**Mohamed v Republic (Criminal Appeal E005 of 2023)**
**[2023] KEHC 20563 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20563 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL APPEAL E005 OF 2023**

**MS SHARIFF, J**

**JULY 18, 2023**

**BETWEEN**

**ADAMS BAKARI MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal arising from the conviction and sentence by Hon F. Rashid (P.M) in original Winam PMC S.O No. 45/2019 delivered on 6/05/2022)***

**JUDGMENT**

1. Adams Bakari Mohamed was arraigned on charges of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act, 2006*. It was alleged that on September 22, 2019 in Kisumu East Sub County he intentionally touched the vagina of MAA, a child aged 5 years with his hands.

2. Upon being called upon to plead, the appellant denied the charges and the matter proceeded to hearing.

3. PW-1, the victim stated that she was outside their gate in the morning when the appellant took her to his house where he inserted his hands into her private parts. PW1 had never seen the appellant before. She thereafter reported the incident to her mother.

4. PW-2 AA, the victim's mother testified that on 22/9/2019, she was in the house when she heard noises of a woman quarrelling the appellant that he wanted to rape a child and she instructed PW1 to get into the house. The following day, a lady came to her house informing her that the appellant had attempted to defile her child, the victim.

5. PW2 stated that upon inquiring from the minor of the said report, the latter informed her that the appellant had removed her clothes and inserted his hands into her vagina and promised to buy her a soda. The incident was reported to the chief and the minor taken to JOOTRH where the P3 form was filled.

6. PW-3, CN stated that on 22/9/2019, she went to a "*kibanda*" to buy tomatoes at about 6 pm. She found a man holding a baby who was crying and the man's short was open. When she inquired on whether the child was his, the said man released the child and the latter ran away. PW3 was informed by other children that the man had undressed the child and inserted his hands in the child's vagina. This witness stated that when she went to the man's house to make further inquiry, the said man threatened to kill her. She testified that the following day, a Monday, she informed the chief. She then searched for the child and she managed to locate her.

7. PW-4 PC Christabel Onyango testified that he received the minor accompanied by her parents on 24/9/2020. The minor was escorted to Jootrh hospital from where the P3 form and the PRC were filled.

8. PW-5, Dr. Ombok from JOOTRH examined the minor and filled the P3 form on October 16, 2019. She noted the minor was slightly withdrawn, fearful but in good condition. On genital examination, the vagina was normal save for the missing hymen.

9. PW-6, Keziah Tauri, a clinical officer from Jootrh examined the minor on 23/9/2019 and noted normal vagina except the missing hymen.

10. The appellant was put on his defence and elected to give sworn evidence. He testified as DW-1 and denied committing the offence. He denied knowing the minor or her parents. That he was in his house that day.

11. The trial magistrate subsequently found the appellant guilty and sentenced him to 10 years imprisonment. Aggrieved, the appellant moved this court by a Petition of Appeal raising the following grounds;

    a. The learned trial magistrate erred in law by finding and holding that the age of the complainant had been proved beyond reasonable doubt.

    b. It was a tremendous misdirection on the part of the learned trial magistrate to choose to ignore recent and binding decisions of the Court of Appeal on the case of proof of age of an alleged victim of defilement and state that the prosecution need not prove age of the alleged victim.

    c. The learned trial magistrate erred by failing to consider the evidence of PW-5 who did not conclude whether the penetration was recent or not hence grossly misdirected herself in making a finding that the said penetration on the complainant was done by the appellant.

    d. The learned trial magistrate erred by failing to consider that the evidence of PW-5 and PW-6 which indicated that the minor's vagina was normal and that there was no scientific evidence linking the appellant with the alleged crime.

    e. The learned trial magistrate erred by failing to consider that PW-1 in her testimony said that she did not know the appellant and it was the first time she was seeing him in court.

    f. The learned trial magistrate erred in dismissing the appellant's defence on grounds that the same was not proved.

    g. The learned trial magistrate erred in not finding that the prosecution had not proved its case beyond reasonable doubt.

h. The judgement of the trial court was against the weight of evidence.

12. Subsequently, parties filed their written submissions. On identification, the appellant submits that if indeed the appellant had been the complainant's neighbour, she ought to have known him. However, in this case, the minor testified that it was the first time she was seeing him. The appellant submits that the trial court's reliance on the minor's unsworn testimony was improper as stated in *Amber May v R* [1979] KLR 38.

13. The appellant also contends that there is material contradiction as relates to PW-1, PW-2, and PW-3's evidence as the witnesses' evidence did not place the appellant at the scene of the crime. He submits that the medical evidence presented does not really prove the offence. Reliance is placed on *John Mutua Munyoki v Republic* [2017] eKLR

14. On the element of age, it is submitted that the only document produced to prove the minor's age is a notification of birth showing that the minor was born on August 20, 2014 while the PRC showed the date as January 13, 2015. The case of *Edwin Nyambongo Onsongo v Republic* [2016] eKLR has been cited in support.

15. It is further submitted that the police failed to call the chief or the children who allegedly witnessed the incident. The appellant posits that the failure to call such crucial witnesses denied the appellant an opportunity to offer exculpatory evidence through their cross examination.

16. The respondent submits that the minor's age was proved satisfactorily by way of evidence of the mother and the minor herself. The authority in *MW v Republic* [2020] eKLR has been cited.

17. On whether the offence was proved, the respondent asserts that the minor's evidence was corroborated by that of PW-5 and PW-6 as stated in the *Charles Wamukoya v Republic*, Criminal Appeal No 72 of 2013.

18. On identity, it is argued that the minor indicated she did not know the appellant's name but knew he stayed close to their home and even pointed to him in court.

19. On sentence, the respondent contends that the same was fair and just and urged this court not to interfere with the same. Reliance is placed on the authority in Joshua Gichuki Mwangi v R Nyeri Criminal Appeal No 84 of 2015 and *Athanas Lijodi v Republic* [2021] eKLR.

**Analysis and determination.**

20. This being a first appeal, I am guided by the sentiments expressed by Mativo J in *Sylvester Wanjau Kariuki v Republic* [2016] eKLR, where the learned judge held:-

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable

from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

21. The appellant having been charged under Section 11(1) of the *Sexual Offences Act*, the necessary ingredients to established were stated in *George Opondo Olunga v Republic* [2016] eKLR, as; identification or recognition of the offender, penetration and the age of the victim.

22. On the element of identity, the victim testified that she had never seen the appellant before. She didn't know his name. PW-2 on her part also stated that she had stayed in the area for one month and didn't know him. PW2 stated that she was told of the incident by a lady who came to her house; the lady's name was not disclosed.

23. The only person who knew the appellant was PW-3 who testified that she even went to the appellant's home before taking the victim to hospital.

24. In the circumstances, I find the appellant's identity was proved.

25. The next element to be ascertained is penetration, on the issue, the minor stated that the appellant testified that the appellant inserted his hands into her vagina. That the incident was seen by PW-3.

26. Doctor Ombok, PW-5 and the clinical officer, PW-6 examined the minor on 23/9/2019 and noted no abnormalities on the vagina other than the missing hymen.

27. This brings out the question of how penetration ought to be proved. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

28. Penetration has to be proved by the victim's own testimony and or corroborated by medical evidence. In this case, the minor was of tender years. She was also declared a vulnerable witness and her testimony therefore should to have treated with utmost caution and the same need be corroborated by satisfactory medical evidence.

29. The court of appeal in *John Mutua Munyoki v Republic* [2017] eKLR, had this to say regarding penetration and the place of medical evidence in such cases;

> "From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic [2008] KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
>
> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

30. This being the case, I find that the medical evidence adduced at the trial court was not sufficiently corroborative of the fact that the minor was penetrated. I find that other than the evidence of PW-3, there is no other evidence pointing to the appellant's culpability in the offence.

31. It is trite law that the standard of proof in criminal cases is that of beyond reasonable doubt. This has been the thread running through our criminal justice system and in order to secure a conviction, the prosecution must establish beyond any reasonable doubt each and every element of the offence. This was the holding in *Stephen Nguli Mulili v Republic* [2014] eKLR that:

> " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolmington,[1935] UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati MurwaV R, [2013] eKLR."

32. In the circumstances of the case before me, I find that the prosecution left gaps which were fatal to its case and the trial court's conviction was unsafe to the extent that the evidence on proof of penetration was not sufficiently proved. The gaps noted ought to have been resolved in the appellant's favour.

33. Having found that the element of penetration was not satisfactorily proved, I find no need to look into the remaining elements of the offence as that would be an academic exercise.

34. The upshot is that the appeal is successful to the extent that the appellant's conviction is hereby quashed and the sentence set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

**DELIVERED,DATED AND SIGNED AT KISUMU THIS 18TH DAY OF JULY 2023.**

**MWANAISHA . S. SHARIFF**

**JUDGE**