Shiverenje v Republic (Criminal Appeal E052 of 2022)
[2023] KEHC 20372 (KLR) (21 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E052 OF 2022

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

BENARD KASSIM SHIVERENJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. DA Alego, Senior Principal Magistrate, SPM, in Kakamega CMCRC No. 5 of 2019, of 14th September 2021)

JUDGMENT

1. The appellant, Benard Kassim Shiverenje, had been charged before the primary court, of the offence of attempted defilement, contrary to section 9(1), as read with section 9(3), 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 30th June 2019, in Kakamega East Sub-County, within Kakamega County, he intentionally attempted to cause his penis to penetrate the vagina of II, a child aged 9 years. The appellant denied the charges, on 4th July 2018, and a trial ensued, where 3 witnesses testified.

2. PW1, the victim, was the complainant. She described how she was sleeping when the appellant came, beat her on her back with a stick, after which he put a stick in her vagina. PW2, Peter Ayoyi, was the clinician who attended to PW1, 2 days after the incident. He noted a bruised hymen and brownish discharge on the hymen. A laboratory test revealed pus and inflammation on the vagina. He concluded that there was sexual penetration. PW3, No. 10xxxx Police Constable Dogo Hassan, was the investigating officer.

3. The appellant was put on his defence, *vide* a ruling that was delivered on 21st October 2020. He made a sworn statement. He denied the charges. He said he had heard rumours within his locale, to effect that he had defiled a child, and he took himself to the police station.

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

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that burden of proof was shifted to him; the evidence was not exhaustively analyzed; material contradictions were not taken into account; penetration was not proved; the judgment did not comply with section 169 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya; the appellant was not informed of his right of appeal; the sentence was harsh and excessive; and the mitigation was ignored.

6. Directions were given on 28th July 2022, for canvassing of the appeal by way of written submissions. The appellant submitted in writing, while the respondent did not submit at all. In his written submissions, the appellant argues around the issue of the burden of proof being shifted to him, the failure to exhaustively analyze the evidence, arriving at erroneous conclusions, failure to comply with section 169 of the *Criminal Procedure Code*, failure to inform the appellant of his right of appeal and the right to cross-examine, and the sentence imposed was not attuned to the evidence tendered.

7. The handling of this matter was bungled from the start. I am still struggling to understand why the prosecution chose to charge the appellant with attempted defilement, and then go on to present witnesses and evidence that supported a charge of defilement. I suppose that the decision to prosecute was founded on the documents that were subsequently put in evidence at the trial, that is to say the laboratory request form, the P3 Form and the treatment notes. The laboratory results indicate presence of epithelial cells and pus cells, which suggested penetration. The treatment notes indicate that PW1 alleged that her assailant had used a hard thing to penetrate her vaginal opening, the laboratory tests reveal a bruised hymen and brownish discharge. The P3 Form notes a bruised labia majora and brownish discharge, and concludes that there was evidence of sexual penetration. The history recorded in the P3 Form is that a hard substance was inserted into the vagina of PW1. These documents are dated 1st and 2nd July 2019. The charge sheet is dated 4th July 2019. I trust that the medical records of 1st and 2nd July 2019 informed the charge. If these medical records indicated that the child had been defiled, as there had been penetration, why did the prosecution decide not to charge the appellant with the offence disclosed in the medical records, that is to say defilement, and instead charged the lesser offence of attempted defilement.

8. It is ludicrous that when the matter came up for oral hearing, and both PW1, the complainant, and PW2, the clinician, testified, their narratives were in line with the medical records, that the vagina of PW1 was penetrated, and the documents, that is those that I have discussed in the foregoing paragraph, were presented as exhibits, then PW3, the investigator, comes in to say he conducted investigations, and decided to charge the appellant with attempted defilement. What investigations did PW3 conduct? Did he ever read the medical records that were to be used in the case, which stated categorically that PW1 had been defiled? Was he not the one who prepared PW1 and PW2 to testify, and was he not aware of the story that the 2 were prepared to tell the court? The evidence tendered by PW1 and PW2 was completely at variance with that presented by PW3. They gave narratives about defilement, while he was presenting a case of attempted defilement. Either he had no clue of what he was doing, or he was up to some mischief. I also find it surprising that the prosecutor, who handled the matter, could present before court witnesses who were to present such a disjointed case. Once PW1 and PW2 testified, and brought out evidence establishing a case of defilement, rather than attempted defilement, the prosecutor should have taken time to rethink her strategy, instead of presenting an investigating officer, who was going to give a narrative completely different from that presented by his principal witnesses, PW1 and PW2.

9. The court also bungled this. The charge that the appellant faced was attempted defilement. After PW1 and PW2 testified, the trial court, if it was clear of what it was doing, would have noted that the evidence

presented that far did not support the charge that was being tried, and should have pointed out that to the prosecution, instead of allowing the State to plough on with a flawed process, wasting precious judicial time. In the judgment, the trial court made no effort to connect the evidence presented with the charge that the appellant faced. That happened because the trial court did not analyze the evidence, in an effort to try to align it to the charge. The questions it should have asked are whether the evidence on record disclosed the offence of attempted defilement. The issues framed, in the judgment, have absolutely nothing to do with the charge of attempted defilement. The court framed issues around PW1 being sexually molested, instead of asking whether there was an attempt to defile her, for that was the charge before the court.

10. The charge is the pleading in criminal cases. The evidence presented should be geared to proving that charge. The issues framed must be on the charge, not the evidence tendered, for parties are bound by their pleadings, and so the issues to be determined must be grounded on the pleadings. The issues framed in the judgment were not drawn from the pleadings, but from the evidence presented, which did not prove the charge of attempted defilement, with the result that the appellant was convicted of an offence other than the one that he was charged with. The trial court made no finding at all on whether the offence of attempted defilement had been established against the appellant. Instead, it made a finding that the offence of sexual molestation and physical assault were proved, yet the appellant was not charged with such. No effort was made to apply section 179 of the *Criminal Procedure Code*, if it applied at all, to salvage the situation.

11. PW1 did not get justice. The medical records and the narratives from her and PW2, point to a plausible case of defilement. If the police, the prosecution and the court had handled this well, there would have been positive outcome. However, as it is, the trial was botched. The crime that was committed against PW1 was not charged, and the appellant was subjected to a trial on facts other than those alleged in the charge that he faced.

12. Let me now advert to the grounds. It is submitted that the burden of proof was shifted to the appellant. Why? Because, in the judgment, the trial court pointed out that the appellant omitted to call individuals that he mentioned in his defence statement, and further that he did not cross-examine the witness who presented medical evidence, who he claimed was his political rival, on that rivalry. The decision in *Dorcas Jemutai Sang v Republic* [2018] eKLR (Waki, Mwera & Murgor, JJA), was cited to support that contention. The portion of the judgment where that shifted allegedly happened is pointed out as the following:

> " The Court takes judicial notice that the accused did not bring his uncle nor any of the family members whom he mentioned in his defence. He equally recorded a concrete statement for his submission. However, it's an irony that he did not wish to call some of his witnesses that he mentioned in his statement. DW2 who was his only witness gave unsworn evidence and he testified that he does not know why he is in court. accused blamed political rivalry with the medical expert who gave evidence yet he did not query him on the political rivalry during his cross examination. He further testified that this was a frame up against him. Ironically accused does not mention at all who frames him as he alleges. He neither refutes or owns up to having been the assailant herein."

13. I do not agree with the appellant that burden of proof was shifted to him. It would appear that the appellant does not appreciate that there are 2 burdens of proof. There is the legal burden of proof, which never shifts, and remains throughout on the prosecution. That is the burden to prove that the accused person is guilty of the charge that he faces. There is no burden on the accused to prove his innocence. The second burden is evidential, rather than legal. This one shifts. Whoever asserts a certain

position, bears the evidential burden to prove it. In this case, the appellant asserted that he had a defence to the allegations against him, and he made certain assertions, which he needed to prove by way of evidence. He testified, in his defence, about his uncle telling him of rumours that he had defiled a child. The burden to establish if such rumours existed was on him, and it did not shift to the prosecution. The prosecution did not make any reference to any such rumours, and it would have been up to whoever brought out the allegation to adduce evidence to support it. On the political rivalry, again it was the appellant raising the issue, the burden was on him to establish existence of that rivalry, which he could do by subjecting PW2, the alleged rival, to cross-examination on that. It should not be forgotten that these assertions of fact were made for the first time at the defence stage, after the prosecution had closed its case, and the prosecution would have had no chance to call evidence to discount them. I am not persuaded that the trial court shifted the legal burden of proof to the appellant. All the trial court did was to point out that the appellant had not discharged his evidential burden, to support the assertions that he had made in his defence.

14. On the evidence not being exhaustively analyzed. I agree, there was no exhaustive analysis of the evidence. What the trial court purports to be an analysis is nothing more than a reiteration of the evidence adduced. The charge was that of attempted defilement. No effort was expended to establish whether the tendered evidence supported the charge of attempted defilement. Did the conduct of the appellant, from the evidence adduced, point to an attempt to defile the minor? What are the elements of attempted defilement? Did the evidence tendered bring the matter within the threshold of attempted defilement? There is no analysis of the evidence, in the judgment, around the matter of attempted defilement.

15. On contradictions, the appellant points at 3 statements made by PW1 and PW2. I have read and re-read the 3 statements, and I see no contradiction. PW1 was clear that her vagina was penetrated by something that she said was a stick. PW2 was also clear that there was evidence of sexual penetration. The mere fact that the torn clothes, mentioned by PW2, were not produced in court is not demonstration of a contradiction or inconsistency. My own reading of the trial record revealed some inconsistencies or contradictions, but I did not find them as critical, in terms of going to the core, or the heart of the matter. Contradictions and inconsistencies are material only to the extent that they touch on the core of the case. Not every other contradiction or inconsistency is material. It is the extent of it that matters. See *John Cancio De SA v VN Amin* [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ), *Joseph Maina Mwangi v Republic* [2000] eKLR (Tunoi, Lakha & Bosire, JJA), *Twehangane Alfred v Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ. Engwau & Byamugisha, JJA), *Dickson Elia Nsamba Shapwata & another v The Republic*, Cr. App. No. 92 of 2007(unreported) and *Philip Nzaka Watu v Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA).

16. The next consideration is with respect to section 169 of the *Criminal Procedure Code*. Section 169 is on the contents of the judgment, being the issues for determination and the reasons, the law under which the accused is convicted and sentenced. The submissions by the appellant, appear to centre around the analysis of the evidence, as comes out in the decision cited, of *Charles Wanyonyi & thers v Republic* Kisumu Criminal Appeal No. 134 of 2004 (unreported). I have dealt with that above, and I need not revisit it. Save to say, that section 169 was not complied with, with respect to specifying the provisions of the law under which the trial court convicted the appellant. The court did not advert to the charge of attempted defilement, and focused on sexual molestation, yet when it convicted it did not indicate whether the conviction was for attempted defilement or for sexual molestation. Anyhow, to the extent that it purported to convict him under the "principle charge," I think it was meant "principal charge," I believe there was no non-compliance, for the principal charge was of the offence created under section 9(1) of the *Sexual Offences Act*. The trial court was mixed up in the manner it handled the matter, but

the judgment is clear that the conviction was under section 9(1) of the *Sexual Offences Act*, which was good enough.

17. On the appellant not being informed of his right to appeal, I will state that that is not fatal, and was cured when leave to appeal out of time was granted. What is more fundamental is the alleged failure to afford him an opportunity to cross-examine PW1. I have looked at the record, and noted that when PW1 testified on 23rd October 2019, the appellant did not cross-examine her. The record is silent on whether he was given the opportunity, but decided not to cross-examine, but I shall presume that that chance was not given. That contrasts with when DW2 was presented as a witness, it is indicated that cross-examination by the prosecution was nil. A similar recording should have been made with respect to PW1, if the appellant had chosen not to cross-examine her.

18. Article 50 of *the Constitution* of Kenya, states the fair trial principles, and that in Article 50(2)(k) is about adducing and challenging evidence. Upon being placed on his defence, the appellant was afforded a chance to adduce evidence, which he did, by taking to the witness, and calling a witness. The right to challenge the case by the prosecution could take the form of presenting defence evidence, and cross-examining the witnesses presented by the prosecution. Cross-examination of prosecution witnesses amounts to confronting the accusers. The accusers include children of tender years, where they are presented as witnesses. In the instant case, the principal accuser was PW1. She was a child of tender years, but that did not absolve her from being confronted by the appellant by way of cross-examination. She was his principal accuser, and her testimony was the most critical. He had a right to challenge whatever evidence she was going to give. The fact that he was denied that chance meant that Article 50(2)(k) was not complied with. When read together with Article 2(4) of *the Constitution*, that omission rendered that trial unfair and invalid, and no conviction and sentence could be founded on it in the circumstances. See *Kato Sula v Uganda* (Criminal Appeal No. of 2000) [2001] UGSC 3 (12 January 2001)(Kanyeihamba, Karokora, Mukasa-Kikonyogo, Mulenga & Tsekooko, JJSC), *Angechel Lotip v Republic* [2017] eKLR (Musinga, Kairu & Murgor, JJA) and *Gailord Yambwesa Landi v Republic* [2019] eKLR (Musinga, Gatembu & Murgor, JJA).

19. On the sentence being harsh and oppressive, I note that under section 9(2) of the *Sexual Offences Act*, the penalty for attempted defilement is imprisonment for a term not less than 10 years. The trial court awarded a term below that, 7 years, no doubt guided by *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No. E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). The child was minor of tender years, 9 years at the date of the commission of the offence. The sentence imposed fitted the offence charged.

20. I find merit in the appeal herein, on 2 grounds. The first is that the evidence presented did not support the offence charged, but a much more serious offence, defilement. Section 179 of the *Criminal Procedure Code* cannot salvage the situation, for it applies only to where the accused is charged of a more serious offence, in respect of which the evidence falls short, but the said evidence establishes a lesser offence. Where charged with the lesser offence of attempt, but the evidence establishes the more serious offence, the one allegedly attempted, section 179 would not apply. Consequently, the trial court should have acquitted the appellant. However, the trial court did not address its mind at all to the question as to the charge of attempted defilement. Secondly, the failure to grant the appellant a chance to cross-examine PW1 was fatal. Consequently, I do hereby find that there was a mistrial, and I hereby quash the conviction of the appellant in Kakamega CMCCRC No. 59 of 2019, and I set aside the sentence imposed upon him.

21. Should a retrial be conducted? The mandate to decide on whether to prosecute or not lies with the respondent. I shall limit myself to ordering that a retrial of the appellant be conducted in Kakamega

CMCCRC No. 59 of 2019. Should the appellant be in custody, the prison authorities shall hand him over to the police for that purpose. Should he be on bond pending appeal, his bond shall stand cancelled, and he shall be placed in custody, for subsequent production before the court in Kakamega CMCCRC No. 59 of 2019, as soon as practicable, for retrial. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kadenyi, instructed by Emily & Associates, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.