Ateti v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 3687 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E035 OF 2022

REA OUGO, J

APRIL 20, 2023

BETWEEN

DENNIS OMEDI ATETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon G. Adhiambo, PM dated 5th April 2022 in Criminal Case (SO) No. E041 of 2021 at the Magistrate's Court at Kimilili)

JUDGMENT

1. The appellant, Dennis Omedi Ateti, was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* ("the Act"). The particulars of the charges were that on the diverse dates between 29th and August 30, 2021 at [particulars withheld] village, [particulars withheld] sub-location, [particulars withheld] location in Bungoma North Sub- County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of DNJ a child aged 15 years. He was sentenced to 20 years imprisonment.

2. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal and the supplementary grounds of appeal and the written submissions filed on October 19, 2022. The thrust of the appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt on account that the complainant in her examination in chiefrefuted any knowledge of the appellant. That the evidence against him was inconsistent and contradictory and could not sustain a conviction.

3. The appeal was opposed by the respondent who filled its rival submissions on October 24, 2022.

4. As a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify

in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174). I will proceed to outline the evidence emerging before the trial court.

5. NDJ (Pw1) testified that she met the appellant on August 28, 2021 outside the West Kenya Gate. They walked together until the junction. She met the appellant again at the West Kenya Gate on the following day. They walked together and the appellant led her to his home. He opened the door and Pw1 got in. He proceeded to light the jiko, cooked and they ate. They went to bed, the appellant removed her clothes and they had unprotected sex three times. She testified that appellant forced her to have sex as she had refused and he asked her to give in. At 5:00 a.m. she told the appellant that she wanted to go to school and she went to school. On her way from school, the appellant saw her, followed her and led her to his house. Pw1 entered his house and he locked it. The appellant went outside to light a stove whereupon Pw1's uncle came with village elders. The appellant tried to run but he was caught. They opened the door and found her in his house. They went to the police station.

6. CM (Pw3) testified that on August 29, 2021 at 7:00 p.m. one of his in-laws told him that they could not get a hold of Pw1. The following morning Pw3 got information that Pw1 had gone to school however in the evening she could not be found. PW (Pw4) testified that Pw3 informed him that his niece, Pw1, had run away from home on Sunday. Pw4 and other members of nyumba kumi set out to look for Pw1. He received information that the girl had been spotted, he called Pw3 and they proceeded to where she had been seen. They met the landlord BM (Pw2) and he led them to the house. Pw2, Pw3 and Pw4 all testified that they found the appellant outside lighting his jiko. Pw2 and Pw4 saw that there was also a basin with soaked socks. Pw4 testified that although the appellant tried to run away he was surrounded. Pw2 and Pw3 testified that the girl was in the appellant's house, on top of the bed and was only wearing a bra.

7. The minor was taken to Naitiri sub-county hospital and was attended by Hassan Muikoa. Desmond Wekesa Situma (Pw5) testified that he was a clinician at the facility and that Hassan Muikoa being his colleague he was familiar with his handwritings. He testified that the minor had a history of having sex with a boy without protection. Upon examination of her private parts there were no bruises or lacerations but the hymen was missing. Her urine was found to have pus cells. On high vaginal swab, spermatozoa were not seen. Based on the history given, they arrived at the conclusion that Pw1 had been defiled.

8. PC Hesbon Osila No 255484 (Pw6) testified that the appellant was brought in by elders after he was found with the minor. He seduced the minor on August 28, 2021 they met the following day and the minor admitted to spending the night with the appellant and having sex. On August 30, 2021 the minor wore her uniform and went to school. They met again in the evening and went to the appellant's house. They were seen together and the nyumba kumi called Pw2 and Pw3. The minor was found in bed while the appellant was lighting a jiko. The minor was sent to hospital and the doctor confirmed that she had engaged in sex.

9. When placed on his defence the appellant testified that the charge against him was fabricated. He claimed that the first time he met the minor was via video Skype. He testified that he had met Pw3 who led him to houses in which the rent was Kshs 1,500/-. He was not sure that Pw3 owned the house and therefore waited for him to prove ownership. Pw3 then came with 2 other people on a motor cycle, they beat him up and took him to the police station without being heard. The appellant denied committing the offence.

10. The main issueat hand in this appeal is whether or not the prosecution has successfully established all the necessary elements of the defilement charge. In order to prove the offence of defilement, it is imperative for the prosecution to demonstrate that the accused committed an act that resulted in

the penetration of a minor. Under section 2 of the Act 'penetration' means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." In addition, the prosecution must establish the age of complainant and the identity of the perpetrator.

11. The appellant in his submissions contends that the element of penetration was not proved by the prosecution for reasons that upon conducting a high vaginal swab, spermatozoa were not seen. He submits that there was no medical evidence led to show the element of penetration given that the complainant did not experience any tears. The prosecution submitted that the evidence of Pw1 alone would be admissible to prove defilement provided the court believed that she was telling the truth, under section 124 of the *Evidence Act*.

12. Pw5 testified that examination of the genitalia revealed that Pw1 did not have any lacerations or bruises. The P3 form noted that the hymen was missing. There were no spermatozoa that were seen on high vaginal swab test. Pw5 testified that he arrived at the conclusion that the minor had been defiled based on the history given by the minor. Therefore, the only evidence on penetration was that by the minor. In the absence of medical proof, a sexual offence can be established depending on the victim's evidence and other circumstances surrounding the commission of the offence (see *CMM v Republic* [2022]). The court in *CMM v Republic* (*supra*) further stated that:

> "...penetration can be proved circumstantially taking into account circumstances under which the act was committed. In the case of Kassim Ali v Republic(2021)e KLR the court of appeal stated that;
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> > "So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

13. The court in *Alex Sayalel Kantai v Republic* [2021] eKLR stated:

> [30] In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:
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> > "Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).
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> [31] PW1 told the court that the appellant removed her clothes, underpants, and then removed his clothes and did tabia mbaya on her outside under a tree. The P3 form and treatment card produced by PW2 show that on vaginal examination of the child the hymen was not intact. The doctor was clear that you may not find spermatozoa after 2-3 days of penetration. Accordingly, the submission by the appellant that absence of spermatozoa meant there was no penetration does not hold sway. See the case of Mark Oiruri Mose v R [2013] eKLR. I find that the medical evidence supports the evidence of the complainant and shows that there was penetration of the child."

14. The evidence of Pw1 was that she had unprotected sexual intercourse with the appellant on August 29, 2021. By the time she went to hospital, Pw1 testified that she had showered. Given the P3 form was filled 2 days after her sexual encounter with the appellant, it could have explained the lack of spermatozoa upon high vaginal swab. Pw5 during cross examination testified that the lack of semen could have been attributed to many factors.

15. Pw1 provided a clear account of how the Appellant sexually assaulted her, stating that she was present at the appellant's house on August 29th and 30th August, 2021. This testimony was supported by Pw2, Pw3, and Pw4, who found her at the Appellant's home. Despite being cross-examined, Pw1 remained unwavering and straightforward in her testimony. Her testimony alone is sufficient to sustain a conviction, as per the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which waives the need for corroboration if the trial magistrate is convinced that the child is telling the truth, and records such reasons. In the circumstances, I find that the minor was telling the truth and that the prosecution established the ingredient of penetration.

16. The appellant has also challenged the age of Pw1 arguing that Pw1 was an adult as she had the ability to engage herself in love affairs with anybody. He argued that Pw1 willingly met the appellant and went to his home. The respondent submits that the Certificate of Birth, Pexh2 was produced by Pw6. According to the Certificate of Birth Pw1 was 15 years at the time the offence was committed as the certificate reveal that she was born on 26th April 2006. The appellant was also aware that Pw1 was a minor as she had her school uniform and allowed her to go to school after having sex with her.

17. The appellant further submitted that he was not positively identified as the minor denied knowing him. According to the evidence of Pw1 she met the appellant for the first time on August 28, 2021 which was a Saturday. She met the appellant during the day and he then took her to his house. She spent 2 days with the appellant and in fact at the time the appellant was arrested, she was found by Pw2, Pw3 and Pw4 in the appellant's house on top of the bed. The appellant having been found with the minor was arrested and also identified by Pw2, Pw3 and Pw4. I therefore find that the trial magistrate correctly held that the appellant was positively identified having been found within the *locus in quo*.

18. I now turn to consider the sentence meted by the trial court. As regards the sentence, the mandatory minimum sentence for defiling a child who is between the age of 12 and 15 years under section 8(3) of the *Sexual Offences Act* is imprisonment for a term of not less than twenty (20) years. In sentencing the appellant, the trial magistrate considered his mitigation and the fact that he was a first offender. The offence herein is a serious one and, in the circumstances, 20 years' imprisonment is not excessive but appropriate sentence.

19. In the end, the appeal is lacking in merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF APRIL 2023.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister C/A