Aminga v Republic (Criminal Appeal E009 of 2023)
[2024] KECA 480 (KLR) (9 May 2024) (Reasons)

Neutral citation: [2024] KECA 480 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E009 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

MAY 9, 2024

BETWEEN

PAUL MIRITO AMINGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (L. N. Mutende, J.) dated 19th May, 2022 in HCCRA No. 131 of 2019)

REASONS

1. By our judgment delivered on 4th October, 2023, we allowed this appeal. We quashed the conviction of the appellant, set aside the sentence and ordered that the appellant shall be immediately set at liberty unless otherwise lawfully held. We reserved the reasons for our judgment.

2. Here are the reasons.

   The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* (*SOA*). The particulars of the offence were that on 7th of May 2012 in Industrial area within Nairobi Area, he intentionally and unlawfully caused his penis to penetrate the vagina of L.M (minor), a girl aged 13 years.

   In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *SOA*.

3. The appellant denied the charge leading to a trial in which the prosecution called 5 witnesses in support of its case. The minor, PW1, testified on 15th December 2017, over 5 years after the alleged incident. She stated that she was born on 28th August 1998 and produced her birth certificate in support of that assertion. PW1 gave evidence that on 7th May 2012, after returning from school at around 4 pm, she went to the stall where her mother used to sell seat covers, nets and curtains. Her mother was away at

the time. While at the stall, the appellant, a friend to her uncle known as Joshua, passed by and told her that he wanted two nets costing Kshs 150 to be taken to his house where she would collect the money upon delivery. She proceeded to the appellant's house between 7pm and 8pm and found him. She gave the appellant the nets and in return he gave her the money. PW1 testified that the appellant held her and told her that he wanted to have sex with her. She refused but he forcefully took her to a mattress which was on the floor, undressed her, and defiled her.

4. After the ordeal, she went back home but did not disclose to anyone what had happened. On 21st May 2012, she met the appellant near a mandazi stall. He gave her Kshs 80 and told her to go for a pregnancy test. The test revealed that she was pregnant. Her father came to know about the pregnancy and PW1 revealed that it was the appellant who was responsible for it. She was taken to Nairobi Women Hospital and on 30th January 2013, she gave birth to a baby girl who, unfortunately, died on 2nd February 2015 due to illness.

5. JOM, the father of the minor, testified as PW2. He explained that on 28th May 2012, he met a friend who works at a chemist and she informed him that PW1 had gone to her chemist asking for an e-pill, which is a drug used against pregnancy. The friend also revealed that she had tested the minor and found that she was pregnant. PW2 went home and requested a certain lady to question the minor about the pregnancy. The minor narrated the incident and disclosed that it was the appellant who had impregnated her. PW2 reported the matter to the Chief's Camp where he was referred to the Police. The appellant was arrested and charged.

6. Doctor Zephaniah Kamau of Nairobi Police Surgery gave testimony as PW3. He testified that he examined the minor on 4th June 2012 following a report of alleged defilement. His examination revealed that there was no vaginal bleeding, the outer genitalia was normal, the hymen had old tags indicating that there were old tears and no discharge was noted. Further, a pregnancy test that was done at Nairobi Women's Hospital was positive. PW3 produced the P3 form as an exhibit. Peter Wanyama, a clinical officer at Nairobi Women's Hospital gave evidence as PW4. He gave evidence on behalf of one Dr. Thuo whom he had worked with for 4 years and knew his handwriting and signature. Dr. Thuo had since left the Hospital. PW4 produced a report dated 30th May, 2012 that was prepared by Dr. Thuo upon examining the minor over an accusation of alleged defilement. The report revealed that the minor declined to have her genitalia examined. Laboratory tests carried out on her showed that she was pregnant.

7. CG, the mother of the minor, testified as PW5. She narrated that she sells bedsheets and curtains. On the material day, she had gone for a seminar in Mathare and left the minor to sell the items for her. When she returned, she found the minor looking distressed. She asked her what the problem was but the minor just cried and did not respond. She did not nudge her any further. A few days later, some person who owns a chemist disclosed to her and PW2 that she had tested the minor and found her to be pregnant. They questioned the minor and she revealed what had transpired.

8. At the close of the prosecution's case, the trial Magistrate found that a *prima facie* case had been established against the appellant and placed him on his defence. The appellant gave an unsworn statement and called no witness. He denied defiling the minor and claimed that sometime in 2012, he met one John and Joshua, an uncle to the minor. At the time he was looking to buy table clothes and Joshua referred him to PW5's stall where she found the minor. They could not agree on the price of the table cloths as the minor wanted Kshs 100 while he had Kshs 80. The appellant narrated that later, one John informed him that he had paid the minor the balance and he should refund him. After some time, the appellant moved to his own house and John approached him requesting to live with him since his landlord had issued him with a notice to vacate his house. John moved to his house with one Kaunda but after two weeks they moved out. Joshua also wanted to stay with him but he refused

because he had a wife. Thereafter, Joshua informed him that he was being accused of causing John to suffer by asking him to move out of his house. Subsequently, he was arrested.

9. After evaluating the evidence tendered before the court, the Chief Magistrate (H. M. Nyaga (as he then was) found the appellant guilty as charged and sentenced him to 20 years imprisonment.

10. Aggrieved, the appellant petitioned the High Court at Nairobi. On 19th May 2022, the learned Judge (L. N. Mutende) delivered a judgment dismissing the appeal in its entirety. Upon considering the period the appellant had served in remand before being released on bond, and the period he had served in prison after conviction and sentencing, before being released on bail pending appeal, the learned Judge sentenced the appellant to 19 years imprisonment from the date of the judgment.

11. Still aggrieved, the appellant preferred the instant appeal, raising 4 grounds. He contended that the learned Judge erred by;

    1. Failing to sufficiently re-evaluate the entire evidence on record as a first appellate court.

    2. Failing to note that the prosecution's case was not proved beyond reasonable doubt.

    3. Shifting the burden of proof to the appellant.

    4. Failing to consider that the trial Magistrate did not adhere to the provisions of section 169 of the *CPC*.

12. The appellant urged us to quash the conviction and set aside the sentence imposed.

13. At the hearing of the appeal, learned counsel Mr. Chandianya, holding brief for Mr. Bosire appeared for the appellant while Mr. Okeyo, learned Prosecution Counsel, appeared for the respondent. Both parties had filed written submissions which they highlighted.

14. While admitting that the age of the minor was not in dispute as it was well proven, Mr. Chandianya initially claimed that penetration as an ingredient of the offence of defilement was not established but we pointed out to him the incontrovertible fact that a baby was born out of the alleged incident, clearly evincing that there was penetration. Counsel proceeded to argue that whereas there was penetration, it was not linked to the appellant for the reason that a DNA test was not conducted to establish that the child was sired by the appellant. Counsel drew our attention to section 36 of the *SOA* which permits the court in certain instances to direct that a DNA test be conducted to ascertain whether or not an accused person committed the offence that he is charged with. He faulted the trial court for noting that there was need to ascertain the paternity of the deceased child but again proceeding to dismiss that observation on the basis that there was sufficient evidence to implicate the appellant. Counsel insisted that a DNA test result would have been the sole link between the victim and the appellant, conclusively determining whether the appellant committed the offence.

15. Mr. Chandianya highlighted that according to the medical report from the Nairobi Women's Hospital, the minor declined vaginal examination. Further, no semen was extracted from her vaginal canal in order to test whether the appellant was connected to the offence. We indicated to counsel that since the medical examination was conducted days after the event, a vaginal swab would not have established anything. Counsel maintained that out of abundance of caution, the same should have been done.

16. In reply, Mr. Okeyo for the respondent, first posed a number of questions to the Court, which we found very odd. Some of the questions he posed were in this fashion;

> " I have indicated that if indeed there was this pregnancy, could it be attributed to the appellant and this is the question I was posing to the Hon. Judges, could it be attributed?"

"...the challenge I got was that could we solely attribute the pregnancy on penetration on the part of the appellant?"

17. We reminded counsel on the standard of proof that must be met by the prosecution, that is beyond reasonable doubt, and the moment the prosecution raises doubts about the culpability of an accused person, then those doubts have to be resolved in favour of the accused. We further advised counsel that the questions he was raising would have been settled if a DNA test on the child had been done. In the end, and quite inevitably, Mr. Okeyo expressly conceded the appeal.

18. It is apparent that this appeal turns on the identity of the perpetrator of the offence; whether the prosecution proved beyond reasonable doubt that the appellant was the offender.

19. The appellant contends that a DNA test would have established beyond a doubt whether he was responsible for the pregnancy of the victim, and hence the perpetrator of the offence. A review of the record reveals that while both the trial court and the High Court were cognizant of the need to conduct a DNA test in this matter, they nonetheless proceeded to find that the evidence adduced was sufficient to make a decision. The trial Magistrate reasoned;

"It may be argued that there was need to conduct a paternity test on LM's child to find out if the accused was the father. That appears not have been done. Unfortunately, the baby passed away. In my view, the test would have been crucial to further corroborate the evidence of the victim. In its absence, I still think that there is sufficient evidence to implicate the accused. It is not all cases that require DNA testing."

20. Similarly, the High Court observed;

"28. It is contended that no DNA test was conducted. This was a case where for reasons not known the Investigating Officer did not testify therefore it was silent on whether an attempt was made for DNA profiling. But since the issue was not paternity of the child but defilement of the minor, it was not mandatory for a DNA test to be conducted in order for the case against the appellant to be proved."

21. We think, with respect, that both courts below fell into error when they determined that a DNA test was not necessary in the matter. While it is trite that DNA testing is not mandatory to prove a sexual offence, we are of considered view that in such a case as the instant one where a child was born out of the alleged defilement, and there was no other medical evidence, DNA testing ought to have been done to establish beyond reasonable doubt that the appellant was the biological father of the child hence connected to the defilement. We, moreover, note that the investigating officer did not testify to shed light on the nature of investigations that were carried out, and explain the basis upon which the appellant was charged. Whist the child who was born out of the alleged offence has since passed away, evidence on record also shows that she was alive for a period of about 2 years.

22. The High Court has been categorical on the importance of conducting DNA tests in certain cases where there is need to establish with certainty, the connection between commission of the offence and the alleged trAnsgressor. In *Republic v Timothy Mwenda Gichuru & 2 others* [2017] eKLR, the court stated;

"[8] Now that I am of that persuasion, is this request for blood samples merited? In this age of technology, DNA has become an investigative tool which will determine with almost certainty that a person committed or did not commit

an offence. Such evidence is also admissible in judicial proceedings whether civil or criminal or *sui generis*."

23. In *Stephano Ngigi Maigwa v Republic* [2022] eKLR, the court observed;

> " 33. The appellant further submits that the complainant's evidence being the only testimony relied upon, and the DNA testing not having been done, the medical examination done on 16th July 2012 was too remote to connect the appellant to the defilement.
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> ...
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> 35. The analysis already done above on the cases concerning the fact that DNA testing is not essential, are helpful as shown where the connection between the commission of the offence and the medical report as to penetration can be readily made. In the present case, I do not think there was a proper basis laid by clear evidence beyond reasonable doubt that the accused was the person who penetrated the complainant."

24. In view of the foregoing authorities and the admissions made by counsel for the respondent, we find that the appellant was not positively identified as the perpetrator of the offence. The benefit of the doubt raised by the respondent itself must be awarded to the appellant.

It is for these reasons that we allowed the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR