Otele v Republic (Criminal Appeal E023 of 2021) [2023] KEHC 20267 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E023 OF 2021

WM MUSYOKA, J

JULY 17, 2023

BETWEEN

FERDINAND OTELE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia RMCSO No. 86 of 2017, of 31st August 2021)

JUDGMENT

1. The appellant, Ferdinand Otele, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(4) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 25th and August 27, 2017, in Amukura Division, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of CM , a child aged 15 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.

2. PW1, CM , was the complainant. She described how she went to the home of the complainant, and spent a whole week with him and his parents, during which she and the appellant had sex. She got pregnant out of that encounter. PW2, EM, was the mother of PW1. She traced PW1 to the home of the appellant, got him arrested, and PW1 examined by a clinician. PW3, VOM, was an uncle of PW1. He was in the party that traced and found PW1 at the home of the appellant. PW4, No. 111038 Police Constable Mabwayo, was the investigating officer. PW5, Eunice Adhiambo, was the clinician who attended to PW1.

3. The appellant was put on his defence, vide a ruling that was delivered on June 22, 2021. He made an unsworn statement. He denied the charges.

4. In its judgment, the trial court found the appellant guilty.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the investigations were inadequate; the medical evidence did not link him to the offence; the conduct of the complainant did not expose her as a school going child; and the ingredients of the offence were not proved.

6. The appeal was canvassed by way of written submissions. The appellant submitted on the charge being defective; the age of the complainant; penetration; identification; and sentence. The respondent submitted around the same issues: age of the complainant, penetration, and defectiveness of the charge.

7. On the charge being defective, the appellant is concerned about section 8(4) of the *Sexual Offences Act*, which prescribes the sentence, where the victim is aged between sixteen and seventeen. His case is that the complainant was said to be 15, and so the charge should have been brought under section 8(3). That is true, but the anomaly is not fatal. The trial court can still convict, and impose sentence based on the age proved.

8. On the age of the complainant, the charge placed her at age 15. PW1 produced a birth certificate, which indicated the date of birth as February 7, 2002. Her mother, PW2, reiterated that birth date, February 7, 2002. That meant that she was 15 years plus as at the date of the commission of the alleged offence. The appellant raises the issue of age because PW5, the clinician said that PW1 was 17 at the time. Well, whatever PW5 said could not contradict the birth certificate, and the word of the mother of PW1. PW5 was not doing age assessment.

9. On penetration, PW1 said that she and the appellant had sexual intercourse over the period that she was in his house. In her oral testimony, PW5, the clinician, made no reference to penetration. However, she produced treatment notes and a P3 Form. Both documents indicate little that would point towards recent sexual activity. It was noted that the labia majora and labia minora were normal, there was no discharge from the vagina, and no blood and no tears. The hymen was said to have had been already broken, but was not indicated whether that was recent. PW1 had described the appellant as her boyfriend. It would suggest that PW1 was sexually active. The intercourse was not forced, as it was consensual and so no tell-tale signs were left. PW1 was the victim of the offence. She testified that her vagina was penetrated on several occasions during the 1 week that she was with the appellant. PW2 and PW3 traced her to the house of the appellant. That ought to be adequate to found basis for the conclusion that there was sexual intercourse, which, of course, involved vaginal penetration.

10. On identification, PW1 said that she was with the appellant for a week. He was a neighbour, and she described him as her boyfriend. Identification should not be an issue. It was a case of recognition. PW2 confirmed that they were neighbours. PW2 and PW3 said that PW1 and the appellant were found together, in the house of the appellant.

11. On sentence, the trial court imposed 15 years. That was on the higher side. PW1 took herself to the appellant's house. Although the fact of consensual sex with a minor is not a defence or excusable, but it is something that could be taken into account at sentencing. Secondly, it was said that he was a student, at [Particulars Withheld] Secondary School. The court disbelieved him. The issue was raised when an application for reduction of bond was made. It should have been revisited after conviction. If the appellant was a student, and therefore a young person, that ought to have been considered in his favour. The trial court treated the issue rather casually. Justice cuts both ways, it caters for both the victim and the perpetrator, and greater consideration should be given where the perpetrator is a young person.

12. I am persuaded that the appellant was properly convicted, as the evidence against him was strong. However, the trial court should have done better when it came to sentencing. It had been suggested

that he was a young person. That should have been investigated, through a pre-sentence report. I shall, and hereby, affirm the conviction. I shall, however, have to interfere with the sentence, but before I do so, let the Busia County Director of Probation and Aftercare Services look into the antecedents of the appellant, interview the family of the victim and the community, and file a report within 30 days. The matter shall be mentioned thereafter, for final orders. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 17TH DAY OF JULYJ 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Ferdinand Otele, the appellant, in person.

Mrs. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.