Chalo v Republic (Criminal Appeal E031 of 2022)
[2023] KEHC 23309 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E031 OF 2022

GMA DULU, J

OCTOBER 11, 2023

BETWEEN

JONATHAN MUSYOKI CHALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 3 of 2006 at Taveta Law Courts delivered on 27th August 2021 by Hon. C. L. Adisa (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's court at Taveta with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of offence being that on different dates between the months of May and June 2020 in Taveta Sub-County within Taita-Taveta County intentionally and unlawfully inserted his penis into the vagina of V.W. a girl child aged 17 years.

3. In the alternative, he was charged with indecent act contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that between the same different dates and at the same place intentionally and unlawfully touched the vagina of V.W. a girl aged 17 years.

4. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to fifteen (15) years imprisonment.

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

    1. That the trial Magistrate erred in law and facts by relying on three ingredients of defilement (age, penile penetration and identification) that were not proved beyond reasonable doubt.

2. That the trial Magistrate erred by failing to undertake analysis of the appellant's defence without considering the defence of alibi thus constituting a breach of the rules of natural justice.

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 have to be guided by the principle that I am duty bound to evaluate 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 four (4) witnesses. The appellant on his part tendered sworn defence testimony and did not call any witness.

9. PW1 described as V.M (minor) was VW, the complainant. She stated that she voluntarily had sexual intercourse a number of times with the appellant. She relied on a birth certificate in which the date of birth was entered as 14th March 2004. She stated in evidence that appellant was a neighbour.

10. PW2 MM testified that he was the father of the complainant, who became unwell and was taken to hospital, only for a report to be received that complainant was pregnant. According to this witness, the complainant identified the appellant as the culprit. He also confirmed the date of birth of PW1 the complainant.

11. PW3 George Ombayo a Clinician at Taveta Sub-County hospital stated that the complainant was established to be 16 weeks pregnant. PW4 PC Irene was the investigating officer who re-arrested the appellant who had been arrested allegedly for another case of defilement. She produced the complainant's birth certificate.

12. On his part, the appellant testified as DW1 and said that the allegations levelled against him were due to an existing family grudge, and also denied impregnating the complainant.

13. Having re-considered all the evidence on record, I am of the view that as was found by the trial Magistrate, the prosecution proved beyond reasonable doubt that the complainant PW1 was 16 years at the time of the incident. Though the charge talks of 17 years, the age proved was 16 years.

14. With regard to the second element of penetration of a sexual nature, with the unchallenged evidence of advanced pregnancy of the complainant PW1, and taking into account that the trial Magistrate must have seen the physical appearance (pregnancy) of PW1, I have no doubt that the prosecution proved beyond any reasonable doubt that penetration of sexual nature had occurred on the complainant.

15. Turning now to the third element of the culprit, the evidence of PW1 is the only evidence connecting the appellant with the alleged offence. Such evidence of a single victim of sexual offence witness if believable and so believed by a trial court on reasons to be recorded, can sustain a conviction. This is anchored in statute under the provisal to Section 124 of the *Evidence Act* (Cap.80).

16. In the present case, in my view, the evidence of PW1 on this element is not believable as a key witness mentioned by her by the name Mwajuma, whom PW1 stated that she found her and the appellant together, on one of the sexual liaison missions, was not called by the prosecution to testify in court, and no reason was given by the prosecution for such default.

17. In my view, the failure of the prosecution to call this crucial witness Mwajuma to support the intimate nexus between PW1 and the appellant, made the evidence of PW1 unbelievable, as none of the other witnesses testified to any close or intimate friendship between the appellant and PW1.

18. On that account alone, I find that the prosecution did not prove beyond reasonable doubt that the appellant had sexual intercourse with the complainant PW1. This appeal will thus have to be allowed.

19. 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 AT VOI IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant – present

Ms. Ondeyo for State