Lengunyiki v Republic (Criminal Appeal E077 of 2022)
[2024] KEHC 14116 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E077 OF 2022

AK NDUNG'U, J

NOVEMBER 13, 2024

BETWEEN

TARGAT LENGUNYIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offence Case No.035 of 2022 – Hon. V. Masivo, SRM)

JUDGMENT

1. The Appellant, Targat Lengunyiki, was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on 21st day of May 2022 in Laikipia County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of RP, a child aged 16 years using his penis. After trial he was sentenced to serve 15 years imprisonment.
2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal. The appeal is based on the following grounds;
    i. That the Learned Trial Magistrate erred in matters of law and fact by failing to note that the appellant herein has no previous records.
    ii. That the Learned Trial Magistrate erred in matters of law and facts by not appreciating that the prosecution did not prove their case beyond reasonable doubt.
    iii. That the Learned Trial magistrate erred in matters of law and fact by failing to note the appellant was not placed squarely at the scene of crime.
    iv. That the Trial Magistrate erred in matters of law and fact by not noting that the appellant herein was not examined together with the complainant.

v. That the sentence meted out upon the accused was harsh and excessive for a first offender.

vi. That the appellant prays to be present during the hearing of this appeal in order to adduce more grounds and may this appeal be given the earliest date possible.

vii. That these grounds have been written in the absence of the trial proceedings and judgment.

viii. That he pray this appeal to succeed, sentence quashed and he be set at liberty.

3. The appeal was canvassed by way of written submissions.

4. This is a first appeal and in line with the law as set in Okeno vs Republic, it is the duty of this court to reevaluate the evidence on record and reach its own findings thereon. A short recap of the evidence thus becomes necessary.

5. PW1 gave sworn evidence, a voir dire examination having been done satisfying the court that she understood the nature and meaning of oath. It was her evidence that the Appellant invited her to his home to spend a night. In the night, he did "tambia Mbaya". She stated that the Appellant undressed and asked her to undress 'alafu akanifanya". 'Alinifanyia sex". He used his private part.

6. She added she was later examined by a doctor and on cross examination, she said she spent two days at the Appellant's.

7. PW2 said that PW1 went away to look for casual work only to return on the 4th day. PW1 stated that she had been at the Appellant's. Matter was investigated by police. PW1 was taken to hospital.

8. PW3 examined the PW1. There was no injury on her genitals. The hymen was old broken. He concluded from history and lab results that there was evidence of penetration.

9. PW4 told the court that the Appellant was arrested in the farm after he was identified by the complainant. PW4 produced the age assessment report in respect of the complainant.

10. The Appellant gave a sworn statement. He said he was a security guard. On the 21/5/22 while at his workplace a girl who was a stranger appeared. The girl asked for food and shelter. She slept in his place till morning when she left. The Appellant continued with his guarding duties and he only woke her up in the morning.

11. In his submissions, the Appellant correctly captured the 3 ingredients that must be proved in a defilement charge namely age, penetration and positive identification of the perpetrator.

12. On age, the appellant attacked the production of the age assessment report by PW4 a police officer. He asserts that it is not indicated whether the document was filled by a dentist or a clinical officer. No basis was laid on familiarity with the handwriting and the signature of the maker.

13. The appellant asserts that the medical evidence on penetration was not conclusive of penetration and further, he draws the attention of the court to the casual narration of the sexual ordeal by the complainant in the hands of a total stranger noting that there was no evidence of threat, struggle or trauma.

14. It is submitted that the court did not meet the criteria required under Section 124 of the *Sexual Offences Act* in so far as the lone evidence of a sexual victim is concerned.

15. In rejoinder, the state submits that the age of the victim was proved by the production of her birth certificate and which evidence was affirmed by the findings in the P3 form and age assessment report.

16. On penetration, the Respondent submitted that PW3 concluded after examining the victim that there was penetration. It is further urged that the provisions of Section 124 of the *evidence Act* come into play as her evidence that 'akanifanyia sex" was never challenged.

17. On identification, it is submitted that this is not in dispute as the Appellant admits that the complainant spent at his place.

18. I have had occasion to consider the evidence as recorded by the trial court. I take cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to counsels' submissions on record and the applicable law.

19. Broadly of determination is whether the prosecution proved its case beyond reasonable doubt. In making a finding on this issue, the question to be answered is whether the 3 ingredients of the offence ie age of the victim, Penetration and identification of the perpetrator were established by the evidence adduced.

20. As regards the age of the complainant, she testified that she was 16years old. PW2, the mother to PW1 testified that PW1 was not 16 years old. The P3 form produced indicated the age of PW1 as 16 years. The age assessment report produced put the age at below 18 years.

21. This court cannot help but observe that the gathering and presentation of evidence relating to the age of the complainant was casual and nonchalant. To begin with, PW1 and PW2 contradict each other on age. Secondly, the indication of the age in the P3 form is not conclusive as the clinical officer does not possess the necessary qualifications to conclusively determine age. Contrary to the submission by the Respondent no birth certificate was produced.

22. It would appear that at some stage the prosecution realized the gap in the evidence and sought from the court an order to have an age assessment done on the complainant. This request was acceded to and the result was an age assessment report by Dr. Ouko produced by PW4 as PEXH 2.

23. This in my view is where the prosecution case meets serious legal headwinds. The prosecution bore the burden to establish the age of the victim. This was a crucial component to be proved.

24. Justice Ngaah with whom I agree entirely put it succinctly in James Murimi Gichoria v Republic [2015] eKLR where he stated;

> "In my earlier decisions on this question I have always been of the humble view that conclusive ascertainment of age is certainly an issue where a person is charged under section 8(1), (2), (3) and (4) of the *Sexual Offences Act*. As earlier noted sub-section (1) of section 8 merely defines the offence of defilement but sub-sections (2), (3) and (4) thereof define the respective sentences meted out against convicts of this offence based on the ages of their victims; the younger the victim the severer the sentence is".

25. The importance of ascertainment of age in sexual offences was also alluded to by The Court of Appeal has on occasion elucidated on the importance of establishment of age of a victim of a sexual offence in a charge of defilement. In Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic. the Court had this to say:-

> Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.

26. The Court quoted with approval its own decision in Alfayo Gombe Okello versus Republic (2010) eKLR where again it commented on the age of the victim of a sexual assault; in that case it said:-

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that... "This child in court is mine aged 14 years born in 1992...The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find".

27. The court concluded that;

> " prove of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars".

28. In the instant appeal. Despite the prosecution taking the necessary step to have an age assessment done on the victim, it failed dismally when it came to production of the report. This was an expert report. The provisions of Section 33 clearly gives leeway for the production of documents/expert evidence) if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. The prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence.

29. Section 77(1) of the *Evidence Act* provides as follows:-

> " In Criminal proceedings any document purporting to be a report under the hand of a government analyst, medical practitioner..... or anything submitted to him for examination or analysis may be used in evidence."

30. The provisions of Subsection 2 of the same provision makes a presumption that the said document is genuine and the signature thereof is authentic. This provision therefore gives the trial court discretion to admit such documents as evidence subject to compliance with comply with Section 33. (See Boaz Owiti Okoth –vs- Republic [2014] eKLR, Fahim Sahim Swale –vs- Repbulic [2001] eKLR and Jamlick Gachari Mwisikiri –vs- Republic [1987] eKLR)

31. A clear reading of the law on evidence touching on expert opinion should illuminates the fact such evidence ought to be tendered by experts as provided under Section 48 of the *Evidence Act* and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar filed of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under Section 33 of the *Evidence Act* and such evidence is admissible and by dint of Section 77 (1) of the *Evidence Act*, the evidence is presumed genuine and authentic.

32. The court of Appeal in Joseph Bakei Kaswili -vs- Republic [2017] eKLR held as follows:-

> " Section 33 of the *Evidence Act* Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."

33. And in Chaol Rotil Angela -vs- Republic [2001] eKLR the Court stated;

> " A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the *Evidence Act*. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h)may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:
>
> > "Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases....."
> >
> > We must however sound a word of caution against the use of expert reports and opinions either under Sections 33 or 77 of *Evidence Act* without procuring attendance of the experts concerned to give evidence and to be cross-examined on their reports and opinions. It is desirable that an expert should attend court and explain to the court his expert opinion and the grounds upon which the opinion is based".

34. From the foregoing the production of the age assessment report by PW4 failed all legal tests. The witness was not an expert who was familiar with the handwriting and signature of Dr. Ouko. Neither was any basis laid for the production of the report as envisaged under Section 33 of the *evidence Act*. In those circumstances and following the contradictory evidence of PW1 and PW2 on age, the inconclusiveness of the P3 form and the fatality that befalls the age assessment report for reasons stated above, age was not proved.

35. This court reiterates once again on the need for investigators and prosecutors to be cognizant of the special and delicate nature sexual offences which requires meticulous handling at every stage. Justice for victims demands nothing less.

36. The cumulative effect is that there was no proof of the complainant's age. I again take refuge in the concluding paragraph by Ngaah J in James Murimi Gichoria v Republic [supra] where he stated;

> " In the case against the appellant, there was no proof of the complainant's age at least in the manner outlined by the Court of Appeal in the foregoing decisions; it follows that even if the state had proved that the appellant had defiled the complainant, it was not proved that

the appellant deserved to be convicted under section 8(3) of the *Sexual Offences Act*. I would therefore conclude that from whichever angle one looks at the prosecution case, it was not proved beyond reasonable doubt.....

37. Even though the above finding disposes of the appeal, I find it necessary to make a passing observation that from his judgement the trial magistrate demonstrated a proper appreciation of the law in respect of application of Section 124 of the *evidence Act*. That alone however is not enough to give a lifeline to the Respondent given the fatal omissions outlined above.

38. With the result that the appeal herein is wholly successful. The same is allowed and the conviction is hereby quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held under another warrant.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 13TH DAY OF NOVEMBER,2024.

A.K. NDUNG'U

JUDGE