Aroko v Republic (Criminal Appeal E053 of 2022)
[2023] KEHC 24042 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E053 OF 2022

RPV WENDOH, J

OCTOBER 19, 2023

BETWEEN

NELSON ODEDE AROKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. C. Maritim – Resident Magistrate in Migori Chief ____ Magistrate's Criminal Case No. E082 OF 2021 delivered on 7/42022)

JUDGMENT

1. Nelson Odede Aroko alias Baba Benji was convicted by the Hon. Resident Magistrate Migori for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. In the alternativ, e he had been charged with the offence of committing an indecent Act contrary to Section 11(1) of the *Sexual Offences Act*.
2. The particulars of the charge were that on diverse dates in the month of November 2021, at [Particulars withheld] "A: Village [Particulars withheld] Sub Location[Particulars withheld] Sub County intentionally caused his penis to penetrate the vagina of STJ a child aged ten (10) years.
3. Upon conviction, the appellant was sentenced to serve life imprisonment.
4. The appellant is aggrieved by the judgment of trial court and by the petition of appeal filed herein, he relied on the following grounds:-
    1. That the court erred by failing to comply with Article 50 (2) (g) and (h) of the *Constitution*;
    2. That the trial court erred by failing to find that the ingredients of the offence of defilement were not proved;
    3. That the trial court failed to consider the appellant's defence and mitigation.

5. The appellant therefore prays that the conviction be quashed and sentence set aside.

6. The firm of Kisera Amonde came on record for the appellant and filed their submissions on 4/5/2023 while the prosecution counsel, Allaen Mulama filed his submissions opposing the appeal.

7. This being the first appeal, this court is required to re-examine all the evidence tendered before the trial court, evaluate and analyse it and arrive at the its own conclusions. This court should however make allowance for the fact that it never saw or heard the witnesses testify. This court is guided by the decision in *Okeno vs. Republic* (1972) EA 32.

8. In support of the case, the prosecution called a total of four witnesses. The appellant was partially represented by Mr. Kisera in the trial court.

9. PW1 STJ a minor, after undergoing a voire dire examination, gave unsworn statement where she recalled that in November, 2021, she had not gone to school that day; that Baba Benji (the appellant) went and asked her why she had not gone to school and she explained that it was because A her younger brother was unwell. Baba Benji gave her 20/= to go buy 'mara moja' medicine for the brother and she bought and returned change of 10/=; made porridge for the brother, then the appellant pushed her from the door, placed her on the bed, lay on her, that he put his thing for urinating into hers and when she tried to scream, he ordered her to be quiet. He tried to do it a second time but she managed to move. He told her to take the medicine and keep the 10/= and not tell anybody. She did not tell anybody till after many days when she told her mother what ha d happened to her and she was took her to Baba Benji who denied committing the offence. She was later taken to hospital by one Dorothy.

10. PW2 BA, a village elder from [Particulars withheld] Area recalled that on some date in November 2021, she heard some children talking saying that a child by name 'STJ had been defiled. She called the child and asked what happened and she narrated to her how the appellant defiled her; that she reported to the Assistant Chief who referred her to the police station and the mother took her to the hospital.

11. PW3 Caroline Onyango, the clinical officer from Uriri Sub County Hospital who examined the appellant found the hymen to be partially broken.

12. PW4 PC (W) Eunice Akoth of Uriri police station the investigating officer in this case received a report of defilement on 30/11/2021 and on 3/12/2021, the appellant was arrested by the Assistant Chief and taken to the police post. She summoned the complainant, interrogated her and she named the appellant who was their neighbour as the culprit. PW4 escorted the complainant to hospital where the complainant was examined and P3 was filled.

13. When called upon to defend himself, the appellant opted to testify on oath. He denied committing the offence but admitted that he was a neighbour of the complainant's mother. He denied going to the neighbours toilet because he has his own toilet; that he bought the land on which he lives in 2019; that the seller sent for him and complainants mother and told them she wanted to be there but they refused; that the sellers wanted their land back; that Hellen agreed to bury person on the land; that they were on good terms and did not know they were planing to accuse him falsely. He linked the land issue to the case and that is why the date of the incident is not indicated and the cancellations in the P3 form.

14. Mr. Kisera submitted that the P3 form supplied to the appellant did not contain part C which is the most relevant in a P3 form and that the whole P3 form was produced in court but contained cancellations and additional information added using a different pen but they were not countersigned by the maker nor were they dated; that the cancellations are prejudicial to the appellant in that in the original form there were no injuries found on the labia majora and minora yet after the cancellations, the new words inserted indicate that the hymen was partially injured that the hymen was partially

broken; that the one who inserted the words is unknown; that gaps did not show the approximate age of the injuries and the treatment notes did not indicate when the child was attended too. Counsel urged that the medical evidence was not reliable or safe to sustain a conviction. Counsel urged the court to consider the defence that the appellant was framed because he was an immigrant in the area. Counsel urged that the prosecution had failed to prove the case to the required standard of beyond reasonable doubt.

15. In opposing the appeal, the prosecution submitted that though the change indicated that the complainant was ten (10) years old, a birth certificate was produced which showed that the complainant was eleven (11) years and eight (8) months and fourteen (14) days as if 1/11/2021 which was still within the delimitation of age set out under Section 8 (2) of the *Sexual Offences Act*. Counsel relied on the case of *Mwalango Chichoro Mwajembe vs. Republic* (2016) eKLR on how age may be proved in a Sexual Offences charge. See also *Fappyton Mutuku vs. Republic* (2014) eKLR.

On penetration

16. Counsel relied on the case of *Mark Oiruri Mose vs. Republic* (2013) eKLR in which it was held that Penetration need not be complete. It was further submitted that PW1 narrated how the appellant inserted his thing for urinating into hers for urinating which evidence was corroborated by the testimony of PW3 who found that the hymen was partially broken.

As regards the identity of the perpetrator,

17. It was submitted that the appellant was a person well known to the complainant and hence the offence was proved.

As to whether the defence was considered.

18. It was submitted that the court in its judgment considered the child's demeanor found no reason to doubt her testimony and relied on Section 124 of the *Evidence Act*.

19. As regards the P3 form, it was noted that counsel represented the appellant in the trial court and he never took issue with it; that it should have been canvassed at that stage; that in any event, the clinical officer who is the maker explained the discrepancies during her evidence and cross -examination.

20. As regards the issue that the specific date was mentioned in the charge sheet, as to when the offence occurred; it was submitted that the charge was clear that it was on diverse dates in a specific month of November 2021. Counsel was of the view that it was in line with Section 134 *Criminal Procedure Code* on drafting of changes.

21. On whether Article 50 (2) (g) and (h) were violated, it was submitted that from the on set, the appellant indicated that he had counsel and counsel came on record after the second witness had testified and counsel never raised applied to recall the two witnesses and is therefore estopped from challenging the proceedings.

22. As regards sentence, counsel submitted that the case of *Francis Karioko Muraatetu & Others vs. Republic* (2021) eKLR did not declare all relating sentences to be unconditional; that in *Republic vs. Ruth Wanjiku Kamande* criminal appeal No. 102 of 2018 the court still sentenced the accused to death for murder which the court of Appeal upheld and hence the Muruatetu case did not declare the death sentence unconstitutional but the mandatory death sentence that took away the court's discretion in sentencing. He concluded that the conviction and sentence were sound and should not be disturbed.

23. I have duly considered the grounds of appeal, all the evidence tendered in the trial court and the rival submissions. Though Mr. Kisera did not submit on his ground, I find it prudent to first consider whether or not Article 50 (2) (g) and (h) was violated. Article 50 of the *Constitution* guarantees an accused's right to fair trial. Article 50 (2) (g) and (h) provide as follows:-

> " 50(2) Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

24. Under Sub Article 2 (g) the court is under a duty to inform an accused of his right to counsel of his own choice; the court is required to inform the accused of this right at the earliest opportunity. Under Sub Article 2 (h) the court is required to inform an accused of his right to counsel to be assigned by the State at State expense if substantial loss will result.

25. First, I wish to note that the court's record clearly shows that the court explained Article 50 (2) to the Appellant. It is clear that the appellant requested to talk to his lawyer on 28/2/2021 on the date the complainant's evidence was taken. Despite the fact that the evidence of PW1 and PW2 was taken in absence of counsel. Counsel never applied to recall the witnesses or raise the issue of violating Article 50 2 (g) and (h) of the *Constitution*.

26. Sub Article 2 (h) requires that an accused be availed counsel at State expense only where substantial injustice will result. It is therefore not an automatic right. So far, only persons charged with murder and children in conflict with the law are automatically entitled to counsel assigned by the State at State expense. For others, one must demonstrate that substantial injustice is likely to result. Instances where substantial injustice might arise was considered in the case of *Karisa Chengo vs. Republic* (2017) eKLR which are for example, complexity of the case, the severity of sentence, ability of the accused person to pay for his own legal representation etc. In this case the appellant was able to pay for his own counsel hence substantial injustice would not result. I find that the said provisions were not violated as alleged.

Whether the offence of defilement was proved:

27. In a different charge, the prosecution has to prove the existence of the following ingredients:

    1. Proof that the victim is a minor;
    2. Proof of penetration;
    3. Proof of the identity of the perpetrator.

Identity of the perpetrator

28. Starting with the last ingredient, the same is not in dispute. The complainant identified the appellant as Baba Benji. The appellant admitted that they are immediate neighbours with the complainants mothers house. They knew each other well.

Age of the complainant

29 The complainant (PW1) was a minor. The court observed her and took PW1 through voire dire examination and determined that she was not fit to testify on oath but gave unsworn evidence.

30. In the case of *Mwalango Chichoro* (*supra*) the court gave guidance on how age can be proved in a defilement case when it said:-

> The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.

31. In the Uganda case of *Francis Omuroni vs. Uganda* Criminal Case No. 2 of 2002 the court observed:-

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

32. PW1 told the court that she was ten (10) years old. However, she identified her that she was born on 18/2/2020. It means as of November, 2021 she was eleven (11) years eight months. The appellant was charged under Section 8 (1) as read with Section 8 (2) of *Sexual Offences Act*. Eleven (11) years eight months still fall within the delimitation of her age under Section 8 (2) of the *Sexual Offence Act*. The court erred in finding that the complainant was only ten (10) years old. However, both ten (10) years and eleven (11) years still fall within the same age brackets under Section 8 (2) of the *Sexual Offences Act*. I am satisfied that the complainants age was proved to be about ten (10) years and fell within Section 8 (2) of the *Sexual Offences Act*.

Whether there was penetration

33. As with most sexual offences, there is only one witness to the event, that is, the complainant. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

34. In *Mark Ouiruri Mose* (*supra*) the court held thus as regards penetration.

> "... in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ...."

35. PW1 clearly narrated how the appellant put her on the bed, lay on her and inserted his thing for urinating into hers and she felt pain; that the appellant had sent her to buy medicine for her brother before luring her to the bedroom when she returned change. Her testimony was not shaken at all. The

complainant did not reveal this happening to anybody till sometime later. It is not known how long she had kept silent with the information but the incident came to light about 29/11/2021 when PW2 got wind of it and took action. PW1 told the court that the incident had occurred in November. It therefore means that it had happened at most three weeks earlier if the incident had taken place three weeks earlier. It is therefore unlikely that any injuries may have been found.

36. The defence has taken issue with the cancellation on the P3 Form. During her testimony PW3 the author of the P3 form explained that she made the cancellations which were corrections to align it with the PRC form and treatment notes. She is the same person who filled the PRC forms when she first examined the complainant. The P3 form is the last document to be filled and the information in the two earlier documents i.e. the PCR form and treatment notes tally, that the hymen was partially torn. I am satisfied with PW3's explanation that she had made a mistake and corrected it though she did not countersign. She was the maker of the document. PW1 narrated in detail what the appellant did to her, that he put his penis in her kitu ya kukojoa – vagina. The medical evidence goes to support her evidence that there was penetration. As held in the *Mark Ouiruri Case* (*supra*), the penetration need not be complete as seems to have been the case here.

As to the identity of the assailant:

37. The trial court observed the demenour of the complainant and believed her to be truthful. PW1's narration of the events of the day were convincing. Her testimony was not shaken during cross examination despite the fact that she was a child only aged ten to eleven years. I have no reason to depart from the trial court's finding on its observations.

38. As for the defence, it was alleged by the appellant that there was a land dispute between the appellant and the complainant's mother. However, there is no evidence that PW1 was aware of any land dispute or that she was involved in it. The said land dispute seems not to have been known to the village elder the whistle blower (PW2). Besides, at the time of the occurrence, the complainant's mother was said to be living in Nairobi and the complainant lived alone with her siblings. The allegation of dispute was an afterthought and unbelievable. The appellant must have taken advantage of the complainant mother's absence to abuse the child. In the end, I find the defence to be unconvincing. The complainant's testimony was cogent and believable.

39. I find that the prosecution proved it s case against the appellant beyond reasonable doubt. The conviction is sound and I affirm it.

On sentence:

40. The appellant was sentenced to serve life imprisonment. Having considered the circumstances of the case, and though the offence is very serious, being a first offender, I find the sentence to be on the higher side. I hereby set it aside. I substitute it with thirty (30) years imprisonment. The sentence will be effective from the time of arrest. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF OCTOBER, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino Prosecution Counsel

Mr. Kisera for appellant

Appellant Present

Ms. Emma/ Phelix –Court Assistant