Legei v Republic (Criminal Appeal E013 of 2021)
[2022] KEHC 10036 (KLR) (17 May 2021) (Judgment)

Neutral citation: [2022] KEHC 10036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E013 OF 2021

JN NJAGI, J

MAY 17, 2021

BETWEEN

SIMON LEPOLOS LEGEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006 and was presumably sentenced to serve life imprisonment. The particulars of the offence were that on the 17th September 2020 at [Particulars withheld] in Marsabit Central Sub-County within Marsabit County intentionally caused his penis to penetrate the anus of AB, a child aged 10 years.

2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal were that the trial court erred in law and in fact in:

    i. Convicting the appellant on the basis of uncorroborated and contradictory evidence of the prosecution witnesses;

    ii. Failing to note that there was a grudge between the appellant and the prosecution witnesses;

    iii. Failing to note that the case was not investigated to the required standard;

    iv. Failing to consider the appellant`s defence and mitigation; and

    v. Imposing a sentence that was harsh and excessive in the circumstances of the case.

Case for prosecution

3. The evidence for the prosecution was that the complaint who was PW1 in the case was at the material time a 10-year old boy. He was living with his parents, his mother PW3 and his father PW4 and his grandmother PW 2. That on the material day at around 2pm the boy was playing within the compound of their home. His grandmother PW2 was within. His mother was at her shop in Marsabit town.

4. That the appellant was a family friend to the family of the complainant. That at the stated time the appellant went to the home of the complainant. He requested the complainant to draw him drinking water. The boy entered into the house to draw him the water. The appellant followed him into the house. The boy`s grandmother saw the appellant entering into the house. The appellant then locked the door upon entering into the house. He took a piece of cloth that he wrapped around the complainant`s mouth and nose. He tied his hands from behind. He removed the boy`s clothes and laid him on the sofa set that was in the house. The appellant then removed his long trouser and inserted his penis into the anus of the boy. On finishing he untied him. He wiped him with a tissue paper that he gave to him and told him to throw it away. The boy threw it into the dustbin. The appellant threatened to kill him in case he told anyone about the incident. The appellant opened the door and left.

5. Meanwhile as the incident was going on, the complainant`s grandmother got concerned on what was going on in the house. She went and knocked the door and found it locked from inside. After the appellant went away, the boy told her what had happened. The boy`s mother came from work at 7pm and the grand mother told her what had happened. The boy`s mother enquired from the boy. He was hesitant to talk but she struck him with a cane and he revealed what had transpired. They picked the tissue paper from the dustbin. The boy`s father soon after returned home and he was upraised of the events. They took the boy to Marsabit police station and to hospital. They were issued with a P3 form and Post Rape Care form. On the following day the boy`s father looked for the appellant and led the police to Kiwanja Ndege village where the appellant was found and was arrested.

6. The case was investigated by PC Elma Wacko PW6. He escorted the boy to Marsabit County Hospital where the P3 form was completed by Dr. Arero Diha PW5. He found the boy with a normal genetalia safe for inflamed anal area. A specimen was taken that was examined in the lab but nothing was found. A tissue paper that was presented to the hospital was also examined but it did not reveal anything. The appellant was charged with the offence. During the hearing the doctor PW5 produced the P3 form and the PRC form as exhibits, Pexhs. 2 and 3 respectively. The Investigating officer produced the birth certificate of the boy as exhibit, Pexh.1. It indicated that he was aged 10 years.

Defence case

7. When placed to his defence the appellant stated in a sworn statement that the parents of the minor are members of his church. That in the church there was some money from a sponsor amounting to Ksh.10,000/. He was supposed to benefit from the money but the pastor denied him the benefit. A grudge then developed between him and them. The pastor called John Arero threatened to deal with him if he raised the issue with the sponsor.

Submissions

8. The appeal proceeded by way of written submissions. The appellant submitted that there was no corroboration to the evidence of the complainant. That the medical doctor who examined the complainant, PW6 did not find any evidence of penetration. That there was no presence of spermatozoa which meant that the subject was not defiled. The appellant relied on the case of *Chila v Republic* (1967) EA 722 where it was held that the court can only convict on uncorroborated evidence

of a child upon warning itself on the dangers of acting on such evidence. The appellant however submitted that in the absence of corroboration the court can convict under the provisions of section 124 of the *Evidence Act* where it is satisfied that the child is telling the truth.

9. The Senior Principal Prosecution Counsel, Mr. W. Ochieng, submitted on behalf of the state that the case was proved beyond reasonable doubt.

That the evidence adduced against the appellant was straight forward and consistent. That the elements of the offence were satisfactorily proven by the witnesses who were called by the prosecution. That the age of the complainant was proved by production of a birth certificate. That the appellant was a family friend to the witnesses – PW1, PW2, PW3 and PW4. That he was also a member of their church. That he was a Sunday school teacher to the victim, PW1. That on the material day the appellant went to the place of business of the complainant`s mother PW3 and told her that he was going to her home to give tuition to her child. That the complainant and his grandmother PW2 confirmed that the appellant indeed went to their home. That the complainant gave candid evidence of how the appellant sodomized him in his parents` house after locking the door. That the doctor who examined the victim found him with an inflamed anal area. That section 124 of the *Evidence Act* allowed the court to convict while making reliance on the evidence of the complainant. That there was no reason adduced as to why the family of the complainant would conspire to frame the appellant with the offence, a person who was like family to them. Therefore, that penetration was proved.

10. It was submitted that the trial court was alive to the appellant`s mitigation but was constricted by the mandatory nature of the sentence as provided by the law.

Analysis and determination

11. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the lower court and draw its own independent conclusions while keeping in mind that the trial court had the advantage of seeing and hearing the witnesses testify -see *Okeno V Republic* (1972) EA 32.

12. The appellant challenged the conviction on the ground that there was no medical evidence to support the charge of defilement. That the doctor who examined the complainant did not find any evidence of defilement nor did the laboratory examination reveal anything to support defilement. It is however trite law as regards cases of defilement and rape that the offences can be proved by other ways other than medical evidence. The Court of Appeal in *AML v Republic* 2012 eKLR (Mombasa), held the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

The same position was taken in the case of *Kassim Ali V Republic* [2006] eKLR where the court noted that:

> " ...The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

In the premises the fact that the medical evidence did not conclusively support the charge of defilement was not fatal to the case.

13. The complainant in the instant case was a minor. The law as concerns the evidence of minors in sexual offences is that there is no necessity of corroboration of their evidence. Section 124 of the *Evidence Act* CAP 80 Laws of Kenya allows the court to convict on the sole evidence of a minor where the court is satisfied that the minor is telling the truth as long as the court gives reasons for such a finding.

14. The trial court in this case found that the complainant was a truthful witness. From the evidence that was adduced before the lower court, there is no doubt that the appellant went to the home of the complainant. The evidence of the complainant to that effect was supported by his grandmother PW2 who saw the appellant entering into the home. There is further evidence that the appellant entered into the complainant`s house and locked the door from inside. The complainant`s grandmother saw the appellant entering into the house. She confirmed that the door was locked from inside as she knocked at the door and found it locked from inside. There can be no any other reason why the appellant had locked the door from inside other than that he was defiling the complainant. When the complainant was examined by the doctor PW5 he was found with an inflamed anal area. This evidence leds credence to the evidence of the complainant that the appellant defiled him.

15. The appellant contended that there were contradictions in the prosecution evidence. He however did not pin-point any of such contradictions. I have reviewed the evidence and I am satisfied that there were no material contradictions in the case.

16. The appellant further contended that the case was not investigated to the required standard. He however did not state any issue that was left out during investigations. The ingredients of the offence of defilement are proof of the age of the victim, identity of the perpetrator and penetration on the victim. The Investigating officer obtained the birth of the boy that proved his age. He called witnesses who identified the appellant as the perpetrator. The doctor was called to testify on the issue of penetration. I therefore find that the investigations covered all the material aspects of the case. Nothing comes out of this submission.

17. The appellant argued that the trial court did not consider his defence that the case was a frame up by members of the complainant`s family as they bore a grudge against him. This is however not correct as the trial magistrate weighed the appellant`s defence against the evidence adduced by the prosecution and held that the defence was not convincing. Indeed, there was no such grudge. The appellant never raised the issue when he cross-examined the prosecution witnesses. He instead brought up the issue at the tail end of the case when he gave his defence. The defence can only have been an afterthought. In any case the appellant did not say in his defence that it is the complainant`s parents who denied him the sponsorship money. He blamed a pastor called John for denying him the money. There was nothing to connect the parents of the complainant with the money. The trial court was therefore right in dismissing the defence.

18. On my own analysis of the evidence I find that the evidence adduced by the prosecution against the appellant was credible, cogent and overwhelming. The prosecution proved that the complainant was a child of under the age of 11 years. The appellant was a person well known by the complainant and his grandmother, PW2. Penetration was sufficiently proved by the evidence of the prosecution witnesses. In the premises, the charge of defilement was proved beyond reasonable doubt. The appeal on conviction is therefore dismissed.

Sentence

19. The appellant was charged under section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 that provides that:

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    2. A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to serve imprisonment for life.

20. The trial court in its sentence on the appellant stated as follows

> "I have considered the mitigation by the accused, I have also put into consideration the mitigation by the accused. I can only sympathize with the accused person. This offense has a mandatory sentence of life imprisonment."

21. It is clear from the above passage that no sentence was imposed by the trial court. The court only remarked that the offense has a mandatory sentence of life imprisonment but imposed no sentence. I thereby order that the file be sent back to the trial magistrate for him to impose sentence upon which the file will be returned to this court for the court to deal with the appeal on sentence.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 17TH DAY OF MAY 2021.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant- Present in person

Court Assistant- Peter