therefore quash the conviction and set aside the sentence of 40 years imprisonment. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

38. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE