Nyongesa v Republic (Criminal Appeal E013 of 2024)
[2024] KEHC 12566 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E013 OF 2024

WM MUSYOKA, J

OCTOBER 22, 2024

BETWEEN

EVANS ODHIAMBO NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCSOC No. 77 of 2020, of 19th December 2022)

JUDGMENT

1. The appellant, Evans Odhiambo Nyongesa, had been charged before and convicted by the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Penal Code*, Cap 63A, Laws of Kenya. The appellant had allegedly taken the complainant, SE, PW1, a minor female allegedly aged 14, to his home, and house, and had sex with her for 2 days, by inserting his penis in her vagina. PW1 informed her mother, PW2, of what had happened, and the matter was escalated to the police, leading to the arrest of the appellant, and his arraignment in court. A trial was conducted, where 4 witnesses testified. The appellant was put on his defence, after which he was convicted, and sentenced to 20 years imprisonment, on 13th February 2023.

2. The appellant was aggrieved, and brought the instant appeal. His grounds of appeal are that he appealed late as he was given the proceedings late; and that he would furnish more substantive grounds, once supplied with the proceedings. Upon being furnished with proceedings, he amended his grounds of appeal, to argue that his arrest was improper; the medical evidence did not support defilement; penetration was not proved; the identity of the perpetrator was not proved; there was malice, and a systematic plan to implicate him; the case was marred by inconsistencies, contradictions and discrepancies; the prosecution witnesses were not credible; the testimony of the complainant was not corroborated; the evidence was circumstantial; the age of the complainant was not proved; the sentence was excessive; and the case was not proved beyond reasonable doubt.

3. Directions were given on 16th May 2024, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions, which I have read through, and noted the arguments made.

4. The appellant attacks everything about his trial. I shall, therefore, have to consider the evidence in totality. In defilement, the prosecution is obliged to prove 3 principal facts: age of the complainant, identification of the perpetrator, and penetration.

5. The charge sheet indicates that the age of PW1 was 14 at the material time. When she took to the stand, PW1 stated that she was 14. PW2 was her mother, she said that she was born in 2007, and was 14 years old. PW3 investigated the case. She testified that PW1 did not have a certificate of birth, and an age assessment had to be done, which placed her age at 14 at the time. PW4 was the clinical officer who attended to her, he put her age at 13 years old.

6. Was there material before the trial court on the age of PW1? Although PW3 alleged that she arranged for an age assessment to be done, she did not produce a report on that assessment, and I have not seen any on the record. PW2 was the mother. Surely, she must have known when she gave birth to PW1. She put the date of the birth of PW1 as 2007, and 14 years as her age at the material time. No evidence can be superior to that. In any event, the documents put her age as either 13 or 14. The issue of age arises only for the purpose of establishing that the victim of the alleged sexual assault was a minor, when it happened. There was, no doubt, overwhelming evidence that PW1 was a minor at the material time. Going by her mother's testimony, she was 14.

7. On the identity of the perpetrator, PW1 identified the appellant, as the person with whom she had had sex for 2 days, at his house. PW2 did not know the appellant prior. Other than what PW1 told the court, there was no other evidence to connect the appellant to the crime. In a case, such as this, where the victim is fairly older, and dealing with a person they claim to be fairly familiar to them, and where the 2 were alleged to be together for a period of 2 days continuously, the court would be inclined to believe her, when she claims that the person she points at is the right person.

8. Penetration is the third issue. PW1 said that it happened. The appellant denied it. That left the trial court with the medical evidence. The question then is whether there was adequate evidence to establish penetration from the medical evidence. PW1 was subjected to forensics the same day that she showed up at home, and that would mean immediately after she had parted with the appellant. PW4 did not find any spermatozoa, nor bloodstains, nor yeast cells, nor vaginitis. He could only point to absence of the hymen, as evidence of defilement. He said that he found it perforated, explaining that when hymen is broken, there should be bleeding, but he saw no bloodstains. The P3 Form indicated that the hymen was perforated, labia majora and minora were intact, there was no vaginal discharge, and no presence of bloodstains.

9. The case against the appellant should have stood or fallen on the 3 issues. While the issues of age and identification of the perpetrator were fairly clear, that on penetration was not. The forensics did not support penetration. The evidence on the hymen was unclear on how recently it had been broken, as there was no evidence of bleeding, which would have been evident if it were recent. PW4 detected an infection, but the same was not connected to the appellant. Epithelial cells were noted, but spermatozoa were not traced. The medical evidence did not help the prosecution case.

10. PW4 did not deal with PW1 immediately after the incident. She was treated by someone else, and at a different facility, immediately after the incident was reported. The evidence of that other person would have been more useful, but that person was not called to the stand. PW4 saw PW1 2 days after that, and she had already bathed by then.

11. In view of the above, it is my finding and holding that there was insufficient evidence to support the conviction of the appellant, of the offence charged. His conviction was, therefore, unsafe. The appeal herein does have merit. I allow it, with the result that the conviction of the appellant, on 19th December 2022, is hereby quashed, and the sentence imposed on him, on 13th February 2023, is hereby set aside. The appellant shall be set free, from prison custody, forthwith, unless he is otherwise lawfully held. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Evans Odhiambo Nyongesa, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.