Kivunjo v Republic (Criminal Appeal 46 of 2018)
[2023] KEHC 1568 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL 46 OF 2018

RK LIMO, J

FEBRUARY 15, 2023

BETWEEN

FRANCIS MUTEMI KIVUNJO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the Conviction and Sentence under Section 8(1) & (4) of Sexual Offence Act No. 3 of 2006 vide Mwingi Principal Magistrates Court Sexual Offence Case No. 769 of 2014.)

A child of tender years is required to be interrogated via voir dire examination but children of 12 years and over needed not be subjected to voir dire examination

The appeal was against the conviction and sentence of the appellant for the offence of defilement of a girl aged 16 years. The court held that a child of tender years was required to be interrogated via voir dire examination but children of 12 years and over needed not be subjected to voir dire examination before being sworn unless a trial court had reasons to believe that the child did not understand the nature of oath. The court further highlighted the ingredients of the offence of defilement. The court also found that failure to avail the doctor who examined the victim and filled the P3 form was fatal to the prosecution case.

Reported by Kakai Toili

Criminal Law *– sexual offences – defilement - ingredients for the offence of defilement – penetration - whether in the absence of proof of penetration (partial or complete) conviction could be sustained in matters of defilement - whether failure to avail the doctor who examined and filled the P3 form of a victim of defilement was fatal to the prosecution case - Sexual Offence Act (cap 63A), section 8(1) and 8(4); Evidence Act (cap 80), section 124.*

Evidence Law *– evidence – evidence by children – voire dire examination - whether children of 12 years and over needed to be subjected to voir dire examination before being sworn to testify.*

Brief facts

The appellant was charged and convicted of the offence of defilement of a girl aged 16 years contrary to section 8(1) and 8(4) of Sexual Offence Act, cap 63A, (the Act). The appellant also faced an alternative count of indecent act with a child. The appellant was sentenced to 15 years' imprisonment. The appellant felt aggrieved

against both conviction and sentence and preferred the instant appeal. The appellant faulted the trial court for, among other things, failing to conduct a *voire dire* examination before taking the complainant's evidence.

Issues

i. Whether children of 12 years and over needed to be subjected to *voir dire* examination before being sworn to testify.

ii. Whether in the absence of proof of penetration, (partial or complete), conviction could be sustained in matters of defilement.

iii. What were the ingredients of the offence of defilement?

iv. Whether failure to avail the doctor who examined and filled the P3 form of a victim of defilement was fatal to the prosecution case.

Held

1. There was nothing to show that the complainant aged 16 years did not understand the meaning of an oath or the importance of giving evidence or oath. A child of tender years required to be interrogated via *voir dire* examination but, children of 12 years and over needed not have been subjected to *voir dire* examination before being sworn unless a trial court had reasons to believe that the child did not understand the nature of oath.
2. The ingredients of defilement were penetration, age of the victim and positive identification of the offender. The age of the victim was established to be 16 years.
3. There was no explanation given for the delay in taking the victim for medical examination but the omission was not fatal because the victim reported the incident on December 22, 2014 which was the following day after the incident happened on the night of December 21, 2014. That was normal that after reporting an incident of that nature. Usually, the victim was sent to the nearest hospital for medical check-up and treatment and the victim had no say in those attendant processes. The complainant be faulted on account that she was examined after 16 days of reporting. However, what was fatal to the prosecution's case was that the doctor who examined the victim and filled the P3 form was not availed to tender the medical treatment sheet and P3 Form.
4. The trial court fell into error by admitting inadmissible medical evidence from PW5 and by relying on evidence that was technically hearsay evidence to render a conviction. In the absence of proof of penetration, whether partial or complete, then conviction could not be sustained in matters of defilement. It was on that ground alone, that the instant court found merit in the appeal. The court could have ordinarily ordered for a retrial but given the fact that the offence took place almost eight years ago, and given the circumstances of the cases, a retrial would not serve the interest of justice.

Appeal allowed; trial court's conviction and sentence set aside.

Citations

Cases

Kenya

1. *Dimiro, Salim Juma v Republic* Criminal Appeal No 114 of 2004 - (Applied)
2. *Njoroge, Gabriel Kamau v Republic* Criminal Appeal 149 of 1986; [1987] KECA 4 (KLR); [1982-88] I KAR 1134 - (Applied)
3. *Omari Ismael Mazzha v Republic* Criminal Appeal 462 of 2010; [2017] KEHC 8885 (KLR) - (Applied)
4. *Onago, Joseph Opondo v Republic* Criminal Appeal 91 of 1999; [2000] KECA 266 (KLR) - (Applied)
5. *Ouma v Republic* Criminal Appeal No 91 of 1985; ; [1986] KECA 50 (KLR) - (Applied)

Regional Court

Okeno v Republic [1972] EA 32 — (Explained)

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 350(2)- (Interpreted)
2. Evidence Act (cap 80) sections 33, 48, 124 - (Interpreted)
3. Sexual Offence Act (cap 63A) section 8(1)(4)- (Interpreted)

Advocates

Mr Okemwa for the Director of Public Prosecution for the respondent

JUDGMENT

1. Francis Mutemi alias Kivunjo the appellant herein, was charged with the offence of defilement contrary to section 8(1) & (4) of *Sexual Offence Act* No 3 of 2006 vide Mwingi Principals Magistrate's Court Sexual Offence Case No 769 of 2014.

2. The particulars of the offence as captured in the charge sheet are that; the appellanton the 21st day of December, 2014 in Mwingi Central District within Kitui County did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of (name withheld), a girl aged 16 years old.

3. He also faced an alternative count of indecent act with a child but since he was convicted of the main charge, the alternative count is not relevant here.

4. The appellant did deny committing the offence and the record of proceedings from the trial court shows that the Prosecution called a total of six witnesses. The evidence tendered are as follows: -

5. (PW1), the complainant told the court that she was born in 1999 and was aged 16 years old. She testified that she was at her brother BK's house on the material day when the appellant went there looking for her. She stated that the appellant inquired whether the other people in the house had slept to which the complainant replied in the affirmative but instead of leaving, she stated that he remained at the door saying he was looking for her. She stated that he held her mouth and took her to his house where he removed her clothes and defiled her before carrying her to a ditch where he left her there. She was found in the same ditch the following morning. She stated that she was taken to Mwingi General Hospital for treatment.

6. MK (PW2) told the court that she was married to PW1's brother and that on the material day, she prepared supper and retired to bed at around 8PM leaving PW1 awake. That after some time, her husband woke up to find PW1 absent from the house and he proceeded to lock the door. That the couple started looking for the Complainant the following morning and found her in a ditch and when initially asked why she was in the ditch she responded that she did not know but she later told them that the Appellant had defiled her.

7. BK (PW3), complainant's brother told the court that he was at his home on the material night when he heard the appellant asking whether he was home which was not unusual as the appellant frequented his house. The witness stated that he woke up later to find the lights and radio in his house on but found the Complainant was missing from her bed. He testified that he switched them off and locked his house door in manner which PW1 could still let herself back into the house. That the following morning, he woke up to go to work but noticed that the Complainant was missing. He left and returned later to accompany his sister in looking for the complainant and found her in a ditch.

8. Joseph Tovo (PW4) a senior dental technologist told the court that he examined PW1 on January 13, 2015 and estimated that she was about 16 years old at the time. He produced age assessment report as Pexh (4)

9. Dr Emma Nzioka (PW5) from Mwingi District Hospital testified on behalf of his colleague Dr Bulimo, who the witness stated that he completed a P3 form after examining PW1 on January 8, 2015 adding that, the examination, the date of defilement was established that PW1's hymen was not intact, that she had undergone Female Genital Mutilation and that there was no injury seen. However, upon vaginal examination, it was recorded that she had a laceration. The witness produced an Outpatient Card as Pexh (1), a Lab Request Form as Pexh(2) and Post Rape Care Form as Pexh (5).

10. PC Peter Kiu (PW6) the investigating officer from Mwingi Police Station indicated that he was at the police station on December 22, 2014when PW1 and PW3 made a report on defilement. The officer stated that he escorted the complainant to hospital in the company of his colleague for medical examination. The officer stated that he conducted his investigations and charged the appellant after he was arrested by members of the public.

11. When placed on his defence, the appellant denied committing the offence stating that he was at Mukuthu Market on the material day and stayed until 9PM when he went home accompanied by his brother (DW2) whom he called as a witness to back up his alibi. He stated that he was arrested by members of Public while at Mukuthu Market and later charged with defilement. He claimed he was framed wondering why the prosecution presented witnesses from only the same family. He however, conceded that he lived only 100 metres away from where the Complainant resided.

12. Daniel Musili Mutemi (DW2) testified and supported the appellantnarrative that they were together with him at Mukuthu Market on the material day and went home at 9PM adding that, their home was a 40 minutes' walk.

13. The trial court evaluated the evidence tendered and found that the Prosecution had proved their case against the appellant to the required standard and proceeded to render a conviction and sentenced him to serve 15 years' imprisonment.

14. The appellant felt aggrieved against both conviction and sentence and preferred this appeal raising the following grounds namely: -

    i. The learned Trial Magistrate erred both in law and fact by convicting the appellant while relying on the evidence that the girl was below 18 years without considering that no birth certificate was produced before the court to prove the same.

    ii. The pundit trial magistrate erred in both law and fact by convicting the appellant relaying on doctor's evidence that the girl was defiled without considering that although the girl's virginal minora was broken, there was no clear prove of who broke it since the accused was not examined.

    iii. The pundit trial magistrate erred in both law and fact by convicting the appellant relaying on the doctor's evidence without considering that after the minor was taken to hospital, no blood was seen neither was any spermatozoa was seen which could prove that the appellant defiled her.

    iv. The trial pundit magistrate erred in both law and fact by convicting the appellant relaying on the evidence adduced before the court without considering that the evidence was full of loop holes and contradicted which could not certain a conviction.

    v. The learned trial magistrate erred in both law and fact by convicting the appellant without considering that all the witnesses belonged to one family and they were his enemies who could plot to upload a heavy burden upon his shoulders.

vi. The learned trial magistrate erred in both law and fact by rejecting the appellant's alibi defence which was strong enough to beat all the witness statements.

15. The appellant in his written submission added additional grounds but without seeking leave of this court, as stipulated under section 350(2) of the *Criminal Procedure Code*. The additional grounds raised are these incompetent and will not be considered in this appeal.

16. In his written submissions, the appellant in summary contend that penetration, a key ingredient in the offence, was not proved. He submits that the complainant as a witness was not credible and the trial court should not have relied on her testimony adding that the prosecution's caseleft many grey areas.

17. The appellant also takes issue with the complainant's testimony submitting that she was not a credible witness. He cites his reasons for this submission to be that she indicated in her testimony that she wanted to go and shower when the appellant went to her brother's house but that in another instance, she testified that she had gone to sleep.

18. On the issue of penetration, the appellant submits that the prosecution failed to prove this element. He submits that the complainant was examined in hospital 17 days after the date of the alleged offence. Secondly, he took issue with PW3's testimony stating that the witness stated that he took the complainant to hospital without indicting precisely when he did that. The appellant has placed reliance on the case of *Omari Ismael Mazzha vs R* [2017] eKLR and *PKW vs R* [2018] eKLR where the court quashed a conviction after making the finding that penetration had not been proven. In *PKW vs R* (*supra*) court reached this conclusion after determining that the complainant was examined by two medical experts who reached different findings on the element of penetration. The initial examiner recorded that the complainant's hymen was intact while the other medic recorded that the complainant's hymen was reddened and had widened and further that the complainant had a foul smelling discharge.

19. The appellant also faults the trial court for failing to conduct a *viore dire* before taking PW1's evidence. He submits that she was a minor at the time as such, her testimony was not received properly by the trial court. He has cited the case of *Joseph Opando vs R* Cr App No 91 of 1999, where the Court of Appeal outlined the stages to be followed in determining whether or not a child of tender years may give sworn evidence as follows:

> "There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavor to ascertain whether the witness understands the meaning, nature and purpose of the oath. The question or questions by the court must be directed to that. If the court from the answer it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of the oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not come into play. Where however the witness does not understand the meaning and the purpose of the oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify the reception of his or her evidence though not on oath. This examination must equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness is attending and other matters. If the court is satisfied from the answer to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence."

The above observations are in respect to children of tender years (11 years and below).

20. However, in this matter, there is nothing to show that the Complainant aged 16 years did not understand the meaning of an oath or the importance of giving evidence or oath. A child of tender years, requires to be interrogated via viore dire examination but, children of 12 years and over need not be subjected to viore dire examination before being sworn unless a trial court has reasons to belief that the child does not understand the nature of oath.

21. The appellant also faulted the trial court for failing to consider his alibi defence. He has also submitted that he believed that the complainant was over eighteen years old citing deceit on her part. He has also submitted that, there was no evidence of force on the complainant

22. The appellant concluded his submissions by urging the court to re-evaluate the evidence afresh based on the case of *Gabriel Kamau Njoroge versus Republic* [1982-88] KAR, *Ouma versus Republic*, Criminal Appeal No, 91 of 1985 and *Salim Juma Dimiro versus R*, Criminal Appeal No 114 of 2004 and to find that the Prosecution failed to prove its case beyond reasonable doubt.

23. This court has considered this appealand the grounds advanced for the record, this appeal is not opposed. The State through Mr Okemwa the Learned Counsel for the Director of Public Prosecution conceded that there was noncompliance of section 33 of the *Evidence Act* with respect to Medical Evidence tendered by PW5. I will address that issue shortly.

24. The duty of this court being the first appellate is stated in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal for Eastern Africa stated that: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] EA 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."

25. The only issue for determination in this appeal is whether the Prosecution proved its case to the required standard to warrant a conviction.

26. The ingredients of defilement are penetration, age of the victim and positive identification of the offender.

    To begin with age, though the appellant claims that the age of the Complainant was not well established, this court has re-evaluated the evidence tendered during trial and in particular the evidence of PW4. (The medical expert) and finds that the age of the victim was established to be 16 years. The age assessment report was tendered as P Ex 4. I find that the assessment report corroborated the evidence tendered by PW6 which means that the element of age was proved beyond any doubt.

27. On the question of penetration, the evidence of the complainant was that she was defiled on December 21, 2014. The appellant has faulted her evidence on grounds that she lacked credibility and the fact that she was examined on January 8, 2015, which was approximately 17 days after the incident. There was no explanation given for the delay in taking the victim for medical examination but that in my view, the omission is not fatal because it is evident that the victim reported the incident on December 22, 2014 which was the following day after the incident happened on the night of December 21, 2014. It is normal that after reporting an incident of this nature, usually, the victim is sent to the nearest hospital for medical checkup and treatment and the victim has no say in these attendant processes. She cannot therefore, be faulted on account that she was examined after 16 days of reporting. What I however, find

fatal to the Prosecution's Case, is that the doctor who examined the victim and filled the P3 form was not availed to tender the medical treatment chit and P3 Form. Dr Emma Nzioka (PW5) testified but laid no basis to testify on her behalf as stipulated under section 33 of *Evidence Act*. This fatal omission is conceded by the respondent and the reasons for concession are obvious.

28. The provisions of section 48 of the *Evidence Act* provides as follows: -

"When a court has to form an opinion upon..... science.....opinions upon that point is admissible if made by persons specially skilled in such .....science....."

29. The record of proceedings indicates that PW5 testified that PW5 testified on behalf of one Dr Bulimo but before the Prosecution presented the witness, to testify it should have laid basis as stipulated under section 33 of the *Evidence Act* which allows for production of statements or evidence of person whose attendance cannot be procured for good reasons like expenses or unreasonable delay. The law also requires that the person who is testifying on behalf of a witness who cannot be procured must tell the court the length of period the two have worked together and if he/she is familiar with her handwriting and expertise. In this instance PW5 did not reveal where

Dr. Bulimo was and how long they had worked together. His expertise as required under section 48 of the *Evidence Act* was also not clearly established thus rending the medical evidence tendered hearsay and inadmissible in evidence. The trial court erred in admitting the medical evidence tendered by PW5 and in absence of medical report and in the absence of non-compliance of section 124 of the *Evidence Act* (Which allows a court to rely on the victim's evidence to render conviction, the ingredient of penetration was not proved to the required standard.)

30. This court finds that flowing from the above, that the trial court fell into error by, one admitting inadmissible medical evidence from PW5 and secondly, by relying on evidence that was technically hearsay evidence to render a conviction. In the absence of proof of penetration, whether partial or complete, then conviction cannot be sustained in matters of defilement.

31. It is on that ground alone, that this court finds merit in this appeal. This court could have ordinarily ordered for a retrial but given the fact that this offence took place almost eight years ago, and given the circumstances of the cases, a retrial would not serve the interest of justice. The only just finding is to allow this appeal, set aside conviction and sentence. The appellant having spent 8 years in jail must have perhaps learnt useful lessons. He is hereby acquitted and shall be set free forthwith unless lawfully with held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE