MAM v Republic (Criminal Appeal 453 of 2014)
[2024] KEHC 12413 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12413 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL 453 OF 2014

PJO OTIENO, J

OCTOBER 11, 2024

BETWEEN

MAM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

Background

1. The appellant herein, MAM, was charged with the offence of defilement of a boy contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 13.11.2014, in Turkana West District of Turkana County, he appellant unlawfully and intentionally caused his penis to penetrate the anus of SB, a boy aged 8 years.

2. The prosecution called a total of three witnesses being PW1 SB, the victim, PW2 Roy Situma, a clinician and PW3 Corporal Jane Ouko, the Investigating Officer.

The Prosecution case

3. Evidence by PW1 was that on 13/11/2014 his mother had been admitted to hospital and he was home with the uncle, the accused. After having a meal at home, the accused told him to go sleep. While in bed, the accused person undressed him completely, took him to mattress and ordered him to kneel before inserting his penis into his anus. When he finished, he warned him not to tell anyone. He said that the accused had sodomised him on two different previous occasions. The witness added that he later told his mother what had happened as he was feeling uncomfortable following the much pain he was experiencing. He was then taken to IRC hospital before his mother reported the matter to the relevant authorities. At the hospital he remembered seeing the p3 form dated 15/11/2014 which he marked as MFI1. He identified the accused at the dock as the person who had sodomised him and that he was separated from the accused after the incident.

4. The record reveal that the complainant was never cross examined and the reason is that he was a minor who the court found to be intelligent and understood the reason for being in court. Even this early, the court must point that the purpose of *voir dire* is to establish if the minor understands the nature of an oath and the duty to speak the truth. The court shall revisit this point later in the determination.

5. PW2, Roy Situma, and the Clinical Officer conducted an examination on the minor and revealed of there being history of sodomy on the minor by a person well known to him. The witness recorded to have, upon examination, found that there was an obvious injury, a laceration, on the anal region with no obvious discharge. He reached a conclusion that indeed the minor had been forcefully penetrated.

6. The witness also produced an age assessment report dated 15.11.2014 (Exh No. 2). He assessed the child's age to have been between 7-9 years at the time of the incident.

7. Upon very short cross-examination, he told the court that he did not see the accused commit the offence.

8. PW3, Jane Ouko, the Investigation Officer, in her testimony indicated that on 15/11/2014 while at her office performing normal duties, she received the complainant who was in company of his uncle. She approximated the child's age to be about 8 years and proceeded to record the complainant's statement and then accompanied them to Kakuma Mission hospital. At the hospital, she witnessed the minor being medically examined, an age assessment conducted as well as filling of the P3 form. PW1 had told the witness that, on 13/11/2014 in the afternoon, while in their house performing household duties and at the time the mother was sick sleeping outside, the accused herein entered the house where he was and confronted him before removing his clothes and inserting his penis into his anus. PW1 then informed him to have informed her ailing mother of the incident the following day after he had been sodomised. The mother to complainant contacted the uncle before they reported to the police the following day. It was her testimony that the accused was later arrested and arraigned by members of the public him to Kakuma police station and later charged.

The Defence case

9. The accused when put on defence, stated that on the night of 15/11/2014 he was a sleep at home as his wife was at the hospital with the children. He further stated that on the following morning he went for food rationing at the distribution centre after which he proceeded to work. He testified that later on, police officer and two men came and arrested him and escorted him to Kakuma police station and later charged with offence of defilement. He described the entire incident to have been a set up and that he never committed the alleged offence.

10. The trial court having had an opportunity to listen to all testimonies presented by both the prosecution and the accused person, reached a conclusion that the offence of defilement had been proven beyond reasonable doubt by the prosecution evidence. The accused was convicted and sentenced to a life imprisonment on the May 15, 2015.

11. The appellant feeling aggrieved by the conviction and sentence has now approached the court by the Petition of Appeal dated 17.10.2023 seeking to upset the decision by the lower court on the grounds that:-

    i. The trial Magistrate erred in fact and law by convicting the accused person notwithstanding that the prosecution did not proof its case beyond reasonable doubt.

    ii. The trial magistrate erred in both law and fact by convicting the accused despite the inconsistencies, and contradictions in the evidence produced.

iii. The trial magistrate erred in fact and law by upholding the prosecution's case despite the prosecution's failure to call essential witnesses.

iv. The trial magistrate erred in law and fact in imposing on the accused person a sentence that was too harsh, excessive and punitive.

12. The appeal has been urged by the written submissions filed by the parties and given the same the deserved consideration. In his submissions, the appellant contends that the trial court in its determination did not consider discrepancies between initial report given to police and evidence in court and proceeded in convicting the appellant by relying on contradictory and inconsistent evidence of the prosecution witnesses. He faulted the trial court for having not considered the fact that his wife, who was to fly to USA, used her brother, PW2, to fix him in the case and further that not all crucial witnesses in the case were called to testify. It is his further averment that the age of PW1 was not determined since there were no documents to prove.

13. It is pointed out that the evidence relied on by the court on identification and recognition was by a single witness who not only implicated him but also fabricated him on the case as the perpetrator. He asserts that the victim's evidence was not continuously tested as conditions available for identification of the accused were unfavourable relying in the case of *Marube & Another vs Republic* (1968) eKLR. It is for the above said reasons that he prays the appeal be allowed, conviction quashed, sentence set aside and he be set at liberty.

Analysis and Determination

14. Before the court is an appeal on defilement contrary to section 8 (1) & (4) of the *Sexual Offences Act* No.3 of 2006. This being a first appellate court, it is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo vs Republic (2004) eKLR.

15. Under Section 8(1) of the *Sexual Offences Act*, a person commits an act which causes penetration with a child is guilty of an offence termed defilement. The offence of defilement as coded in the provision founded on three main ingredients, being; the age of the victim as a minor, the fact of penetration and the proper identification of the perpetrator.

16. On age, the appellant fault the trial court to have erred in determining the age of the minor on the basis that there were no documents to prove the same. The Court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR stated, in respect of proving the age of a victim in cases of defilement: -

> "...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

17. PW2 asserted to have conducted an age assessment on the minor and prepared an age assessment report dated 15/11/2014 produced at the trial court as exhibit (Exh No.2). Analysis on the age assessment report revealed that the child was between 7-9 years. It was done only two days after the incident. Based on the evidence on record, it is the finding of the court that this evidence adequately proves the age of the victim. The court thus finds that the lower court adequately evaluated the evidence presented and arrived at a determination that is not amenable to being disturbed on the basis of proof of the age of the victim.

18. Penetration as the second ingredient in proving defilement is defined under section 2 of the *Sexual Offences Act* to be the partial or complete insertion of the genital organ of a person into the genital organs of another person. Tritely, penetration is sufficiently proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim alone, if cogent, or when corroborated with the medical examination report is in many cases sufficient to determine that indeed penetration occurred.

19. In instances where medical examination may not be available or conclusive, the court ought to weigh and scrutinise with utmost caution, the evidence of the child, in order to determine whether there was indeed penetration. The court is called upon to warn itself before convicting on the uncorroborated and unsworn evidence of a minor, See Section 124 *Evidence Act*, Cap 80 Laws of Kenya, by *Act No. 5 of 2003*.

20. The minor herein PW1 said to the court that on 13/11/2014 the appellant directed him to go sleep and that while on bed appellant approached and undressed him, took him to the mattress on the ground and ordered him to kneel before he inserted his penis into his anus. He was then warned not to tell anyone of the incident.

21. The issue is whether this evidence was ever corroborated. This is the pivotal evidence to ground the charge. It needs to be cogent and giving no impression that the is something not adding up. In his evidence the complainant said that his mother was in hospital at the time while to PW3 he said that his mother was outside the house sleeping. The court find this contradiction to worth noting in that as at the date he was talking to PW3, it was just two days after the incident and his memory was expected to be fresh. Unfortunately, the court and the prosecution failed to pursue the line of evidence to establish whether the mother was home or away in hospital. Even the evidence that they had taken a meal before the accused invited him to and sleep was never pursued to clarify if the meal was lunch or dinner. Those two aspects of the evidence, when juxtaposed against the evidence of the appellant, that he was framed by his wife, and it not being clear if the alleged wife was the mother to the complainant, makes the court doubt what time the offence occurred and if there was absolutely nobody around the house.

22. That state of evidence needed other pieces of evidence to strengthen. None was available as there was no eye witness. It is only the evidence of PW2, the Clinical Officer who conducted an examination on the minor and prepared a P3 form, that offers a chance build on the otherwise contradictory evidence of PW1. The medical evidence can only corroborate cogent evidence by an eye witness unless there be circumstantial evidence that meet the test of law. In this case the court finds that the evidence by PW1 was contradictory and unpersuasive to be capable of strengthening by the medical evidence.

23. More importantly, the trial court appears not to have complied with the law on *voir dire* before receiving the evidence of PW1. The record bears out that the court was more concerned with whether the minor understood the reason for being in court yet, the purpose of *voir dire* is to establish if the minor understands the nature of an oath and the duty to tell the truth. In that task the court erred with the consequence that the evidence was improperly received.

24. While in Kenya there is no prescribed and rigid procedure for conducting a *voir dire* examination, the most important object is that it must establish whether the child of tender years understands the nature of an oath and the duty to tell the truth. See *James Mwangi Muriithi v Republic* [2016] eKLR.

25. To the extent that the trial court did not establish the appreciation of the minor on the duty to tell the truth, the unsworn statement was improperly taken and it is unsafe to found a conviction for it is not know how serios the minor took the court proceedings

26. To this extent, this court finds that there is reasonable doubt if the minor victim was indeed penetrated. With that doubt, the conviction is negated and it is not necessary to delve into the next issue whether the appellant was properly identified. It is to this court appreciated that being a relative living with the appellant, the evidence of PW1 was more on recognition rather than identification.

27. For the reasons above, I upset the conviction for defilement of a child contrary to section 8(1) of the *Sexual Offences Act* and the sentence imposed by the trial magistrate. The conviction is quashed and sentence set aside and the appellant shall be set free and into liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT LODWAR, THIS 11TH DAY OF OCTOBER, 2024

PATRICK J O OTIENO

JUDGE