Director of Public Prosecutions v SOO (Criminal Case E062 of 2021)
[2024] KEMC 67 (KLR) (15 January 2024) (Judgment)

Neutral citation: [2024] KEMC 67 (KLR)

REPUBLIC OF KENYA

IN THE KWALE LAW COURTS

CRIMINAL CASE E062 OF 2021

ZK KAGENYO, RM

JANUARY 15, 2024

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC

AND

SOO ..... ACCUSED

A court could rely on the results of a per vaginum test (two finger test) when the test was done on the prosecution's own volition

The accused person was charged for the offence of defilement of a girl child aged 15 years and in the alternative, he was charged with the offence of committing an indecent act with the child. The court found that in any rape or defilement case, absence of the lacerations, bruises or an injury did not negate such sexual assault. The court noted that the per vaginum test (two finger test) had been declared inappropriate, discriminatory and breaching the rights to dignity and privacy of the person. The court held that it should rely on the results of the test when it was on the prosecution's own volition.

Reported by Kakai Toili

Evidence Law *– evidence – evidence in sexual offences – medical evidence - per vaginum test (two finger test) - whether a court could rely on the results of a two finger test when the test was done on the prosecution's own volition - whether where the two finger test was positive, then the survivor of a sexual assault was sexually active and an adverse finding should be made against that person.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – rights to dignity and privacy - whether the per vaginum test (two finger test) was discriminatory and breached the rights to dignity and privacy of the person.*

Criminal Law *– sexual offences – rape and defilement – ingredients of the offences of rape and defilement - whether the absence of laceration, bruises or injury negated a charge of rape or defilement - Sexual Offence (cap 63A), sections 8(1) and 8(3).*

Brief facts

The accused person was charged for the offence of defilement of a girl child aged 15 years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act cap 63A. In the alternative, he was charged with the offence of committing an indecent act with the child contrary to section 11(1) of the Sexual Offences Act. The accused was the complainant's father. While placed on his defence, the accused defended himself by tendering unsworn evidence where he told the court that he did not commit the alleged acts and that the reason he was being prosecuted was his daughter's spite over him as he was a strict disciplinarian who had kept his potentially truant daughter on her toes.

Issues

i. Whether a court could rely on the results of a *per vaginum* test (two finger test) when the test was done on the prosecution's own volition.

ii. Whether a positive two finger test was conclusive proof that the survivor of a sexual assault was sexually active and an adverse finding should be made against them.

iii. Whether the two finger test was inappropriate, discriminatory and breached the rights to dignity and privacy of the person.

iv. Whether the absence of laceration, bruises or injury negated a charge of rape or defilement.

Held

1. There was sufficient evidence, both oral and documentary by way of a certificate of birth that on October 23, 2021, the complainant was at least 14 years and 1 month old and hence a minor as defined in section 2 of both the repealed Children Act, 2001 and the current Children Act, 2022. The fact that it was indicated that she was 15 years old did not prejudice the accused in any way.
2. Through both the oral evidence and medical evidence adduced by the prosecution, the element of penetration was proven beyond peradventure. Section 124 of the Evidence Act enjoined the court to take note that survivors of sexual and gender-based violence and more particularly rape and defilement experienced the horrendous acts in the absence of other people who could not corroborate their accounts and the only two or more persons who knew of the same were the people involved in it. However, the Act required the court to record the reasons why it would believe the complainant.
3. It was the prosecution and not the accused nor the court that brought the issue of the accused having been the first person to have had sex with the complainant. The sex was said to be forceful. The observations by the medical practitioner just but six hours later were that there was no unusual observation be it a laceration, bruises or any form of injury however minute. However, that should not be misconstrued as implying that in any rape or defilement, absence of the lacerations, bruises or an injury negated such sexual assault.
4. There had been debate on the uselessness of the *per vaginum* test (two finger test) and it had been declared inappropriate, discriminatory and breaching the rights to dignity and privacy of the person. Courts in some countries such as India had declared it as criminal while the United Nations was heard to be campaigning for a ban of the same.
5. Over time, the two finger test had been conducted to test the virginity, purity or chastity of a girl, which was so primitive and a stereotypic act, and the test had been used to test whether a person was habituated to sexual intercourse.
6. Inasmuch as the test was discouraged when it served the purpose of demonstrating the sexual history of a person, the court should rely on the results when they were not done on application of the accused or order of the court but on the prosecution's own volition.
7. The court was not validating that just because the two finger test was positive, then the survivor was sexually active and so an adverse finding should be made against that person. What the court was saying was that when a person wanted the court to believe that she was a virgin and another person forcefully took away that virginity, then a positive two finger test became of relevance. Such was the case in the instant matter which in the end affected the credibility of the complainant.

8. It was unsafe to solely rely on the evidence of the complainant. The accused was described by his wife and the complainant as a strict father but yet caring. He had taken issues with the complainant who was a candidate of truancy and falling into bad company were it not for the strictness of the accused person. The complainant was disgruntled when her father, the accused, substituted the money he had given her to buy a birthday dress, and treated it as a foregone cost over other more pressing needs. There had been a previous disciplinary case against the complainant, before PW1, who however testified as if the complainant was just but a stranger to him. In the circumstances, the court could not overrule a theory of disgruntlement of a child towards a parent a fact that cast doubt on motive.

Accused acquitted.

Orders

i. *The accused person acquitted under section 215 of the Criminal Procedure Code for both the main count of defilement of a child aged 15 years proscribed under section 8(1) as read with section 8(3) of the Sexual Offences Act, cap 63A and for the alternative count therein of committing an indecent act with a child proscribed under section 11(1) of the Sexual Offences Act.*

ii. *The accused was set at liberty unless he was otherwise lawfully held.*

Citations

Cases

India

State of Jharkhand v Shailendra Kumar Rai Criminal Appeal 1441 of 2022 — (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 2 - (Interpreted)
2. Criminal Procedure Code (cap 75) section 215 - (Interpreted)
3. Evidence Act (cap 80) section 124 - (Interpreted)
4. Sexual Offences Act (cap 63A) sections 8(1)(3); 11(1); 34 (1) - (Interpreted)

Advocates

Mr Khamis for the republic.

JUDGMENT

1. The accused person was on October 26, 2021 arraigned for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offence Act* No 3 of 2006

   The particulars were that on the October 23, 2021 at [Particulars Withheld] of Kwale county within Coast region, unlawfully and intentionally caused his penis to penetrate into the vagina of VAO a girl child aged 15 years.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.

   The particulars were that on the October 23, 2021 at [Particulars Withheld] of Kwale county within coast region, unlawfully and intentionally touched the vagina of VAO a child aged 15 years with his penis.

3. According to the prosecution, on Saturday the October 23, 2021, the complainant had come home from school at around midday and at home, she was in the company of her father and brother. She took her lunch and took a bath and as she was having her private moments at the dressing room, the accused approached her and suggested to her that he wanted to spread oil on her body. Shocked by such

a suggestion from her father, the complainant categorically rejected that invitation and undeterred, the accused person spread a towel on the bed and laid the complainant on that bed whereat he defiled the complainant. After such heinous act., the accused directed the complainant to clean her genital parts and thereafter sent her to take money to a certain person. The complainant seized the moment and opened up to PW1, a Volunteer Children Protection officer. The said officer interrogated the complainant, summoned her mother and the matter was reported at Diani police station. Immediately thereafter, the complainant was taken to the hospital and after the conclusion of the investigations, the accused was arraigned before this court.

4. While placed on his defence, the accused defended himself by tendering unsworn evidence where he told the court that he did not commit the alleged acts and the reason he was being prosecuted was her daughter's spite over him as he was a strict disciplinarian who had kept her potentially truant daughter on toes.

5. The parties having closed their respective cases invited this court to make its determination which I hereby do.

6. I have looked at the evidence adduced and I am satisfied that there was sufficient evidence, both oral and documentary by way of a certificate of birth that on the October 23, 2021, the complainant was at least 14 years and 1 month old and hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the current *Children Act*, 2022. The fact that it was indicated that she was 15 years old did not prejudice the accused in any way.

7. Through both the oral evidence and medical evidence adduced by the prosecution, the element of penetration was proven beyond peradventure.

8. The question arises on who caused such penetration, the complainant insisting that it was her father while the accused denied being the one responsible.

9. I have looked at the evidence as a whole and I observe that the complainant was taken to the hospital and examined by the medical practitioner 6 hours after the accident.

10. While adducing her evidence at the examination-in-chief led by the prosecution counsel, the complainant pierced her protection under section 34(1) of the *Sexual Offences Act*, 2006 and informed this court that the said defilement was her first sexual intercourse ever in her life.

11. While being examined by the medical practitioner, it was observed that her external genitalia, vagina and cervix were normal but her hymen was missing, with a two-finger test being in the positive. In his written submissions, the accused took issue with this observation and opined that that was highly unlikely, defilement of a virgin without causing a bruise or even bleeding. Further, the accused invited this court to find that the positive two finger test demonstrated that what the girl was saying was untrue.

12. Section 124 of the *Evidence Act* enjoins me to take note that survivors of Sexual and Gender Based Violence and more particularly rape and defilement experience the horrendous acts in the absence of other people who cannot corroborate their accounts and the only two or more persons who know of the same are the people involved in it. However, the Act requires the court to record the reasons why it would believe the complainant.

13. Did the court have any reason to view the evidence of the complainant as that which is not to be believed entirely?

14. To answer this, I considered that it is the prosecution and not the accused nor the court that brought the issue of the accused having been the first person to have had sex with the complainant. The sex was said to be forceful. I take the observations by the medical practitioner just but six hours later who

said that there was no unusual observation be it a laceration, bruise or any form of injury however minute. I should however not be misconstrued as implying that in any rape or defilement, absence of the lacerations, bruises or an injury negates such sexual assault.

15. I also note that the medical practitioner said that two finger test was positive. By so recording, what did the said medical practitioner mean or intend the consumer of the said document to deduce from the same.

16. There has been debate on the uselessness of the per vaginum test and has been declared inappropriate, discriminatory and breaching the rights to dignity and privacy of the person. Courts in some countries such as India have declared it as criminal while the United Nations is heard to be campaigning for a ban of the same.

17. Over time, the test has been conducted to test the virginity, purity or chastity of a girl, which in my view is so primitive and stereotypic act so to do, and secondly, the test has been used to test whether a person is habituated to sexual intercourse.

18. In *The State of Jharkhand v Shailendra Kumar Rai* Criminal Appeal No 1441 of 2022, the Supreme Court of India observed that,

> While examining the victim, the Medical Board conducted what is known as the "two-finger test" to determine whether she was habituated to sexual intercourse. This court has time and again deprecated the use of this regressive and invasive test in cases alleging rape and sexual assault. This so-called test has no scientific basis and neither proves nor disproves allegations of rape. It instead re-victimizes and re-traumatizes women who may have been sexually assaulted, and is an affront to their dignity. The "two-finger test" or pre vaginum test must not be conducted. In *Lillu v State of Haryana*, (2013) 14 SCC 643 this court held that the "two-finger test" violates the right to privacy, integrity, and dignity: "13. ... rape survivors are entitled to legal recourse that does not retraumatise them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy. 14. Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity." Whether a woman is "habituated to sexual intercourse" or "habitual to sexual intercourse" is irrelevant for the purposes of determining whether the ingredients of section 375 of the IPC are present in a particular case. The so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth – a woman's sexual history is wholly immaterial while adjudicating whether the accused raped her. Further, the probative value of a woman's testimony does not depend upon her sexual history. It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active. The legislature explicitly recognized this fact when it enacted the Criminal Law (Amendment) Act 2013 which inter alia amended the Evidence Act to insert Section 53A. In terms of section 53A of the Evidence Act, evidence of a victim's character or of her previous sexual experience with any person shall not be relevant to the issue of consent or the quality of consent, in prosecutions of sexual offences.The Ministry of Health and Family Welfare issued guidelines for health providers in cases of sexual violence. (Ministry of Health

and Family Welfare, Government of India, "Medico-legal care for survivors / victims of sexual violence" (19 March 2014)). These guidelines proscribe the application of the "two-finger test": "Per-Vaginum examination commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated. The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented."

19. In my view, inasmuch as the test is discouraged when it is to serve the purpose of demonstrating the sexual history of a person, what should the court do when the results of the test, not done on application of the accused or order of the court but on the prosecution's own volition. I think the court should rely on the same.

20. In this case, the court is not validating that just because the per vaginum test is positive, then the survivor was sexually active and so an adverse finding should be made against that person. What the court is saying is that when a person wants the court to believe that she was a virgin and another person forcefully took away that virginity, then a positive per vaginum test becomes of relevance. Such is the case here which in the end affects the credibility of the complainant.

21. In his submissions, the accused took issue with the same and the court finds reasonable doubt as it finds it unsafe to solely rely on the evidence of the complainant.

22. I note how the accused was described by his wife and the complainant as a strict father but yet caring. He had taken issues with the complainant who was a candidate of truancy and falling into bad company were it not for the strictness of the accused person. The complainant admitted that she would leave home in uniform but secretly carry home clothes so as she would change after she leaves the confines of their home and the accused discovered the same and took an issue with her. The complainant admitted that a furious and concerned accused person would go checking on her whenever she failed to come back home on time and in some instances, the accused would find her in a not so good situation or company as a minor. It emerged that the complainant was disgruntled when her father, the accused, substituted the money he had given her to buy a birthday dress, and treated it as a foregone cost over other more pressing needs. Further, it emerged that there had been a previous disciplinary case against the complainant, before PW1, who however testified as if the complainant was just but a stranger to him. In the circumstances, I cannot overrule a theory of disgruntlement of a child towards a parent a fact that casts doubt on motive.

23. From the foregoing, this court hereby dismisses the case against the accused person and forthwith acquits him under section 215 of the *Criminal Procedure Code* for both the main count of defilement of a child aged 15 years proscribed under section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11(1) of the *Sexual Offences Act*, 2006.

24. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 15TH DAY OF JANUARY, 2024.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 23rd day of January, 2024, by Hon. C.K. Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

In the presence of:

Mr. Khamis, the Prosecutor.

Mr. Hud, the Court Assistant

Accused