Owade v Republic (Criminal Appeal E051 of 2021)
[2023] KEHC 2270 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E051 OF 2021

REA OUGO, J

MARCH 22, 2023

BETWEEN

REAGAN OWADE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence from the judgment of Hon. A. Odawo (SRM) delivered on 17th May 2022 in Bungoma CMCR. SO NO 29 OF 2021)

JUDGMENT

1. The appellant, Reagan Owade, was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, *2006*. The particulars of the offence were that on November 12, 2020 within Bungoma County defiled LJ a child aged 17 years. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The Appellant pleaded not guilty to both the main and the alternative charge. A full hearing was conducted in which the prosecution called five (5) witnesses.

3. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion bearing in mind that it never had the opportunity to hear the witnesses and observe their demeanour. (See *Okeno v Republic* [1972] EA 32).

4. LJ (Pw1) testified that she met the appellant in November of 2020 and on November 12, 2020 while she was walking the appellant greeted her and told her that he loved her. He asked if he could tutor her in chemistry and mathematic to which she agreed. They went to a house that belonged to the appellant's sister is S Pw1 told court that they were just the two of them. They sat in the sitting room until 2:00 pm then went to the bedroom. She sat on the bed and the appellant touched her thighs and removed her clothes, then his clothes. They then had sex. The appellant put his penis in her vagina for about

20 minutes then ejaculated. The appellant escorted her home. She testified that she did not receive her periods in November and December. She went to school in January and was not feeling well. When she took a pregnancy test it turned positive and she found out that she was 5 months pregnant. The appellant denied liability and called her a prostitute.

5. Elias Adoka (Pw2) the clinician at Bungoma County Referral Hospital and filled the P3 Form on April 13, 2021. The hymen was missing and she noted a white discharge. Pregnancy test was positive. Pw2 testified that that Pw1's pregnancy was 19 weeks and 6 days.

6. The complainant's mother JEL (Pw3) testified that she knew of Pw1's pregnancy in April 2021. Pw1 told them that the appellant was responsible for the pregnancy. Pw1 took them to the appellant's house, she tried to talk to him but he was too arrogant. The complainant was in form 3 at the time. Pw3 testified that the complainant delivered a healthy baby boy.

7. The investigating officer, No PC Samwel Ooro (Pw4) testified that Pw1 reported to have been defiled and was pregnant. The pregnancy was discovered by her grandmother when it was 5 months. Pw1 showed them the appellant's house and told them that he was responsible for the pregnancy. During investigations, the minor was not sure who the father of the baby was as she had been with other men.

8. The prosecution sought to have the minor and the appellant undergo DNA test and the court granted the order and directed that the same be done at the Government Chemist in Kisumu. Salvine Cheruto Katukoi (Pw5) a graduate from Kenyatta University with a Bachelor in Bio Chemistry testified that she works for the government chemist at Kisumu. On November 25, 2021 she received a court order seeking for DNA test to be conducted on the accused, complainant and the minor and took a swab. On December 1, 2021 she reached a conclusion that the accused is excluded as the biological father of the minor. The complainant was the biological mother of the minor. She explained that the DNA should reflect half from being from the father and half from the mother.

9. The trial court placed the appellant on his defence and he testified that on the material day he was working in Kitale. While engaged in construction work in a hotel, he was approached by 2 women in a Rav4 and told that he was being charged. He testified that he did not know Pw1 and never defiled her. On cross examination he testified that he stays with his sister and brother-in-law in Sikata.

10. The trial magistrate in her judgment found that the age of the appellant was proved. On the issue of penetration, she considered that this was established from medical evidence and the fact that Pw1 was pregnant. The subordinate court also found that the appellant was positively identified as the perpetrator given that the incident occurred during the day. Although the DNA report excluded the appellant as the father of the minor, she found that the minor did not narrate that she had not had sex with any other person. The trial magistrate was therefore satisfied that the prosecution had proved its case and therefore convicted the appellant for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*.

11. The appellant dissatisfied with the judgment of the trial magistrate has lodged this appeal raising the following grounds:

    1. That the learned trial Magistrate erred in law and in fact by failing to properly analyze the evidence on record and thereby arriving at an erroneous decision.

    2. That the learned trial Magistrate erred in law and in fact by convicting the appellant where there was no evidence on record; circumstantial or scientific implicating the Appellant in the offence.

3. That the learned trial Magistrate erred in law and in fact by holding that pregnancy was enough evidence to prove that there was penetration by the Appellant and therefore enough evidence to convict the Appellant.

4. That the learned trial Magistrate erred in law and in fact by failing to consider explicit evidence of the DNA test report which vindicated the Appellant from the offence in arriving at her decision.

5. That the learned trial Magistrate misdirected herself in law and in fact in convicting the Appellant when the said decision was premised on contradictory analysis of evidence and the law.

6. That the learned trial Magistrate erred in law and in fact in convicting the Appellant based on conjecture.

7. That the learned trial Magistrate erred in law and in fact in relying on insufficient evidence to convict the Appellant.

8. That the learned trial Magistrate therefore erred in law and in fact in sentencing the Appellant to 15 years imprisonment without consideration of evidence on record that could not have warranted, first, any conviction.

12. At the hearing of the appeal the parties were directed to file written submissions and both parties have complied by filing their submissions. The appellant submits that the criminal proceedings instigated against him were on the notion that he impregnated Pw1. First there was inconsistency in Pw1's evidence when she claimed to have had sex with the appellant in November 2020 and by January 2021, she was 5 months pregnant. The DNA results also found that the appellant was excluded from being the minor's father. The appellant submits that the evidence adduced by the prosecution was insufficient to sustain the conviction.

13. The prosecution on the other hand found that they proved all the ingredients for the offence. The trial magistrate who had the opportunity to hear and see Pw1 found that the complainant gave a clear and graphic picture as to how the incident occurred. They cited the decision by the court of appeal where the court found that the fact of rape or defilement is not proved by way of DNA test but by way of evidence.

14. The first issue before the court is whether the prosecution proved its case to the required standard. In this case it is not in dispute that Pw1 was a child aged 17 years and this fact was confirmed by the complainant's birth certificate. Pw1, Pw2, and Pw3 all confirmed that Pw1 was pregnant and therefore penetration was proved.

15. The main contention raised in the appeal is whether the appellant was identified as the perpetrator. The prosecution evidence is solely based on the evidence of Pw1. Section 124 of the *Evidence Act* provides that:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim

and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

16. The court can therefore rely on the evidence of a single witness provided the court is satisfied that the complaint is telling the truth. Therefore, this court must determine whether Pw1 was credible in her testimony. Pw1 in this instant case only named the appellant as the person she had sex with. This is corroborated by the evidence of Pw2 who testified that when she found out Pw1 had been defiled and was pregnant; Pw1 told her that the appellant was the one responsible for the pregnancy. The trial magistrate in her judgment found that at no point did the complaint narrate that she had not had sex with any other person. However, looking at the evidence of Pw1 the only inference that can be drawn from her testimony is that she only had sex with the appellant. She omitted mentioning that that she had been sexually active before the November 12, 2020 and maintained that the appellant was responsible for the pregnancy.

17. On the other hand, Pw3 testified that after conducting a DNA test the results were that the appellant was excluded from the father. This means that the appellant had been sexually active with other people, a fact which she left out in her testimony. The prosecution should have presented evidence of the appellant's prior sexual activity, through Pw1's testimony. This would also have allowed the appellant to cross examine her on the same. As the prosecution's case heavily relied on Pw1's testimony and her credibility as a witness, this evidence was significant. The court in *M WLN v Republic* [2021] eKLR held as follows:

> 50. It bears repeating that, that exclusion by DNA result does not absolve any other sexual intercourse with the minor which may be proved through other evidence. It is the onus of the prosecution to properly tie or connect through evidence, the penetration of a child to the accused. I am aware of the proviso to section 124 of the *Evidence Act* which permits conviction on the sole evidence of a child who is the victim of sexual assault as long as the court has recorded the reasons of believing the child. I have found that the fact that DNA report excluded the Appellant as the father of the child routs the core of the testimony by PW1- the victim child which was to the effect that she had sex once with the appellant which resulted into the pregnancy. In addition, there was no other cogent and strong evidence which proved any other penetration of the victim by the appellant. I wonder why no efforts were made to establish the person who impregnated the victim herein. It is also strange that the first report to the police did not contain the name of the suspect. These matters cast doubt on whether the Appellant defiled the complainant. It also cast doubt on the credibility of the evidence by the complainant.

18. Similarly, the court in the case of *Simon Gichuki Maina v Republic* [2016] eKLR stated that:

> "Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.

> Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case. I therefore quash the appellant's conviction on the charge of defilement. The subsequent sentence of 25 years' imprisonment is also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held."

19. Having found that the credibility of the complainant was doubtful, consequently I find that the appeal is successful. The conviction against the Appellant is hereby quashed and sentence of 15 years' imprisonment is set aside. The Appellant is hereby set free unless lawfully held.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MARCH 2023.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Mr. Ayekha For the Respondent

Wilkister - C/A