ADG v Republic (Criminal Appeal 125 of 2022)
[2024] KECA 673 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 673 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 125 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

JANUARY 25, 2024

BETWEEN

ADG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Mativo, J.) dated 7th June 2022 in High Court Criminal Appeal No. E008 of 2022)

JUDGMENT

1. The appellant, ADG, is presently serving a prison sentence for a term of 20 years having been convicted for the offence of defilement by the Magistrates Court at Shanzu Mombasa in a judgment delivered on 6th December 2021 by Hon. David Odhiambo, Resident Magistrate. He had been charged under Section 8(1) read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between November 2016 and December 2018, in Kilifi County of the Coast Region, he intentionally and unlawfully caused his penis to penetrate the vagina of STM, a child aged 12 years old.

2. The prosecution case was that the appellant and STM's mother, RN (PW2) were in a husband-and-wife relationship living together in their home in Majengo, Kanamai between 2012 and 2019, although, according to the appellant, their relationship was strained because of PW2's alleged infidelity. STM and her brother, the children of PW2, regarded the appellant as their stepfather. On his part, the appellant took the children as his own and was responsible for them, attended school meetings, and even took them to hospital when the need arose.

3. STM testified before the trial court on 23rd July 2019. She was in Standard 8 at the time. Based on the birth certificate that was produced, she was born on 6th April 2006 and was aged 13 years at the time of her testimony. According to her, she was staying with the appellant, her stepdad, as she referred to

him, since 2014. She graphically narrated before the trial court how the appellant abused and defiled her over an extended period.

4. STM's mother, PW2, stated that on 29th December 2018 she called her children from her workplace to find out how they were. Her son picked the call and informed her that STM had gone to the shop. PW2 was flabbergasted that her daughter had gone to the shop as there was everything in the house. She called later and her daughter was still not home. She got worried, left work, and arrived home at the same time as her daughter. Angry, she asked her daughter what she had gone to do at the shops. Her daughter started crying and told her that she was talking to a friend. That STM continued crying and asked her mother to take her to the bedroom. PW2 explained:

> " She then told me to take her to the bedroom, as she wanted to tell me something. She then told me that someone had been stressing her. She told me that A had been calling her to his bedroom and at times going to her bedroom and touching her breasts and kissing her. She also told me A had been having sex with her and she was worried she could be pregnant. I then got sad and took them and went to my parents' home. While at home I went to the hospital and took her to the hospital. she told me A started sleeping with her when she was in Std 5. She was born in 2006."

5. PW2 stated, under cross examination, that there were disagreements with the appellant because she used the phone to call the complainant's biological father.

6. STM was examined on 31st December 2018 at Mtwapa Healthcare by AM, a nursing officer, who filled out a Post Rape Care Form (PRC) which was produced before the trial court on her behalf by JM (PW3), a clinical officer at Mtwapa Healthcare who stated that he was familiar with AM's handwriting.

7. PW3 stated that by time the PRC form was filled, the incident had occurred about a month earlier and that it was noted that the incidents had been going on since the tender age of nine years; that based on the report, all tests were normal except for a perforated broken hymen. PW3 produced the PRC form as an exhibit alongside the P3 Form which he filled. He stated under cross examination that from the history, it is implied that penetration occurred as the complainant had "a broken hymen which was perforated" but he could not tell when it was broken.

8. The investigating officer was Sergeant HA (PW4), of Mtwapa Police Station where the matter was reported. She met the complainant and her mother (PW2) at the police station office. STM complained that her stepfather had defiled her severally. PW4 referred them to Mtwapa Health Care for treatment where the PRC form was filled out. She also issued them with P3 form. She recorded their statements and visited the scene at their home. She then arrested the appellant and charged him with the offence. Under cross examination, PW4 stated that the complainant stated that the defilement had started sometime in 2016.

9. In his sworn defence, the appellant stated that he was living with PW2 and her children but moved out and changed his residence after the defilement charges were instituted. He maintained that he never defiled the complainant; that in 2016 he was not in the house and had gone to rent another house 2 km away; and that he was never alone with the complainant alone who shared a room with her brother and the house help. He stated that he never had a good relationship with PW2; that "she used to have affairs with other men"; that in January 2016 he left and went to stay alone but they reconciled in December 2016; that one day in 2018, on returning from church, the complainant's brother went and found her with a boy and that there was a cousin who saw the complainant kissing a boy at a salon.

10. The appellant maintained under cross examination that he left the house in early January 2016 and went back in December 2016 where he remained until December 2018; that PW2 worked as a hotelier

and when she was away on night duties, he would stay with the children. He stated that he did not know what the complainant had against him to make the allegations against him.

11. Dr. MKOO (DW2) a consultant obstetrician and gynaecologist testified on the appellant's behalf and produced his report titled "expert advise on sexual offence case No. 3 of 2019". He testified that in his opinion, no proper examination of the complainant was done; that there was no documentation of the examination or instruments used in examining the complainant; that the examination was incomplete, and it was not possible to reach a conclusion that there was penetration; and that no DNA evidence was captured in the PRC form.

12. Under cross examination, DW2 stated that he did not examine the complainant and that it is possible to establish perforation of the hymen without DNA evidence. He stated that the complainant's good performance in school was not in tandem with psychological stress and that there was nothing consistent with the minor to show that she had been defiled.

13. Having considered the prosecution case and the defence, the trial court, expressed that on account of the age of the complainant, the appellant ought to have been charged under Section 8(3) as opposed to Section 8(4) of the *Sexual Offences Act* and having found that the ingredients of the offence were proved beyond a reasonable doubt convicted him accordingly.

14. The High Court (J. M. Mativo, J. (as he then was)) on its part in its detailed considered judgment upheld the judgment of the trial court having also found that all the ingredients of the offence were proved beyond a reasonable doubt and having rejected the contention by the appellant that the trial court wrongly invoked, misconstrued, and misapplied section 124 of the *Evidence Act*.

15. In this second appeal, the appellant through Mr. O, learned counsel, raised eleven grounds of appeal in his memorandum of appeal which counsel condensed into two main complaints during the hearing of the appeal before us on 20th June 2023, namely that inadmissible evidence was used as a basis of the finding of guilt; and that Section 124 of the *Evidence Act* was wrongly invoked.

16. Counsel submitted that the proviso to Section 124 excludes operation of the main provision of that section; that a conviction cannot be based on both the main provision as well as the proviso. It must be based on either the main provision or on the proviso, and not both, it was urged. It was submitted that under Section 124, corroboration is required but in this case, the P3 form which was produced did not corroborate as it was not authentic, was tampered with and lacked details including the complainant's name.

17. According to counsel, the P3 form was altered after the plea was taken to include the injury described as maim and to indicate that the hymen was perforated and the basis of the alteration was not disclosed to the appellant. It was urged that the P3 form did not corroborate as it contained unreliable hearsay and its accuracy is doubtful; and that the trial court convicted the appellant based on tampered evidence.

18. It was submitted that the proviso to Section 124 can only apply where there is only one witness. It cannot apply in the present case where witnesses were called with the object of providing corroboration. Counsel submitted that where the proviso to Section 124 is applied, it is not mandatory or obligatory to adduce the medical evidence; the decision in the case of *Joseph Chirchir Kabutie vs. Republic* [2019] was cited.

19. It was submitted further that the medical officer who examined PW1 was not called as a witness; that no basis was laid for PW3 to testify; that the treatment notes were not tendered in evidence; and that the manner of creation of the medical evidence was doubtful.

20. Counsel submitted that in relying on the demeanor of PW1 as a basis of concluding that her evidence was credible, the trial court erred. In counsel's view, the correct standard is what he referred to as the satisfactory test. The cases of *Pandya vs Republic* [1957] E.A; and *Joshua Karianjahi Waiganjo vs. Republic* [2017] eKLR were cited in support. It was urged that the judge concluded that the contradictions in the evidence were minor without any analysis. The High Court case of *PWN vs. Republic* [2017] eKLR was cited.

21. Counsel concluded by submitting that the courts below failed to consider that the relationship between the 62-year-old appellant and PW2, the mother of victim, was sore; and that the appellant's guilt was not established beyond reasonable doubt.

22. Opposing the appeal, learned Senior Principal Prosecution Counsel Mr. MK, submitted that the claim that the P3 form was tampered with was properly addressed by the High Court and has no basis; that Mr. O who appeared for the appellant before the trial court never raised the question of genuineness of the P3 form or admissibility of the medical evidence; that the P3 form in the record of appeal is the same form that was produced before the trial court; and that the evidence of PW3 and the PRC form established that the complainant's hymen was perforated.

23. Counsel submitted that the arguments advanced by counsel for the appellant in relation to what was referred to as "demeanor test" and "satisfactory test" are misplaced; and that under Section 124 of the *Evidence Act*, there is no inconsistency in a court relying on medical evidence as well as on the demeanor as a basis for conviction.

24. It was submitted that in the present case, what was critical was for the prosecution to establish the ingredients of the offence, which it did; that the age of the complainant was proved through production of the birth certificate; that penetration was established by the evidence of the complainant's own testimony which was corroborated by the evidence tendered by PW3; and that the appellant was positively identified as the perpetrator of the offence.

25. On the sentence, it was submitted that no basis has been laid for the court to interfere.

26. We have considered the appeal and the submissions. As this is a second appeal, our mandate is limited to considering matters of law. In that regard, in the case of *Peter Osanya vs. Republic* [2016] eKLR this Court stated:

> "Section 361(1)(a) of the *Criminal Procedure Code* limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong V. Republic [1984] KLR 611, Ogeto V Republic [2004] KLR 14 And Koingo V Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced:-
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> > "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)" [Emphasis added]

27. Therefore, the question in this appeal is whether there was evidence based on which the trial court convicted the appellant and based on which the High Court upheld that conviction. In that regard, the prosecution had the burden to prove age of the complainant, penetration, and identification of the perpetrator to sustain a conviction.

28. It is common ground that the appellant and the complainant's mother, PW2, and her children, including the complainant, were living together as a family. The appellant, in his own testimony, stated that he regarded PW2's children as his own. He was therefore well known to the complainant and the question of mistaken identity did not arise. In her testimony, the complainant explained in detail how the appellant:

> " ... started touching my breasts. He told me not to tell my mother. He took advantage and continued doing certain things. He would take me from my room to my mother's room. My mother works at [R] Hotel and she would go on night shift. He took me to his room and removed my clothes. He took his penis and put it on me. He had removed his penis and put it on me. He had removed his Kikoi. He was not able to penetrate and he said he would use oil. He then started using his finger and fingers. He was not able to penetrate me. At that time I was in standard 3. In standard 4 he was not able to penetrate me. At standard 5 he was able to penetrate me, as there was way in my vagina. In standard 6 I feared as I was menstruating and he continued doing it. I did not tell my mother and he used to give me money and snacks. He told me we would suffer if I told my mother and in case he was jailed. That was in 2018 when I was in Std 7. He stopped in August 2018. In December 2018 I opened to my mother and told her what was happening. On that day A had taken my uncle to the airport."

29. Her mother, PW2, explained in her testimony how the complainant, in tears, eventually broke the news to her that the appellant had been abusing her. The trial magistrate was impressed by the complainant's candour expressing that:

> " I have also taken caution under section 124 of the *Evidence Act* to believe the testimony of the complainant as her demeanor portrayed her a confident and knowledgeable of what had happened to her. PW1 during voir dire examination came out as a child who understood the duty of saying the truth and gave no reason for her credibility to be put in question. Moreover, in Mohammed vs. Republic [2006] 2 KLR 138 the court stated that "it is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

30. In effect, the trial court's finding was based on the credibility of the complainant which finding can only be assailed by an appellate court if no reasonable court could make such a finding, or the finding is clearly wrong. See decision of this Court in *Republic vs. Francis Otieno Oyier* [1985] eKLR.

31. There is no contest regarding the age of the complainant.

That was established by production of the birth certificate. Neither is there an issue regarding the identity of the appellant. The argument advanced by the appellant before us, as already set out above, is that under Section 124 of the *Evidence Act*, a conviction can either be based on the evidence of the victim corroborated by other evidence, or, under the proviso, the evidence of the victim alone without any other corroborating evidence.

32. The effect of the appellant's argument, as we understand it, is that the trial court erred in considering other corroborating evidence whilst the evidence of the complainant should have stood alone. Section 124 of the *Evidence Act*, provides as follows:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the

> Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

33. In our view, the proviso does no more than provide an exception to the general rule which requires the evidence of a victim to be corroborated by other evidence to sustain a conviction. The general rule and the exception are not mutually exclusive. If anything, a conviction based on both the general provision and the exception is that much more re-assuring to the extent that the evidence of the victim is buttressed by other corroborating evidence.

34. We agree entirely with the conclusion by the High Court that the proviso to Section 124 is clear that "the evidence of a victim if she is the only witness is admissible, but the court is required to record reasons in the judgment that it is satisfied that the witness is telling the truth" and that in this case, the complainant's evidence was not the only evidence but was corroborated by other evidence.

35. Regarding the complaint that the medical evidence was inadmissible and tampered with, the P3 form and the PRC form were produced as exhibits before the trial court by PW3. PW 3 stated that he had worked with AM the maker of the PRC form and was familiar with her handwriting. PW3 stated that he is the one who filled the P3. As submitted by counsel for the respondent, the appellant was represented by counsel at the trial and there was no objection to their production. In the circumstances, absent any objection, there was no basis for the trial court to disregard those documents considering Section 77 of the *Evidence Act*.

36. On the sentence, under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact outside the scope of a second appeal.

37. In conclusion, the appeal fails and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed DEPUTY REGISTRAR