Nandi v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 2157 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E017 OF 2022

TA ODERA, J

MARCH 1, 2023

BETWEEN

JORDAN ODHIAMBO NANDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence of Hon F.RASHID P.M in original MWINAM SPM Criminal Case No. E013 of 2018 delivered on 24.5.22)

JUDGMENT

1. The appellant herein was charged in the lower court with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars were that on April 15, 2018 in Kisumu East Sub-County within Kisumu County intentionally caused his penis to penetrate the vagina of AA a child aged 5 years. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on April 15, 2018 in Kisumu East Sub-County within Kisumu County intentionally touched the vagina of AA a child aged 5 years with his penis .

2. Upon arraignment and being called upon to plead, he pleaded not guilty and the matter thus proceeded to full hearing.

3. The brief facts of the court are that PW1, AA (PW1)was aged 5 at the material time . On April 15, 2018, she went to play with some children and appellant took her to his parent's house and had sexual intercourse with her on a sofa in the sitting room. Appellant then gave her mandazi and meat which she ate. J(DW2) who is the mother to appellant found her having been defiled and bleeding and carried her to her parent's home and found GA (PW4), AO (PW2), MA(PW5) , Linda Owuoro . DAO (PW7) went to the home later. The child was taken to Gita Dispensary where she was initially seen by Jane Alice Atito (PW9) a nurse who made treatment notes Pexh 3. She found the labia swollen and bruised

and that her clothes were stained with blood and that there were traces of spermatozoa. On cross examination she was admitted that she never took samples of sperms for analysis and she did not check the anus of the child to tell whether there was a rectal prolapse. As PW3 Violet Adisa followed PW1 to hospital and found her with PW5, PW7 and PW4 . They witnessed examination by the nurse and saw blood coming out of her private parts and something also came out of her vagina. PW10 Dr Eddie Odhiambo of Jaramogi Oginga Odinga teaching and referral hospital saw the patient on April 18, 2018 and noted that the labia was swollen. The vagina was reddish with blood discharge and the hymen was missing. He run high vaginal swab test , urinalysis , hepatitis B and she was put on PEP and antibiotics As per PW9 and PW10 the patient was unable to identify the perpetrator but PW2, PW3, PW5, PW6, PW7 and PW8. PW1 told them that appellant is the one who defiled heron a chair in his mother's house. Appellant was later arrested and charged PW6 conducted an identification parade he said that the child identified appellant by touching him.

It also emerged from the evidence of the witnesses herein that the family of complainant had have had long standing bad blood.

On being placed on his defence, the appellant opted to adduce sworn testimony. He denied the charge sand raised a defence of alibi that he went herding his father's call the on the material day and that his father later sent him to buy bulbs 5 kilometres away from home and he returned home later in the evening and police went there with a crowd and he was arrested and charged herein . He said the identification paraded was flawed as the mother of the child pointed out at him while still in the cells and told the child to go and identify him. This evidence was supported in material aspects by DW2 NKA and DW3 GNA who are his parents. DW2 said the alleged cushion was not blood stained and it was never collected by police a reported the incident to her teacher and also informed her. Also that she had bad blood with one Listons a brother to the father to PW1 who invaded her house in 2016 and she had him arrested and charged and she testified against him in that case. Also that Liston also threatened her when she reported that he threatened to kill him

4. After considering the evidence, the trial magistrate convicted the appellant and sentenced him to 25 years imprisonment prompting the instant appeal anchored on the following grounds;

    a. That the trial magistrate failed to observe that the sentence imposed was manifestly harsh and disproportionate.

    b. That the court be pleased to consider that the ingredients forming the office were not proved beyond any reasonable doubt.

    c. That the court be pleased to consider that that the investigations were shoddy

    d. That the court be pleased to consider any aspect or condition that shall not occasions prejudice.

    e. That the appellant hereby beseeches the Superior court to indulge into the same or be pleased to reduce the sentence proportionately as enshrined in Article 50(2) of the *Constitution* trial magistrate erred both in law and fact by failing to consider that his fundamental rights had been grossly violated for overstaying in police custody for a period of over 24 hours before arraignment.

    f. The learned trial magistrate based the conviction on misapprehension of facts by not finding that PW1 was coached and influenced by the prosecution to fix the appellant.

5. I have seen the submissions by both parties and considered them with the law and the evidence on record.

Analysis and determination.

6. This being a first appeal, I am guided by the sentiments expressed by the Court of Appeal in Kiilu & Another v Republic (2005)1 KLR 174, where it was stated;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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."

7. It is now settled that on a charge of defilement, the prosecution ought to establish the complainant's age, the act of penetration and positive identity of the perpetrator.

8. As relates to age, the relevant evidence is to be found in PW1's testimony that the minor was aged 5 years at the time. The nurse who first saw her (PW9) also said she was 5 years old. No treatment notes were produced to show her age. In the case of Francis Omuroni v Uganda Court of Appeal in criminal Appeal no 2 of 2000 it was held that ''apart from medical evidence , age may also be proved by birth certificate , victims parent or guardian and by observation and common sense. Neither I nor the trial magistrate saw the victim as the magistrate who took her evidence was transferred before close of proceedings. However, from the evidence on record which was not challenged i have no doubt that she was aged 5.

9. On the element of penetration, Section 2 of the *Sexual Offences Act*, 2006 defines penetration as ''the partial or complete insertion of the genital organ of a person into the genital organs of another person".

10. PW5 told the court that the appellant defiled her in the sitting room of his mother in the presence of his mother who was watching television. '' PW9 is the nurse who first saw PW1 on the material day, and examined her she found that the labia was swollen and bruised and there were blood stains on the dress and traces of discharge of spermatozoa, she said there were no tears on her private parts. PW10 Dr Eddy Owuor saw the patient on April 18, 2018 and found that the labia was swollen labia and bruised, there were blood stains on the perineum and its doors, the vagina was reddened and the hymen was absent. Clinical Collins Omondi also found moderate mild epithelial cells, swollen labia, reddened vagina and absent hymen. The said Collins was not called to testify and no reason was given for the same. It was important that he comes to testify as his finding and those of PW9 differ as PW9 said there was no tear. It is trite law that when a crucial witness is not called to testify, then the court will infer that had the evidence been called then the his testimony would have been adverse to prosecution's case as rightly submitted by appellant .the evidence of PW1 and she says she was defiled in the house of the parents to appellant in the presence of the mother who was watching television. The inconsistency in the evidence of PW9 and PW10 on the issue of the hymen therefore goes to the root of the case as the issue of whether the hymen was torn or not is material and PW9 is the one who first saw the patient and she said there was no tear and that there was no penetration from the anus and she did not see the rectal prolapse. PW10 Collins allegedly saw the patient 4 days after the incident and PW9 saw her on the material day when the injuries were still fresh. One would have expected the observations of PW9 to be the most accurate on the issue of whether they hymen was broken or not.

11. PW1 in her evidence in chief said that it is her mother who told her to say that appellant had sexual intercourse with her and also the fact of bad blood between the 2 families which has emerged herein. The investigating officer was not called to testify to say whether he investigated the alleged issue of the grudge and whether it is related to this case. It is clear to me that there is doubt as to whether there was penetration, into the vagina of PW1 in the circumstances.

12. On the identity of the perpetrator, PW1 said she was assaulted by appellant. PW9 and PW10 said that PW1 told them she could not identify her assailant.

13. On cross examination and re-examination, PW1 said it is her mother who told her to implicate appellant. It is prosecution's case that PW1 picked appellant in an identification parade and PW6 said that he conducted the parade at the instance of DW2 who insisted that the minor did not know her assailant. Appellant faulted the parade saying that the mother to PW1 pointed him out and told the child to pick him. PW6 said the child picked out appellant from the parade. PC Omuse the investigating officer did not come to tell the court why she opted to have the parade and PW1 denied picking out appellant at a parade it is clear that no basis was laid for conducting the parade . The parade did not conform with order 6 (iv) of the *Forces Standing Orders Act* (cap 46). He admitted that that the word touching was not in the report given to counsel. PW2 Appellant raised a defence of alibi that he had gone to the shop 5 kilometres away to buy a bulb. It is trite law that the burden of proof does not shift from prosecution even where a defence of alibi has been raised. The circumstances of this case required that the investigating officer testifies to fill in the gaps herein due to the alleged bad blood between the family of complainant and that of appellant. I find that the defence of appellant has raised serious doun is doubt that appellant was at the scene at the material doubt.

14. In the upshot, I find that the conviction of the appellant was not safe and so I proceeded to quash the same together with the sentence. Appellant is set free forthwith unless otherwise lawfully held.

TA ODERA - JUDGE

01. 03. 2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

THE APPELLANT,

PROSECUTION COUNSEL OKOTH FOR THE STATE,

COURT ASSISTANT; APONDI.

T A ODERA - JUDGE

01. 03. 2023