Aliwa v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 23377 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E010 OF 2022

GMA DULU, J

OCTOBER 11, 2023

BETWEEN

FREDRICK ALIWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence in Sexual Offence Case No. 13 of 2019 at Voi Law Courts delivered on 7th May 2020 by Hon. D. Wangeci (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of offence were that on 8th March 2019 at around 0900hours in Voi Sub-County within Taita-Taveta County intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of MQA a girl, aged 12 years.

3. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and place intentionally touched the vagina of MQA a girl aged 12 years with his penis.

4. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to twenty (20) years imprisonment.

5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-

    1. That the trial Magistrate erred in law by convicting and sentencing him yet failed to find that his constitutional right to a fair trial under Article 50(g) and (h) were violated.

    2. The learned trial Magistrate erred in law and in fact by failing to find that the prosecution did not discharge its duty pursuant to Section 107 of the *Evidence Act*.

    3. That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.

6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.

7. This being a first appeal, I am bound to be guided by the legal principle that as a first appellate court, I am duty bound to evaluate and consider all the evidence on record afresh and come to my own independent conclusions and inferences – see Okeno =Versus= Republic [1972] EA 32.

8. At the trial, the prosecution called five (5) witnesses. On his part the appellant tendered sworn defence testimony and called one witness DW2.

9. The appellant raised both technical and substantive grounds of appeal. I will start with the technical ground which is in relation to fair hearing.

10. On this ground of fair hearing, he states that he was denied the right to legal representation under Article 50(2)(g) of *the Constitution*.

11. Perusing through the proceedings, I find no point at which the appellant enquired about legal representation, and was denied the same by the trial court.

12. There is also no indication on record that the appellant was not aware that he had the constitutional right to be represented by advocate. Thus the fact that the appellant was not informed by the court that he could engage counsel was not fatal to the proceedings nor did it amount to violation or denial of his constitutional right to legal representation or fair hearing. I dismiss that ground.

13. The next ground is on proof of the case beyond reasonable doubt. In this regard, courts have held that the principal elements of defilement for which the appellant was convicted are three, first the age of the victim (complainant). Second, proof of sexual penetration. Thirdly, the identity of the perpetrator.

14. With regard to the first element of the age of the complainant, PW1 FDM the aunt of the complainant, stated in cross-examination that complainant was 12 years old and in Standard 6. PW3 the complainant stated that she was 13 as at the time of testifying in court. In the P3 form it is indicated that she was 10 years old. No birth certificate or other document on her age was relied upon. However, the appellant knew the complainant well as his primary school pupil.

15. In my view, the prosecution proved beyond reasonable doubt that the complainant was 12 years as at the time of the incident since both the appellant and Magistrate saw her testify, and did not doubt the age, and the appellant was also the teacher of the complainant.

16. Was sexual penetration proved? I note that the medical evidence on record is that the hymen of the complainant was broken and not long ago. I note also that PW1 testified that the incident occurred at 5p.m; as informed by the complainant, while PW3 the complainant, in her sworn evidence, stated that the sexual penetration occurred at 9:30p.m. This was a big difference in the time of the incident. Nancy and Benjamin, both pupils who were said to be with PW3 slightly before the incident, were not called by the prosecution to testify in court and no reason was given by the prosecution for that default.

17. On the same sexual penetration, PW2 PI a teacher at [Particulars Withheld] School Voi, stated that the complainant merely complained that her skirt was lifted, and that the appellant admitted lifting the skirt.

18. In my view, since there was no evidence of spermatozoa, and the complaint of the complainant to PW2 was for lifting the skirt, and since there is material contradiction of time of incident between PW1 and PW3, and crucial witnesses on the time of incident were not called to testify, I find that penetration of a sexual nature was not proved, but lifting of the skirt of the complainant was so proved.

19. Was the appellant the culprit? On this element, the appellant admitted in his sworn defence that he lifted the skirt of the complainant to administer corporal punishment to her.

20. That lifting of the skirt to administer corporal punishment in my view did not amount to the alternative count of indecent act, as the particulars of the charge relate to touching the complainant's vagina with his penis, which was not proved.

21. In my view, if the appellant was charged with inflicting injury on the complainant, he could be convicted of assault under Section 251 of the *Penal Code* because he admitted imposing corporal punishment on the complainant.

22. However, in the present case, the appellant was not charged or defending himself for any assault or a similar offence, thus it would be contrary to the principles of natural justice and fair hearing under Article 50 of *the Constitution*, to convict him of assault. I will thus allow the appeal since penetration of a sexual nature, or touching of the vagina of the complainant was not proved beyond reasonable doubt.

23. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF OCTOBER 2023 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Ms. Ondeyo for State