Eshitemi v Republic (Criminal Appeal E039 of 2021)
[2023] KEHC 1729 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1729 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E039 OF 2021

PJO OTIENO, J

MARCH 10, 2023

BETWEEN

ZACHARIA WASWA ESHITEMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. T.A. Odera SPM in Mumias Sexual Offence No. 2 of 2020)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate at Mumias charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the January 1, 2020 in Mumias East Sub County within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MAO a child aged 10 years.

2. 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* No. 3 of 2006 whose particulars were that on the on the January 1, 2020 in Mumias East Sub County within Kakamega County, the appellant intentionally and unlawfully touched the vagina of MAO a child aged 10 years.

3. The appellant pleaded not guilty to the charge and the case proceeded to full trial where the prosecution called a total of Four (4) witnesses and the appellant was placed on is defence elected to give sworn statement and called three other witnesses.

4. Being a child, *voire dire* examination was conducted on PW1, the complainant and upon the court being satisfied on her ability to speak truthfully, she testified on oath and told the court that she was a class four student at [Particulars Withheld] Primary School and that on January 1, 2020 she went to play with her friends at the home of one pastor Dismus when the appellant called him and took her to

his sons room where he removed her clothes and his too and did 'tabia mbaya' to her and only stopped when the son came in and found him on top of her. She then returned home at 7PM and while her mother was cleaning the house, she found her panty stained with blood under the bed. She inquired from her why it was stained and that is when she confided with her about what the appellant had done to her. They reported the incident with the police and the next day she was taken to hospital. She also stated that the appellant had defiled her three times before and he threatened her to not tell anyone and he would give her Kshs. 20 or Kshs. 50 to buy chips. On cross examination she denied that she was coached by her mother, PW2, on what to say.

5. It was the evidence of PW2, MFA the mother to the complainant that on January 6, 2020 she was cleaning the house when she came across the complainant's blood stained panty and when she asked her about it she said that the appellant had defiled her yet again that day, having defiled her before the first time being the month of August, 2019. She stated that PW1 was born on December 22, 2009 and produced her birth certificate. On cross examination she denied fabricating the case against the appellant owing to differences with the appellant's wife.

6. PW3, No. 113153 PC Dennis Odhiambo and the investing officer testified that on January 7, 2020 he was assigned the complainant's case as a consequence of which he called the complainant's mother who informed him that they were at Makunga Health Centre. He went to that facility and interrogated the both of them. PW1 told to him how the appellant pulled her to his house, removed her clothes and defiled her while the mother narrated how she discovered the complainant's stained panty. Following the doctor's report that the complainant had been defiled, he decided to arrest the appellant. On cross examination he stated that he and the doctor never saw the blood stained panty and that PW2 tumble upon the matter a week after the event. On the presence of other people in the compound at the time of the incident, he said that on that day other no Sunday school children nor adults were in the compound and that it was only the appellant and the complainant in the house. He added that there were other houses nearby but did not find out who occupies them and whether they were in at the time of the incident. When referred to the P3 form, the witness said that the document stated that there had been no treatment on the complainant before the P3 was completed and that PW2 directed him to arrest the appellant.

7. PW4, Cosmas Simwa Tatuli, a clinical officer at Makunga Health Centre testified that on January 7, 2020 he examined the genitals of the complainant and found that the hymen was perforated and she had a whitish like discharge. He thus made the conclusion that the complainant had been defiled. In recalling the narration by PW2, the witness said that the child had been defiled in the appellant's kitchen. He formed the opinion that the whitish discharge was an indication of an infection but HIV test, urine analysis and heamoglobin tests were all negative. He then produced, P# form, PRC form, treatment notes, lab request form and consent as exhibits. When cross examined, he told the court that when PW1 went to the facility, she was in good general conditions, walking well with no physical problems. He explained his approximation of the age of injury at six months to be computed from the first alleged incident but confirmed that the blood stained panty was never shown to him. He however ruled out any chance of the blood stains to be menstrual but said that the complainant had had her periods on the 5.1.2020.

8. When called to his defence, the appellant told the court that he was a Sunday school teacher and that the complainant was one of his students. He stated that on 01/01/2020 he went for a church service and then went back home since his wife had a 2-month old baby. He said his two daughters and three other children were at home and since his house had four rooms that is; a sitting room his bedroom, the children's bedroom and the kitchen, it was impossible for him to defile the complainant without being notice. He further stated that he once resolved a dispute between the complainant's mother and

another church member which did not please PW2 and she swore that she would do something to the church as a proof that she is a Teso.

9. On cross examination he stated that the case was fabricated because PW2 wanted to have an affair with him and he refused and that on that day they had three adult guests who also had children.

10. DW2, CWS, a Sunday school teacher stated that on 1/1/2020 he went to pastor Dismus's home who shared the same compound with the appellant. From where she sat she would see the appellant's house and she saw his wife cooking from outside. The appellant's home had a number of children including hers. She left for her home at 5PM when all visitors had left and as she was leaving she saw the complainant in that home and so was the appellant. She stated that PW2 had a rift with church members which resulted in PW2 leaving the church.

11. On cross examination she stated that she did not know about everything that happened in the house of the appellant, that PW2 had many cases with church members.

12. PW3, NA, testified that she had a rift with PW2 after she made allegations that she urinates on the mandazis she sells which issue was heard by the appellant. PW2 had promised to do something to the church after the incident. He said that the home of the appellant, that of his brother pastor Dismuas and the house of their mother are within the same compound.

13. Judgment was subsequently delivered and the accused person was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006 and sentenced to life imprisonment. The decision aggrieved the appellant who lodged this appeal setting out on the following grounds: -

    a. That the trial court erred in law and fact by convicting the appellant on circumstantial evidence that did not meet the required legal standards.

    b. That the trial court was biased against the appellant in sentencing him by relying on hearsay information that was not collaborated by either the prosecution and/or evidence on record.

    c. That the trial court erred in law in shifting the burden of proof to the appellant contrary to the provisions of the law.

    d. That the learned trial court erred in law and in fact in misapprehending the facts and applying wrong legal principles causing miscarriage of justice.

    e. That the learned trial court erred in law and in fact by failing to analyze the entire evidence and form sound judicial conclusion causing miscarriage of justice.

    f. That the trial court erred in law and in fact by failing to find that the prosecution case was wrote with fatal discrepancies and contradictions which raised doubts that ought to have been resolved in favour of the appellant.

    g. That the trial court erred in law and in fact by failing to believe the appellant's defence without giving cogent reasons for doing so, leading to a miscarriage of justice.

    h. That the appellant state that his constitutional rights were infringed during the arrest and arraignment in court and the trial court erred in law for failure to protect him.

    i. That the prosecution/respondent's case was not proved beyond reasonable doubt leading to miscarriage of justice.

j. That the sentence awarded against the appellant was manifestly harsh and excessive in all the circumstances of the case leading to the infringement of the constitutional rights of the appellant.

k. That the trial court erred in law and in fact for finding that there was penetration when the medical evidence on record raised doubts leading to miscarriage of justice.

l. That the trial court erred in law and in fact for holding that the age of the victim was 10 years when the evidence on record was contradicting leading to miscarriage of justice.

m. That the trial court erred in law on relying on circumstantial evidence that needed contribution leading to miscarriage of justice."

14. The appeal has been canvassed by way of written submissions in which the appellant identifies four issues for determination namely; a) whether the charges against the appellant were proved to the required legal standards; b) whether the age of the victim was ascertained from the evidence on record; c) whether the appellant's defence was considered and; d) whether the sentence was manifestly harsh and excessive.

15. On whether the charges against the appellant were proved to the required legal standards, the appellant contends that the friends that were playing with the complainant on the material date were not called to corroborate her testimony. He further notes discrepancies on when PW2 discovered the blood stained panty since PW1 stated that it was discovered on January 1, 2020 while PW2 stated that she found it on January 6, 2020. He argues that since it was the testimony of PW4 that the complainant had periods on January 5, 2020, it was possible that the blood on the panty was menstrual blood. He submits that PW4 indicated that the age of the injuries was 6 months old and contends that the medical evidence given by the court ought to have proved that indeed penetration occurred on the material date or rather the day that had been indicated on the charge and relies on the case of *Gerishon Gichera Muremi vs Republic* (2017) eKLR for the proposition of the law that where the medical evidence does not prove penetration the accused is entitled to an acquittal.

16. On whether the age of the victim was ascertained from the evidence on record, the appellant argues that the age given by the complainant and the complainant's mother differed from what was contained in the charge sheet and that the clinical officer failed to ascertain the age of the victim before preferring the charges. Reliance was then placed on the decision in *Kelvin Kiprotich Amos Rotich vs Republic* (2017)eKLR for the proposition that the age of a complainant in defilement being of significance, it's assessment deserve seriousness.

17. On whether the appellant's defence was considered, the appellant argues that the trial court did not consider same especially the rift that was proved to have existed between the appellant and the victim's mother.

18. On whether the sentence was manifestly harsh and excessive, the appellant contends that the case of *Francis Muruatetu & another v Republic* (2017) eKLR and *Maingi vs DPP* (2020) ekl were cited to the effect that a mandatory sentence fails to conform to the tenets of a right to fair trial under article 25 of the *constitution*.

19. For the respondent, it was submitted, while conceding to the appeal that the evidence of the prosecution was marred with contradictions and inconsistencies and for that reason it was not safe to convict and sentence the appellant. They argue that the evidence of the complainant was untruthful since the clinical officer stated that the penetration occurred six months earlier yet the victim was examined 6 days after the said incident. They argue further that the prosecution did not prove that

penetration occurred on the material date thus falling below the prescribed threshold for the offence of defilement and places reliance in the case of *Gerishon Gichera Muremi vs Republic* (2017) eKLR.

20. It was further submitted that the untruthfulness of the victim's evidence can be seen when she stated that the incident occurred on January 1, 2020 which is the date when the mother discovered her panty whereas the mother stated that she discovered the panty on January 6, 2020. Another inconsistency cited is when the victim stated that she did not know what monthly periods were yet the mother and the clinical officer stated that the victim experienced monthly periods. To the respondent, the victim was an untruthful witness whose evidence ought not have been the basis of the conviction and cited to court the decision in *Joseph Ndungu Kimanyi v R* (1979) eKLR and *Felix Kosgei Kanda v Republic* (2013) eKLR for the position that the credibility of a single witness to a case of sexual offence is key and where the witness creates an impression of being untrustworthy, it becomes unsafe to rely on her evidence. *Daniel Cherono vs Republic* (2014) eKLR was cited for the law that where a complainant alleges previous defilement, it is the obligation of the prosecution to prove all the ingredients of the offence of which penetration is key. Lastly, *PMG vs Republic* (2022) eKLR, was cited for the proposition that the application of section 124 of the *Evidence Act* should be treated with great care and on the basis of the clearest of the victim's evidence leaving no iota of the doubt.

Issues, Analysis and Determination

21. Looking at the petition of appeal as against the record filed and the written submission, and notwithstanding the concession by the prosecution. the court, in executing the mandate as a first appellate court, discerns the following issues for determination: -

    a. Whether the offence of defilement was proved to the required standard against the appellant?

    b. Whether the appellant's defence was considered?

    c. Only if the two above are answered in the affirmative, whether the sentence was manifestly harsh and excessive?

Whether the offence of defilement was proved to the required standard against the appellant

22. The offence of defilement as defined and created by section 8 of the *Sexual Offences Act* No. 3 of 2006 is committed when a person causes penetration of his genital organ with a child. The penalty for offender is more severe depending on the age of the victim.

23. The elements of the offence of defilement are now settled by stare decisis to be; age of the complainant, proof of penetration and positive identification of the assailant. All the three ingredients are integral to the proof of the offence and none is less in importance hence all must be proved to the requisite standards. The age is however primary in that defilement is more harmful to society on account that it is an offence against the vulnerable and defenseless children. Therefore, before looking at all else, a court ought to satisfy itself that the victim of the offence is indeed a child.

24. The court of appeal in *Kaingu Kasomo vs Republic* Criminal Appeal No. 504 of 2010 stressed on the importance of establishing the age of a victim in a sexual assault case by holding as follows: -

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

25. Ways in which the age of the victim can be proved was addressed by the court in *IOA vs Republic* (2019) eKLR where it was stated as follows: -

> " It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

26. PW2, the complainant's mother testified that the complainant was born on December 22, 2009 and produced her birth certificate marked as PMFI1 in respect thereto. For that reason alone, even though there was a discrepancy of that fact from the evidence of PW1 and the particulars of the charge, the court finds that the age of the complainant was sufficiently proved to have been aged 11 as at the date of the incident.

27. On penetration, Section 2 of the *Sexual Offences Act* defines "penetration to be the partial or complete insertion of the genital organs of a person into the genital organs of another person. Penetration may be proved by the evidence of the victim and in most cases corroborated by medical evidence. Such evidence, however needs no corroboration provided the court is satisfied that the single evidence of the victim is cogent and credible.

28. Here, the charge sheet and the evidence of the victim assert that the act of defilement occurred on January 1, 2020. According to the testimony of PW4, the clinical officer who examined the victim's genitals, he stated that victim appeared to have been defiled about 6 months before he examined her on the January 6, 2020. six months from the date of examination would take one to the month of June 2019. Yet PW1 was adamant that the first time the appellant ever defiled her was in September. If the evidence of PW4 was to be believed, then it must be accepted that the complainant lost her virginity otherwise than by the acts of the appellant hence the loss of virginity could not be the proof of unlawful acts by the appellant.

29. In addition, the clinical officer further stated that the victim had had her periods on January 5, 2020 and therefore it was not possible that the blood stain on her panty could not have been menstrual. To the contrary the victim was adamant that she had never experienced her menstrual circle. The question of whether the alleged blood stain on the panty was menstrual was heavily relied on by the defence in the trail of cross examination. It was however a glaring omission on the investigator that he never thought it important to have the piece of clothing produced as exhibit. The allegation that it was the blood stained panty that raised the alarm was never proved.

30. It is thus not apparent, but reasonably doubtful, from the evidence of the prosecution, that the appellant could have defiled the complainant on the material day as stated in the charge sheet.

31. More importantly, and on the credibility and cogency of the evidence by the complainant is the fact that the undisputed evidence by PW1 herself and that of defence witnesses that there were several people, at least six children and four adults, at the home of the appellant on the date and time the offence is alleged to have been committed. PW1 herself said that other than her, there were her friends from whom the appellant removed her from on the guise that he was going to send her to the shop. She also admitted the evidence by the defence that appellant's wife was home. In addition, the appellant was consistent that two other ladies visited his home with children. That evidence was never meaningfully challenged. It is to this court incredible that the heinous act could occur within the earshot of those many people without them noticing. To the contrary, the court finds that the defence witnesses did raise a reasonable doubt that the offence could not have happened on the day and the manner alleged.

32. In dealing with the defence case in the judgment now challenged in the appeal, the trial court said;

> " PW1 said accused had sex with her twice before the material date this explains the age of the broken hymen. There is overwhelming evidence that there was penetration. It is my finding that the prosecution proved beyond reasonable doubt that there was penetration into the vagina of PW1...
>
> I saw PW1 during her testimony and she was able to clearly state the sequence of events and she withstood the test of cross-examination as her evidence was not displaced. Although PW2 had a case with DW3 and the same was heard by accused. PW1 was only 10 years old and she denied that her mother coached her on what to tell court. I do not see why he could have fabricated the case against accused. She impressed me as truthful. I admit her evidence and I proceed to dismiss defence as a mere denial."

33. Clearly, the appreciation of the evidence was cursory and fell short of the expected standard. A keener analysis would have captured the inconsistencies and addressed whether the same were material or trivial. That was not done. The court thus agrees with the appellant that his evidence was never given the due consideration it deserved.

34. In conclusion, it is the finding by the court that the evidence of penetration was deficient and was the kind that passes as untruthful. It is incapable of being the basis of a conviction hence it is held that the conviction was unsafe and the same is set aside. When aside, no meaning purpose remains to be served by seeking to resolve the issue of severity of the sentence.

35. Accordingly, for the reasons set out above, I allow this appeal, quash the conviction and set aside the sentence. The appellant is therefore set at liberty forthwith, unless he is otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person from Prison

Ms. Chala for the Respondent/Prosecution

Court Assistant: Polycap