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Kipkembo v Republic (Criminal Appeal 59 of 2017) [2023] KEHC 17720 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 59 OF 2017

CM KARIUKI, J

MAY 18, 2023

BETWEEN

GEDION KIPRONO KIPKEMBO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Conviction and Sentence of Hon A. Mukenga - Resident Magistrate in Nyahururu Chief Magistrate's Criminal Case No. 1830 of 2013)

JUDGMENT

1. The appellant was charged with defilement, contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.
2. Particulars being that on the 20th day of October 2013 at (Particulars Withheld) in Laikipia County, intentionally and unlawfully caused his genital organs, namely the penis, to penetrate the vagina of MC, a child aged seven years.
3. In the alternative charge, he faced one of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No 3 of 2006. Notably, on the 20th of October 2013, at (Particulars Withheld) in Laikipia County, he unlawfully caused his genital organs, namely the penis, to come into contact with the vagina of MC, a child aged seven years.
4. At the hearing, the prosecution called a total of 4 witnesses, and at the close of its case, the appellant opted to give an unsworn defense and did not call any witnesses.
5. The Appellant was then convicted of the main count of defilement contrary to section 8(1) as read with section 8(2) of the sexual offenses act and was on September 2, 2015 sentenced to life imprisonment. Dissatisfied with the judgment, the appellant filed the instant appeal and enumerated seven grounds

for appeal. He raises the issues;The defect of the charge.proof of ingredients of the offense of the defilementIdentificationAnd the harshness of the sentence

6. The parties were directed to canvass appeal via submissions which were filed and exchanged.

Appellant Submissions.

7. The appellant submits that the charge sheet stated and described the offense as 'defilement' contradictory to PW3 doctor's chief evidence (page 18 of the Judgment, 2nd Paragraph), where, according to the doctor, PW1 told him that the accused person inserted his penis in the complainant's thus offense should have been described as sodomy.

8. In cross-examination by the accused (page 19 of the judgment) PW3, the doctor stated that the hymen can be broken by many factors, not only through sexual intercourse, and he did not see any injuries on PW1 the complainant.

9. PW2 mother to the Child (page 16 of the judgment) stated well that, on 20/10/201, 04.00, she sent her daughter to [Particuars withheld] to bring a panga, then her daughter came back at 7.00 pm and said she was taken by "somebody" to the forest, she said the " man" took her to the forest. The information from PW1, the complainant, and PW 2 mother of their child, did not identify the perpetrator. It shows PW 2, the complainant, was being fed stories and information concerning this case.

10. In this case, the prosecution did not prove their case beyond reasonable doubt and was full of contradiction.

11. PW 2, the complainant's mother (page 16 of the judgment), stated well that she inspected PW1, the complainant's private parts, and she saw blood, and the complainant was walking with difficulty, then she took her to the hospital. But according to PW 3 (page 18 of the judgment), the doctors' evidence stated that after inspecting PW 1 the complainants' private parts, he saw no bleeding, no vaginal discharge, no injuries on the anus, no blood, no spermatozoa and thus contradicting the evidence of PW 2 the complainant's mother.

12. Cross-examination by accused (page 17, last paragraph of the judgment) PW 2 The complainant's mother said, "During identification parade," the child identified me. Still, PW 4, the investigating Officer at Rumuruti police station (page 22, first paragraph of the judgment), said, "We did not conduct an identification parade." Therefore, contradicting their evidence.

13. He submits that his defense should have been considered.

Respondent Submissions

14. The appellant was charged with defilement, contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.

15. Particulars being that on the 20th day of October 2013 at (Particulars Withheld) in Laikipia County, intentionally and unlawfully caused his genital organs, namely the penis, to penetrate the vagina of MC, a child aged seven years.

16. In the alternative charge, he faced one of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No 3 of 2006. Notably, on the 20th of October 2013 at (Particulars Withheld) in Laikipia County, he unlawfully caused his genital organs, namely the penis, to come into contact with the vagina of MC, a child aged seven years.

17. At the hearing, the prosecution called a total of 4 witnesses, and at the close of its case, the appellant opted to give an unsworn defense and did not call any witnesses.

18. The Appellant was then convicted of the primary count of defilement contrary to section 8(1) as read with section 8(2) of the sexual offenses act and was on September 2, 2015 sentenced to life imprisonment. Being dissatisfied with the whole of the said judgment, the appellant filed the instant appeal and enumerated seven grounds of appeal to which the appeal is vehemently opposed.

19. The prosecution submitted that the elements required to prove the charge of defilement are Age, Penetration, and Identity and cited the case of *Daniel Wambugu Maina v Republic* (2018), eKLR.

20. It was also argued that the charge sheet indicated that the complainant was a seven-year-old child. PW 1 testified that she was seven years old and went to school at [Particulars Withheld] Primary School in a stand (1). PW 2 testified that her child, the complainant, was aged seven years and produced her immunization card marked MF1-1, which shows she was seven years old.PW 4, the police investigating officer, testified and had the complainant's clinic card as exhibit 3, proving that she was seven years old. This piece of evidence was never dislodged by the appellant by the effective tool of cross-examination. Reliance was placed on See the case of Mwalango Chichoro – versus – Republic Msa C Appeal No 24 of 2015 [UR] finally settled the question of proof of age.

21. PW 1 testified that on October 20, 2013, she had been sent to buy oil. On the road, she met the accused/appellant, Gedeon, who took her to the forest and behaved badly (tabia mbaya). He removed her clothes, placed her on the ground, and inserted his thing on her lower part (points at her private part) and used it to do tabia mbaya, she cried. Finally, he strangled her on the neck. Then he left. She then put on her clothes and went home (see page 7 of the proceedings). She was consistent during cross-examination.

22. PW 2 collaborated this statement that the complainant mentioned that Gedeon had defiled her. She even said that after three days, the complainant told her she had seen the person who defiled her. She told her it was Gedeon Kiprono, who is a neighbour.

23. Hence the complainant knew the Appellant before the incident as their neighbor, therefore, it was one of recognition, and identification was cogent.

24. The Appellant brought out an issue of bad blood between him and the complainant's family after his father was sacked from employment. However, the complainant and her mother were not parties to the dispute and had no valid reason to frame the appellant.

25. Moreover, the appellant raised the issue in an unsworn defense that lacks weight. In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a face may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has yet to be seen would carry a different weight than evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage of an accused person electing to make an unsworn statement.

26. See the case of *Amber May v The Republic* [1999] KLR 38 on appeal against that decision and reported as *May v The Republic* (1981) KLR 129.

27. Issues analysis and determination

28. After going through the proceedings and the submissions, I find the issues are; whether the prosecution proved its case on the balance of probabilities. Whether the appellant's defense was considered and whether the sentence excessive or harsh?

29. The duty of the first appellate court was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123, where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence to draw its conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

30. The Prosecution presented four (4) witnesses to prove their case, namely; PW1 MC – Child of tender years and also the complainant, PW2 MC -Mother to the Child/complainant; Henry Kemboi Chepkemboi – Clinical Officer at Rumuruti District Hospital and pw 4 No 55607 CP Charles Kazungu - investigating officer at Rumuruti Police station.

31. On the onset, there are collateral issues on whether the charge was defective as it stated and described the offense as 'defilement' contrary to PW3 doctor's chief evidence (page 18 of the Judgment, 2nd Paragraph), where according to the doctor, PW1 told him that the accused person inserted his penis in the complainant's anus'. If it was true, the appellate argues that the charge should have stated and described the offense as 'sodomy.'

32. In the case of *Isaac Omambia v Republic*, [1995] eKLR where the court considered the ingredients necessary in a charge sheet and stated as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of S 134 of the Criminal Procedure Code, which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offense or offenses with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offense."

33. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR quoted the Isaac Omambia case with approval and further stated that:

> " A charge can also be defective if it is at variance with the evidence in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R, [198] eKLR that:
>
> "In England, it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offenses not disclosed in that evidence or fails to charge an offense which is disclosed therein,
>
> (ii) when for the such reason it does not accord with the evidence given at the trial."

34. The discrepancies appear both in pw3 testimonies, where pw1 told him she was penetrated in the anus, and are also reflected on the first page of the p3 produced as an exhibit. The charge sheet talks of penetration of the vagina of pw1. However, the issue of the defect was not raised during the trial, and in any event, the doctor examined both the vagina and anus and found no injuries save a broken hymen.

35. Pw1 talked of her private parts (pointing at it), referring to her vagina, and her hand told her mother pw2 of her private part as the one which was penetrated. Thus, discrepancies cannot be considered

fatal as the charge sheet shows the actual offense the accused faced, ie, defilement by penetrating the pw1 vagina.

36. On proof of the case beyond a reasonable doubt, the elements required to prove the charge of defilement are Age, Penetration, and Identity of the perpetrator as set out in the case of vide *Daniel Wambugu Maina v Republic* (2018), eKLR.

37. On age, PW 2 testified that her child, the complainant, was aged seven years and produced her immunization card marked MF1-1, which shows she was seven years old.PW 4, the police investigating officer, testified and produced the complainant's clinic card as exhibit 3, proving that she was seven years old. This piece of evidence was never dislodged by the appellant by the effective tool of cross-examination. Reliance was placed on See the Mwalango Chichoro v Republic Msa case C Appeal No 24 of 2015 [UR] finally settled the question of proof of age.

38. On penetration of genital organ, PW 1 testified that on October 20, 2013, she had been sent to buy oil. On the road, she met the accused/appellant, who took her to the forest and behaved badly (tabia mbaya). He removed her clothes, placed her on the ground, and inserted his thing on her lower part (points at her private part) and used it to do tabia mbaya, she cried. Finally, he strangled her on the neck. Then he left. She then put on her clothes and went home (see page 7 of the proceedings).

39. However, when p3 is recorded, the organ penetrated was the anus, and pw3 clinical officer reiterated in his evidence that pw3 told him that it was her anus which was penetrated, which upon examination proved to have no injuries, nor spermatozoa or discharge raises doubt as to the truthfulness of the pw1.The vagina was also examined and contained no discharge nor injuries but a broken hymen.

40. In cross-examination by accused PW3, the doctor stated that the hymen can be broken by many factors, not only through sexual intercourse; PW 2, the complainant's mother (page 16 of the judgment) stated that she inspected PW1, the complainants' private parts and she saw blood and complainant was walking with difficulty then she took her to hospital. But according to PW 3 (page 18 of the judgment), the doctors' evidence stated that after inspecting PW 1 the complainants' private parts, he saw no bleeding, no vaginal discharge, no injuries on the anus, no blood, no spermatozoa and thus contradicting the evidence of PW 2 the complainant's mother.

41. On identification of PW 2, the mother to the Child (page 16 of the judgment) stated that, on 20/10/201, 04.00, she sent her daughter to Kapkulei to bring a panga, then her daughter came back at 7.00 and said she was taken by "somebody" to the forest, she said the " man" took her to the forest. However, the information from PW1, the complainant, and PW 2 mother of their child, did not identify the perpetrator.

42. Cross-examination by accused (page 17, last paragraph of the judgment) PW 2 The complainant's mother said, "During identification parade," the child identified the accused. Still, PW 4, the investigating Officer at Rumuruti police station (page 22, first paragraph of the judgment), said, "We did not conduct an identification parade." Therefore, contradicting their evidence.

43. The victim pw1, in cross-examination by the accused, did not tell police the accused's name, nor were any descriptions alluded to of the attacker anywhere on record. The rules and principles on the weight of visual identifying witness evidence do not give exceptions where the witness was a minor but apply equally.

44. The Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 426 stated as hereunder: -

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to scrutinize such evidence and to be satisfied that the

circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction."

45. The evidence in the trial court was by a single identifying witness. Evidence of a single identifying witness must be scrutinized to ensure it is water-tight before a conviction is founded on it. In the case of *Kiilu & Another v Republic* [2005] 1 KLR 174, it was held that:

> " Subject to certain well-known exceptions, it is trite law that the testimony of a single witness may prove a fact, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

46. In this case, I conclude that the doubt in identification and the element of penetration makes this court holds that the prosecution did not prove the case beyond any reasonable doubt. Thus, the court makes orders that;

    i. The conviction is quashed and sentence set aside and appellant is set at liberty forth with unless otherwise lawfully held.

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

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CHARLES KARIUKI

JUDGE