Alex v Republic (Criminal Appeal E046 of 2022) [2023] KEHC 19483 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 19483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E046 OF 2022

RPV WENDOH, J

MAY 18, 2023

BETWEEN

HESBON ONYNAGO ALEX .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Hesbon Onyango Alex, the appellant, was charged in the CM's Court Migori for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offence Act*. He faced an alternative charge of committing an Indecent Act with a child contrary to section 11 (1) of the *Sexual Offence Act*.
2. The particulars of the charge are that on 12/12/2020 and 20/3/2021 at [Particulars Withheld], Migori County, he intentionally caused his penis to penetrate the vagina of DAK, a girl aged 11 years. In the alternative, on the same date, he intentionally touched the buttocks, vagina and breasts of DAK, a girl aged 11 years.
3. The prosecution called a total of (5) witnesses in support of their case.
4. At the close of the prosecution case, the appellant was called upon to defend himself. He gave unsworn evidence and called one other witness.
5. The appellant was convicted on the main charge and sentenced to life imprisonment. The said judgment provoked this appeal.
6. The grounds of Appeal are found in the memorandum of Appeal filed by Mr. Odondi Awino Advocate and as follows;-
    1. That the age of the complainant was not proved;

2. That the P3 form estimating the complainant's age at 11 years was unsupported by evidence;

3. That the prosecution failed to call evidence of Oluoch Makaya;

4. That the identity of the perpetrator was not proved.

7. He therefore prays that the conviction be quashed and sentence set aside.

8. Mr. Awino filed submissions in support of the grounds. Counsel argued that the age assessment placed the age of the complainant at between 11 - 15 hence the age was not proved and the question is what age the court pegged the sentence on. Counsel relied on the case of *E K v Republic* (2018) eKLR where the court had relied on the age assessment made by a police officer and *Mutua Richard v Republic* (2018) eKLR, where the court reduced the sentence of the appellant where the age of the minor was not ascertained.

9. It was also submitted that the court failed to call a key witness, one, Oluoch Makaya who the complainant said took her to the police station to report that she had been impregnated and that the person wanted her to report that one Odhiambo Magere impregnated her but she insisted that it was Onyango Alex. The counsel relied on the case of *Omar Nache Uche v Republic* (2015) eKLR and *Bukenya v Uganda* (1972) EA 549 where the court held that the court has the right to call any witness who appears essential to the just decision of the case. Based on that submission, he urged the court to quash the conviction.

10. The appeal was opposed. On the age of the complainant, counsel submitted that the exact age not having been ascertained, the trial court erred by sentencing the appellant under section 8 (2) of the *Sexual Offences Act*.

11. Of penetration, counsel relied on the decision of *Mark Oiruri Mose v Republic* (2013) eKLR. Counsel submitted that PW4 narrated how she met the appellant in a maize plantation severally, and he had carnal knowledge of her till he realised that she was pregnant, and he disappeared; that the Clinical Officer PW1, found that the hymen was broken and there were lacerations on the vagina wall and the minor was 20 weeks pregnant.

12. According to counsel, failure to call Oluoch Makaya as a witness was not fatal to the prosecution case as he was only a secondary witness; that the court invoked section 124 of the *Evidence Act* which provides that corroboration is not mandatory in such a case. Counsel also relied on section 143 of the *Evidence Act*. Counsel conceded the appeal only on account of age.

13. This is a first appeal and it behoves this court to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusions. The court is guided by the case of *Okeno v Republic* (1972) EA 32.

14. PW1 Stella Oiro is a Clinical officer based at Migori Referral Hospital. PW1 found that the complainant had been examined and found to be 20 weeks pregnant. The outer vagina was red, hymen was broken and lacerations seen on vagina walls. PW1 received the age assessment report which indicates that the complainant was 11 years old.

15. PW2 Esther Nyangige testified that on 21/1/2021, about 5;30pm, she was informed that D. (PW1) had been taken by people for Children's Rights and taken to Kowino Police station. She learned that one Oluoch Makaya took the complainant away. She followed Oluoch to Kowino but did not find both Oluoch and the complainant. She learned that Oluoch was only a mason. The complainant and Oluoch were not found at Magoto.

16. Back at Kowino, the police officer informed them that the complainant was pregnant and had gone back home.

17. They went back to Oluoch's house where they found Oluoch, the wife and complainant. They took the complainant home and next day, reported to Kowino police station. They were told to look for Oluoch or that he could be arrested. They took the complainant to hospital where she was confirmed to be pregnant. They reported to the Chief who interrogated the complainant and she said that Onyango defiled her and not Ochieng.

18. W3 AA recalled that on 21/6/2021 about 4;00pm, Oluoch Makaya went to her home when the complainant had just come from school and he asked PW3 why she was keeping a child who was pregnant. She denied knowing about it and Oluoch took the child to Kowino Police station; PW3 followed to Kowino police station but did not get the complainant and Oluoch.

19. At Kowino, they found that the complainant had recorded a statement but she was nowhere. They went to Oluoch's house and found the wife and complainant. They took the complainant to Migori Referral hospital next day and she was confirmed to be pregnant by Onyango. They reported back to Piny Oyie police station and the appellant was arrested.

20. PW4 DA, underwent voire dire examination and gave unsworn evidence. He remembered meeting the appellant on 12/12/2022 when he took her to a maize plantation, told her to remove her under pant and put his penis in her vagina and threatened to kill her if she told anyone. He gave her Ksh 50. After that, they had several sexual encounters till 21/3/2021.

21. On 21/6/2021 PW1 reached home and one Oluoch came home and informed her step mother that she is pregnant and that he was taking her to Kowino police station. That Oluoch informed her one Odhiambo impregnated her but she confirmed to the parents that it is Onyango who impregnated her. After that, Oluoch took her to his home and her step mother (PW2) found her and took her home till next day when the matter was reported to police station and she was treated at Migori.

22. PW5 PC Samson Ndolo was the investigating officer in this case. He took the complainant (PW4) to hospital where she was examined and confirmed to be pregnant. He traced the appellant and charged him.

23. In his unsworn defence, the appellant stated that he knows the complainant but has no knowledge of the charge; that the person who defiled the complainant escaped and the complainants mother framed him because of a grudge.

24. DW2 Joseph Kawidhi stated that the appellant is his Nephew and he knows the complainant as a neighbour. He also stated that the mother of the complainant gave false testimony against the appellant because they had grudge.

25. I have now considered the grounds of appeal, evidence tendered in the trial court and submissions by counsel. The appellant having been charged with the offence of defilement, to prove the said charge, the prosecution has to prove beyond reasonable doubt the following;-

    1. Proof of victim's age;
    2. Proof of penetration;
    3. Proof of the identity of the perpetrator.

Proof of age

26. In the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR the court held as follows;-

> "The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

27. In *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2020, the Court of Appeal of Uganda stated as follows on proof of age in defilement case"

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

28. Guided by the above decisions age can be proved by the parents, guardian medical evidence , birth certificate of the victim or even common sense.

29. In this case, the Clinical Officer estimated PW1's age at 11 years while the age assessment that PW4 produced in evidence indicated that the age was 11-15 years. The relatives of the victim did not tell the court the complainant's age.

30. I have considered the decision that the appellants counsel relied on. I do agree with the findings in *Mutua Richard case* (*supra*) where the court said;

> 40. The victim in this case was between 15 and 16 years at the time of the offence. This does not fall within a specific age bracket as provided for by the law. As much as the P3 form stated that she was 15 years, the expert who assessed her age did not come up with a definite age. It is my considered view that the learned trial magistrate should have given the appellant the benefit of the age bracket which prescribes a lesser sentence to wit 'between 16 and 18 years'.
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> 41. Accordingly, this ground should succeed only to the extent of reducing the term of imprisonment from 20 years to 15 years.

31. The age assessment did not establish the actual age of the complainant.

32. The trial court erred in finding that the complainants age bracket falls under section 8 (2) of Sexual Offence Act which provides that where the victim is aged eleven (11) years and below the offender will be imprisoned for life.

33. Since the age assessment indicates that the complainant could have been between 11 - 15 years old. The trial court should have given the appellant the benefit of the age bracket which prescribed a lesser sentence. He should have been sentenced under Section 8 (3) of the *Sexual Offence Act* which provides that where the victim is between the age of 12 and 15 years, one is liable to imprisonment for a term not less than 20 years imprisonment. I am satisfied that the said ground succeeds to that extent.

Of penetration

34. Penetration is defined in Section 2 of the *Sexual Offences Act* as

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

35. In the case of *Mark Oiruri Mose v Republic* (2013) eKLR, the Court of Appeal defined penetration as follows: -

> … in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. 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…."

36. The complainant vividly narrated how the appellant met her, led her to the maize plantation inserted his penis into hers genitalia. It was not once but it was done on several occasions till she found herself pregnant. PW4 found that the complainant's hymen had been broken, there were lacerations to the vagina walls. The totality of this evidence ie pregnancy and lacerations all go to prove the fact of penetration.

Identity of the perpetrator

37. According to PW4 the defilement did not occur once but severally.

38. PW4 knows the appellant very well. In fact the appellant admitted that they know each other.

39. DW 2 confirmed that they are neighbours with the complainant. Although DW1 and DW2 claim that it is the complainants mother who framed him because of a grudge, that defence was first raised in the defence. The witnesses did not tell the court exactly who this is that framed the appellant. DW1 and DW2 did not tell the court the nature of the grudge.

40. This is because PW4 told the court that the complainant's mother is deceased. If DW1 and DW2 want to blame PW2 and PW3 for framing the appellant, the appellant never put the question of grudge to the two witnesses. It is an afterthought. The complainant's testimony was not shaken and this court is in agreement with the trial court's finding that it is the appellant who defiled the complainant, not once but severally and impregnated her.

41. The appellant alleged that a crucial witness, Oluoch Makaya, was not called as a witness. Indeed, Oluoch was mentioned by PW2,3, 4 and 5 as the person as the whistle blower who revealed the complainant's pregnancy and he is the one who took PW4 to the police station to report.

42. According to PW 4, the said Oluoch informed her that Odhiambo impregnated her but she insisted that it was Onyango, the appellant who impregnated. In fact once the issue of pregnancy arose, PW4 informed PW2, PW3 and police that it was the appellant who defiled her .

43. Section 43 of the *Evidence Act* provides that a fact may be proved by the testimony of one witness save in special circumstances where the law provides otherwise. It is also trite law, that the prosecution has the discretion to determine which witnesses they wish to call in support of their case unless it is shown

that they omitted to call a witness because he would have given evidence adverse to the prosecution case. In *Mwangi v Republic* (2008) 1 KLR 1134 the Court of Appeal held ;-

> "whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and a court will not interfere with that discretion unless it may be shown into the prosecutor was influenced by some oblique motive”

44. In this case, the appellant has not pointed to any oblique motive that may have caused the prosecutor not to call the said Oluoch Makaya. A part from being a whistle blower to the fact of the pregnancy, the said Oluoch was not a primary witness. He did not witness the offence but only reported to the police about the pregnancy and it turned out to be true. Failure to call Oluoch as a witness, in my view, did not weaken the prosecution case in any way. The trial court observed that the complainant was firm and consistent on who defiled her and the court believed the witness. I agree with the said finding. In the end I find that the offence of defilement was proved. I affirm the conviction.

45. As regards sentence, as earlier noted, the appellant should have been sentenced under section 8 (3) but not 8 (2) of the *Sexual Offences Act*. I therefore set aside the sentence of life imprisonment. I substitute it with 18 years imprisonment. The prison sentence will run from the date of sentence on 25/4/2022. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 18TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

In presence of; -

Ms. Kosgei for Prosecution counsel

Appellant Present

Ms. Emma/ Phelix –Court Assistant