Yunas v Republic (Criminal Appeal 22 of 2024)
[2024] KEHC 14042 (KLR) (12 November 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 22 OF 2024

DR KAVEDZA, J

NOVEMBER 12, 2024

BETWEEN

ABDUL RAUF YUNAS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 15th February 2024 by Hon. I. Kahuya (S.P.M) for Sexual Offences Case no. E005 of 2019 Republic vs Abdul Rauf Yunas)

JUDGMENT

1. The appellant Abdul Rauf Yunus was charged and after a full trial convicted for the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to serve twelve (12) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.

2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court erred in convicting him for an offence not charged.

3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).

4. The starting point would be to look at what the law states in regard to the offence in question. Section 9(1) (2) of the *sexual offences Act* provides that;

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2)A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

5. The prosecution in an offence of attempted defilement must therefore prove the other ingredients of the offence of defilement except penetration. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, and positive identification of the assailant in sexual offences is paramount.

6. The prosecution called seven (7) witnesses in support of their case. The complainant, PW1 (name withheld), stated she was 15 at the time of the incident. She recalled that on 21st December 2017, she and her cousin went for a walk at around 3:30 p.m. in the estate, where they passed Abdul Rauf the appellant herein.

7. After returning home, her cousin left, and PW1 decided to take another walk alone. When she reached the place where the appellant was seated, he signalled her to come over, and they began talking. At around 5:30 p.m., she asked to leave, but the appellant refused. He then suggested they go to his place so he could teach her to play guitar in the servant's quarters where he lived. Inside the house, the appellant undressed her and undressed himself. He then inserted his penis into her vagina. She told the court that she did not scream.

8. The complainant stated that when her aunt returned home at 6 p.m. and found her missing, she knocked at the gate without response, and then reported to the police. The police knocked at the gate of house number 2X, prompting the appellant to tell PW1 to leave his house. He took her to the back and threw her over the fence, causing an injury to her lower abdomen, where the caretaker later found her. She was taken to the police station and also taken to the hospital for examination and treatment.

9. In cross-examination, the complainant stated she and the appellant were strangers. She returned to his house after a brief walk, feeling timid. She couldn't recall the exact time spent but clarified in re-examination that she was with the appellant from around 3:30 p.m. to 5:30 p.m.

10. As discussed in the Kenya Judiciary *Criminal Procedure Bench Book* 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

> " 94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
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> 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK"

11. The complainant's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout. I therefore hold that the appellant was properly identified.

12. PW2, Dr. RC, testified that on 21/12/2017, she returned home to find her niece outside, who said PW1 was missing. The niece mentioned seeing PW1 enter house No 2X with the appellant around 3:30 p.m. PW2 informed Omwenga, and they saw the man near the gate, whom the niece identified. When confronted, he refused to speak and left. PW2, her niece, and Omwenga searched for PW1, knocking at house No 2X, where the appellant then appeared, denying any involvement.

13. After reporting to Akila Police, officers searched house No 2X but didn't find PW1. Omwenga later found PW1 outside, who said the appellant threw her over the fence when PW2 knocked.

14. PW4, Omwenga Makori, corroborated PW2's evidence. On cross-examination, he stated that he did not see the appellant throw the girl over the fence.

15. PW3, Brian Mwanzia, testified that he lives in Mugoya, South C, and had rented his servant's quarters to the appellant. When Akila Police were investigating a defilement case involving Rauf, they searched the property but did not find him. PW3 contacted the appellant, who refused to return, fearing arrest. Subsequently, PW3 was arrested and charged with aiding the appellant escape (case cr. 3919 of 2017).

16. PW3 stated that he saw the appellant with the girl in his quarters. When her mother came looking, the appellant initially denied her presence. After she went to the police, PW3 saw Rauf push the girl over the fence. The girl later returned to knock at the gate. The appellant was later apprehended in Jinja, Uganda. He maintained that he witnessed the appellant push the girl over the fence.

17. PW5, IP Godfrey Likawu, formerly of Akila Police Station, testified that on 21/12/2017, Rose Koross reported her daughter missing, with information that she was last seen entering house No 2X with a "Rasta" who denied having the girl. There he met PW4 who denied knowing the girl's whereabouts. After searching the house and servant's quarters and finding no one, they arrested PW4 for aiding a felony. At the gate, PW1 was found with caretaker PW4 who found her over the fence.

18. PW6, John Njuguna, a clinician at Nairobi Women's Hospital, reported that on 21/12/2017, PW1 presented with symptoms of genital injury. The findings made upon examination were that there were no bruises, no tears, and the hymen was torn with whitish discharge. He produced the Post Rape Care form as evidence. On cross-examination, he confirmed that the PRC form had gaps in terms of information pertaining to the victim and the procedures undertaken.

19. The P3 report on record indicated that the hymen was broken, there was however no evidence that there was penal penetration by the appellant on the on the material day.

20. PW7, PC Garithi Francis, confirmed PW5's account and stated that PW1 reported the appellant invited her to play guitar but then defiled her. When the police arrived, he pushed her over the wall to escape and fled himself. She provided PW1's birth certificate and a P3 form but confirmed no DNA or fingerprints were taken.

21. In his defense, the appellant, denied the offence, stating he was a musician. He recalled that on the date in question, he was at a friend's house in South C at 5 p.m. when PW1 approached him asking about children nearby. She returned 15 minutes later, requesting to learn guitar. He agreed and took her to Brian's guesthouse, where he kept his guitar. He claims she played for 15 minutes, and they left together through the main gate, then parted ways.

22. He said he later encountered a crying woman demanding he "produce the child," but he ignored her, not understanding the situation. He was subsequently arrested in Uganda on 18/11/2019. On cross-examination, he clarified he didn't live in the guesthouse and denied lending a jacket to PW1.

23. In view of the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.

24. On the age of the complainant, the trial court considered the birth certificate produced by PW7. The certificate indicated that the complainant was born on 31/5/2001. She was therefore sixteen (16) years old at the time of the offence. There is therefore no doubt that PW1 was a child.

25. The appellant complained that he was unlawfully convicted for an offence not charged. From the record, I note that the trial court convicted the appellant for the offence of attempted defilement yet he was charged with defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*.

26. Section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The application of Section 179 was given by the Court of Appeal in the case of *Rashid Mwinyi Nguisya and another v Republic* [1997] eKLR which it was held: -

> " In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code."

27. In my view, therefore, the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with. In this case, the trial court convicted the appellant for the offence of attempted defilement which is a minor offence to the offence of defilement. The trial court was not in error in this regard. It is clear that the appellant understood the charge against him and participated in the trial. The appellant's claim that the error resulted in a miscarriage of justice is therefore baseless, and I reject it.

28. The upshot of the above is that I affirm the conviction for the offence of attempted defilement.

29. On sentence, the appellant was sentenced to serve twelve (12) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender.

30. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I am satisfied that the sentence was excessive under the circumstances.

31. For the above reason, I hereby set aside the sentence of twelve (12) years imposed by the trial court and substitute it with a sentence of five (5) years imprisonment.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 12TH DAY OF NOVEMBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Amenya for the Appellant

Mburugu for the Respondent

Achode for the Appellant