Koskei v Republic (Criminal Appeal E067 of 2022)
[2023] KEHC 19955 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E067 OF 2022

TA ODERA, J

JULY 6, 2023

BETWEEN

JOSIAH KOSKEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence of Hon Y.I KHATAMBI S.R.M in original NAKURU S.O 07 OF 2020 delivered on 14/07/2021)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) read with section 8 (2) of the *Sexual Offences Act*. The particulars were that on the January 9, 2010 at Njoro – Sub County within Nakuru County, he intentionally caused his penis to penetrate the vagina of CC a child aged 2 ½ years which caused penetration .

2. He also faces and alternative charge of indecent act with a child contrary to section 11 (1) of the *sexual offences Act*. The particulars were that on the January 9, 2010 at Njoro – Sub County within Nakuru County, he unlawfully and committed an indecent act with a child named CC a child aged 2 ½ years which caused penetration.

3. The appellant denied the charges and the matter proceeded to full hearing. He appeared in person in the said proceedings.

4. Prosecution's case is that on January 9, 2020 morning Pw3 DC was at home with her children IC aged about 8 (Pw1) and CC aged 2 1/2 years when the appellant who was known to her and the children before as a neighbour went there and gave the children some chewing gum. She later left her home and as the children were playing, appellant called CC to the kitchen leaving IC outside. Pw4 no xxxx Pc Etensy Napi Esinyo was of kelengo police post was passing through the home of pw3 while on patrol when he peeped through the kitchen window and saw appellant carrying a child on his laps he asked

for drinking water and left. In the meantime, Pw3 and returned home at 10.00am and found appellant seated in the kitchen facing down and his trousers were unzipped and the child CC was seated next to him looking disturbed . She examined the child and noted presence of blood and some discharge on her vagina. She reported to a police office on phone. Pw4 he walked for 100 metres and heard screams he turned back to where he had come from and found a mob assaulting appellant. He rescued him and took him to the dispensary where he and the child were was treated. appellant was taken to Njoro police station where the case was reported on January 9, 2020 and investigations were commenced by no xxxx (Pw5) the child was examined at Khelingo dispensary by Pw6 Jacob Chelimo a clinical officer no 3841 who filled the p3 form on January 9, 2020 and found that the hymen was freshly torn, genitalia was bruised and labia minora was inflamed. He produced the p3 form – Pexh 2 and post rape care form pexh 3. Investigations were completed and the appellant was charged with the offences herein.

5. Appellant opted to adduce sworn testimony. He denied the charges saying he was framed up by pw3 who owed him some money and he also reported her to the chief for selling changaa and she was arrested. He admitted that he was in the kitchen of Pw3 at the material time and that the child was seated next to him but said the child was not crying and pw3 later called a mob and told them he had defiled the child. The case was heard and determined by the learned trial magistrate and he was convicted and sentenced to life imprisonment on July 12, 2021.

6. He filed supplementary record of appeal dated February 27, 2023 through Raydon Mwangi and Associates and Mrs Morande appeared for him in court. He raised the following grounds of appeal;

    i. That the Honourable court erred in fact by finding that prosecution had proved its case beyond reasonable doubt.

    ii. That the Honourable court erred in fact by failing t6o appreciate that the medical evidence adduced by prosecution was not sufficient to allow a conviction.

    iii. That the Honourable trial magistrate erred in fact and law by convicting and sentencing the appellant based on inconsistent .contradictory and incredible evidence.

    iv. That the Honourable trial magistrate erred in fact and law by disregarding evidence of the appellant and treating prosecution evidence in isolation yet the prosecution evidence was merely credible.

    v. That the Honourable trial magistrate erred in fact and law by

7. The appeal was canvassed by way of written submissions. The appellant complied by filing his submissions, the same have been considered together with the cited cases.

Analysis and determination.

8. 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.'

9. On the ingredients of the offence charged, the prosecution in a charge of defilement ought to establish the complainant's age, the act of penetration and positive identity of the perpetrator. The age of the minor and recognition of appellant are not in issue.

10. The only issue for determination is whether penetration was proved beyond reasonable doubt .

11. On the issue of penetration, it is trite law that penetration is an important ingredient of the offence of defilement. Section 2 of the *Sexual Offences Act*, 2006 defines the term as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Pw1 told the court that appellant went to their home and called her sister CC to the kitchen Pw3 said she found appellant in the kitchen with the child and that her trousers had been unzipped and the child was gloomy and on checking her vagina she saw blood and sperms . Pw4 said he peeped through the kitchen window and saw appellant went to their home and called her sister CC to the kitchen. Pw6 said that he examined the child who was 2 ½ years old and found that she had been defiled. Defence submitted that the evidence was contradictory as the P3 form and the PRC form (Pexh2 and 3 contained contradictory information in that both documents indicate Pw3 as complainant and PRC form indicates t6hat the hymen was torn and old looking while the P3 form indicates that the hymen was torn and fresh looking. Also that Pw6 mentioned presence of spermatozoa which was not indicated in the PRC form. Prosecution submitted that the error do not go to the root of the case as they proved penetration by appellant by way of circumstantial evidence as appellant was the only person who was last seen with the child . Further that all the witness could not have conspired to frame appellant as Pw4 and pw6 did not know him before.

12. In the case of in *Bassita v Uganda SC Criminal Appeal No 35 of 1995*, (Uganda) it was stated:-

> ' The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.'

13. There was no eye witness to the incident and so prosecution relied on circumstantial evidence herein. The law on circumstantial evidence in Kenya is well settled in the case of *Sawe v Republic [2003] KLR 364*, the Court of Appeal amplified on the above thus: 'In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.'

14. I have carefully considered prosecution's case and defence and submissions. I have perused the p3 form and the PRC form (pexh 2 & 3 respectively) and I note that the p3 form is indicated to have been issued to DC aged 2 ½ years (the age has been altered) part c of the 4 said p3 indicates the freshly broken hymen and there is an cancellation of the words 'old broken '. The PRC form gives history of the victim to be DC and also that she is a baby who was defiled and she aged 40 was broken. On the part of examination it is indicated that the hymen was broken and old looking. The charge sheet indicates that the child CC aged 2 ½ years.

15. The position is worsened by the fact that the initial treatment notes were not produced in evidence. The said notes would have shown what the treating doctor observed. The victim in the charge sheet

is a child aged 2 ½ old who cannot ordinarily have broken hymen unless she had been defiled before the incident.

16. This is a criminal case and the burden of proof is on prosecution to prove their case beyond any reasonable doubt. In the case of *Joseph Maina Mwangi v Republic Criminal Appeal No 73 of 1993*, held, inter alia, that: -

> ' In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence'

17. In the case of *John Chemengich Wachie & Peter Cherangas v Republic[2004] eKLR* cited by defence, it was held that 'Such contradictions can only give the accused persons, the benefit of doubt. It is trite law that whenever there is any doubt in the prosecution case, no matter how minor the doubt, a conviction cannot lie.

18. I have re-evaluated the entire evidence adduced by prosecution and the fabrication theory advanced by appellant and I find that the inculpatory facts herein are compatible with the innocence of appellant. The main charge therefore must fail.

19. On the alternative charge, since the credibility of pw3 is in doubt the same cannot also be sustained.

20. The learned trial magistrate thus erred in law and fact by convicting appellant based on the contradictory evidence of penetration.

21. In the upshot I find merit in the appeal and allow it. I proceed to quash the conviction and sentence. Appellant is set free unless otherwise lawfully held.

T.A. ODERA - JUDGE

6.7 2023

Delivered virtually via teams platform in the Presence of

Appellant, his counsel Mrs Morande,

Kihara for the State,

Court assistant Bor.

T.A. ODERA - JUDGE

6.7 2023