Odemba v Republic (Criminal Appeal 126 of 2018)
[2024] KECA 1613 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1613 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 126 OF 2018

PO KIAGE, AK MURGOR & F SICHALE, JJA

NOVEMBER 8, 2024

BETWEEN

GIDI ONYANGO ODEMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi, (Kimaru J), dated and delivered on 13th February 2018) in HC. CRA NO. 46 OF 2017)

JUDGMENT

1. Gidi Onyango Odemba (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Chief Magistrate's Court at Makadara (Hon. E.S Olwande, the then SPM). The charge against him was defilement of a girl contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 15th day of February 2008, at around 4:00PM at (particulars withheld), he caused his penis to penetrate the vagina of RN a child aged 7 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he unlawfully and intentionally committed an indecent act with RN a child aged 7 years, by touching her private parts, namely, her vagina.

4. The appellant denied the charges after which a full trial ensued with the State calling a total of 5 prosecution witnesses while the appellant elected to give a sworn testimony and called 1 witness.

5. In a judgment delivered on 21st April 2017, the appellant was found guilty of the main charge and convicted. He was sentenced to life imprisonment.

6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 13th February 2018, Kimaru, J (as he then was), found the same to be devoid of merit and dismissed the appeal in its entirety.

7. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 21st February 2018 and a Memorandum of Appeal filed in Court on 3rd August 2018, raising 9 grounds of appeal as follows:

> " a). The learned judge of the superior court erred in law and fact in dismissing the appellant (sic) appeal against consent endorsed on record.
>
> b. The learned judge of the superior court erred in law and fact holding that the contradictions that became apparent during the trial were minor and did not affect the thrust of the evidence adduced by the prosecution.
>
> c. The learned judge of the superior court erred in law and fact in holding that the appellant is the one who defiled the minor in the absence of any DNA test been (sic) conducted to confirm the same.
>
> d. The learned judge of the superior court erred in law and fact in holding that the age of the minor was 7 years at the time of the alleged offence in the absence of Birth Certificate or Baptismal Card of the minor being presented to proof the same.
>
> e. The learned judge of the superior court erred in law and fact in failing to appreciate that the failure on part of the prosecution to call as witness one Nzula who is alleged to have witnessed the alleged offence was a clear indication that the prosecution feared that by calling her may jeopardize the prosecution case.
>
> f. The learned judge of the superior court erred in law and fact in wholly believing the respondent submission and totally disregarding the appellant evidence and submission.
>
> g. The learned judge of the superior court erred in law and fact in delivering judgment on the 13th February 2018, in absence of the appellant herein;-
>
> a. The learned judge of the superior court erred in law and fact in proceeding on a wrong principle and thereby arriving at a wrong decision.
>
> b. That the decision and findings of the judge of the superior court was against the weight of the evidence as on record."

8. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows: RN testified as PW1 and was the complainant in this case. She testified that on a day she could not remember, she had gone to the appellant's barber shop (a place she had had several haircuts before) for a haircut.

9. It was her evidence that after the appellant finished giving her a haircut, he closed the door to the shop and started "doing bad manners" to her by touching her on "the thing she urinates with". She narrated that he removed her trousers and panties, removed his thing for urinating through the zip

of his trousers, made her lie on a bench in the shop and put his thing for urinating in her thing for urinating. She felt a lot of pain. She however did not scream.

10. It was her further evidence that one Nzula came and saw them through the window and asked the appellant in Kiswahili, "unafanya nini mtoto mdogo" ("what are you doing to a small child"), to which he replied "hakuna" ("nothing") and the appellant then opened the door and grabbed Nzula but she ran away leaving behind her sweater.

11. The appellant then told her to go home and not tell anyone what had happened. On the following day, she told her mum what the appellant had done to her. She was later taken to Nairobi Women's Hospital for treatment.

12. T M testified as PW2. She told the trial court that on 16th February, 2008, at about 2:00 PM, she had sent PW1 (her daughter) then aged 7 years to the appellant's barber shop for a haircut. At about 4:00 PM, she got concerned as she had not returned prompting her to send her house girl one Nzula to go and look for her.

13. On learning what had happened to PW1, she rushed PW1 to Nairobi Women Hospital for examination and treatment. She later reported the matter at Kayole Police Station where she recorded her statement and the appellant was arrested and charged with the offence.

14. Dr. Kamau a police doctor testified as PW3. It was his evidence that on 13th March 2008, he examined the appellant who was a suspect of defilement. On examination, he had no injuries and his genitalia was normal.

15. It was his further evidence that on 12th March 2008, he examined PW1 in a case of defilement. Upon examination, PW1 had no physical injuries and there was no blood. She, however, had a vaginal tear.

16. PW4 was Kinuthia Mbugua a registered clinical officer then working at Nairobi Women's Hospital. He produced a medical report in respect of PW1, who had a history of defilement prepared by Dr. Muhombe on 16th February 2008. Upon vaginal examination, the same was found to be reddish at the opening and the vaginal walls were inflamed. Further investigations revealed presence of red blood cells in the urine. HIV, hepatitis B and syphilis tests were all negative. A vaginal swab detected spermatozoa. He concluded that defilement had occurred.

17. PW5 was PC Naomi Nyamweya then attached to Kayole police station and the investigations officer in this case. It was her evidence that on 16th February 2008, PW1 and her mother (PW2) reported that PW1 had been defiled the previous day i.e. on 15th February 2008.

18. On 26th February 2008, in the company of Sergeant Korir, they went to the appellant's barber shop and arrested him. The appellant was identified to them by PW1 who had accompanied them.

19. It was her further evidence that PW1 told her that on the material day at about 1:00PM, she had gone to the appellant's barber shop for a haircut and that afterwards, the appellant laid her on the bench and defiled her. The complainant later reported the incident to their house help (Nzula).

20. The appellant in his defence gave a sworn statement and denied having committed the offence. He further testified that he used to operate a barber shop in Kayole with one Collins Omondi and that he knew PW1, her siblings and parents as they were his customers.

21. He further testified that on the material day PW1 never visited his shop and that the testimony given by PW1 was a lie. He testified that he had a strained relationship with PW1's father as he had once requested him to allow him have his shop but he declined, and from that time, he stopped coming to his shop.

22. DW2 was Ruth Maithya attached to Kayole police station. It was her testimony that she was the current investigations officer and that when the police file was handed over to her, she came across the statement of Mary Nzula which she produced as Defence exhibit 1.

23. When the matter came up for plenary hearing on 3rd March 2020, Mr. Migele, learned counsel held brief for Mr. Oyuko for the appellant whereas Ms Magdalene, Senior Assistant Director of Public Prosecution appeared for the respondent. Mr. Migele relied on his written submissions filed in Court on 24th May 2019 and a list of authorities filed on 24th August 2019 which he orally highlighted before us. Ms. Magdalene for the respondent on the other hand, did not file written submissions but nevertheless made brief oral submissions.

24. The appellant in his submissions condensed his grounds of appeal into 3 main thematic areas namely; contradictions of testimonies of the prosecution witnesses, failure to corroborate the testimony of PW1and failure by the two courts below to consider his defence.

25. On the first issue, it was submitted that it was evident that the evidence of the witnesses presented by the prosecution in the lower court was littered with numerous contradictions that rendered the appellants' conviction unsafe.

26. It was submitted that when PW1 testified on 15th January 2009, she made allegations not contained in her statement to the police.

27. Regarding, PW2's testimony, it was submitted that she testified twice in court and that in her two statements she contradicted herself. It was submitted that in her first testimony, she had stated that she was not at home when PW1 went to the barber shop whereas in the second one, she implied that she was present in the house when PW1 went to the barber shop when she stated thus: "I sent my Rosemary Nduta to the barber shop, at around 4.00PM we got concerned."

28. It was further submitted that in her first testimony, she alleged the day of defilement was 15th February 2008, while in the second testimony, the date changed from 15th to 16th February 2008.

29. Further, in the first statement, she stated that she was told that both the barber (the appellant) and PW1 were half naked but in the second testimony she said that the complainant and the appellant were fully naked.

30. Turning to corroboration, it was submitted that the learned trial magistrate did not state in her judgment that she was satisfied that the child was telling the truth and neither did she warn herself on the dangers of convicting the appellant on uncorroborated evidence of a child and that the supposed eye witness and the complainant did not corroborate each. Moreover, no DNA test was done to confirm that the spermatozoa found on PW1 was of the appellant.

31. Lastly, regarding the appellant's evidence, it was submitted that the appellant gave sworn evidence inter alia that on the material day PW1 did not go for a haircut at his barber shop as it was a school day; that PW1 was a school going child and that this evidence was not challenged since the prosecution witnesses had contradicted each other on the time PW1 went for a haircut. It was contended that the court disregarded this evidence.

32. Consequently, we were urged to find merit in the appellant's appeal and set aside the conviction and sentence of the lower court as upheld by the Superior Court.

33. Miss Magdalene learned prosecution counsel for the respondent, on the other hand, while opposing the appeal, submitted that a DNA test was not necessary as there was no other evidence to suggest that PW1 could have been defiled by someone else.

Further, the appellant was very well known to PW1 as she had been to his barber shop on several other occasions.

34. Regarding PW1's age, it was submitted that there was no doubt as regards the age of PW1 and that there was a concurrent finding of fact by the two courts below that PW1 was 7 years old at the time of the incident. The evidence of PW1's mother who testified as PW2 was sufficient in this regard.

35. Turning to the issue of failing to call Nzula, the house help who allegedly witnessed the incident, it was submitted that the investigations officer had stated that she could not trace her and there was no need to make adverse findings for her non- availability. Further, the trial had dragged on for 7 years, and that PW1 was consistent in her evidence. Finally, we were urged to find that the medical evidence proved penetration and defilement.

36. We have carefully considered the record, the rival written and oral submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code, we are mandated to consider matters of law only.

37. The above provision has been enunciated in several decisions of this Court. In David Njoroge Macharia vs. Republic [2011] eKLR the said mandate was summed up in the following terms:

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213)."

38. Having carefully gone through the record and the rival pleadings by the parties, we have framed the following 3 main issues for our determination:

    a. Whether the two courts below erred in relying on the prosecution's evidence which was marred with contradictions/ inconsistencies.

    b. Whether the trial court erred in relying on the testimony of PW1 which was not corroborated.

    c. Whether the trial court erred in failing to consider the appellant's evidence/ defence.

39. As regards whether the prosecution's case was marred with contradictions, PW1 testified that on a day she could not recall, she had gone to the appellant's barber shop for a haircut and that the appellant was well known to her as she had previously gone there severally for a haircut.

40. It was her evidence that after the haircut, the appellant started "doing bad manners to her" by touching her private parts.

41. It was her further evidence that the appellant then removed her trousers and panties, laid her on a bench and proceeded to defile her.

42. In cross examination she remained firm and consistent when she stated thus:

> " I came to your shop at about 2PM. You have always cut my hair when I am with my brother. On that day I was alone. You did the bad manners to me 3 times taking breaks in between."

43. PW2, who was the complainant's mother and who testified twice gave a consistent account of how when PW1 delayed in returning home from the barber shop, she sent her house help one Nzula to the appellant's barbershop.

44. PW3 and PW4 who both examined PW1, indeed confirmed that she had been defiled with PW3 stating that he saw a vaginal tear in PW1's vagina whereas PW4 stated a vaginal swab revealed presence of spermatozoa leading to the conclusion that defilement had occurred.

45. PW5 who was the investigations officer in this case, gave a consistent account of the events of that day as narrated to her by PW1; that on the material day PW1 had gone to the appellant's barber shop for a haircut whereupon she was defiled by the appellant. It is indeed not in doubt that PW1 was defiled as evidenced by the testimony given by PW1 which evidence was corroborated by the medical evidence tendered by both PW3 and PW4 who examined her. Additionally, both PW2, the complainant's mother and PW5, the investigations officer gave detailed accounts of how PW1 was defiled as narrated to them by PW1 which evidence, speaking to consistency, remained largely unshaken even under cross examination.

46. Additionally, it was not in dispute that the appellant was well known to PW1 as she used to go to his barber shop for a haircut. The appellant in his defence admitted as much.

47. Be that as it may, we note that there were minor contradictions in the testimony of the prosecution witnesses which in our view did not go the root of the prosecution's case for reasons we shall allude to shortly. PW2 for example in her first testimony stated that the defilement occurred on 15th February 2008 whereas in the second statement she stated that the same occurred on 16th February 2008.

48. The charge sheet on the other hand indicated that the defilement occurred on 15th February 2008 and PW5 who was the investigations officer stated in re-examination that the incident took place on 15th February 2008 but was reported on 16th February 2008.

49. Regarding the other contradictions raised by the appellant inter alia whether PW1 and the appellant were half or fully naked, the date and time when PW1 went for the haircut, what her real name was, whether it was Kshs 20 or 10 for the haircut and whether Nzula was a house girl or cousin to PW1, we consider them to be of no consequence as they did not dislodge in any way, the overwhelming evidence tendered by the prosecution that PW1 was defiled by the appellant.

50. In the case of Philip Nzaka Watu v Republic {2016} eKLR, this Court stated as follows regarding contradictions in evidence:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty,

just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question." (Emphasis ours)

51. We fully agree and reiterate the sentiments expressed by the Court in the authority cited above and consequently find no merit in this ground of appeal.

52. Turning to the second issue that we have framed for our determination, the trial court was faulted for relying on the testimony of PW1 which was uncorroborated.

53. It was the appellant's submission that an accused person shall not be liable to be convicted on the evidence of a child unless it was corroborated by other material evidence implicating an accused person.

54. It was submitted that in the instant case, the trial magistrate having taken the child through voire dire examination, she formed the opinion that the child was intelligent and directed that she makes an unsworn statement because she did not understand the meaning of taking an oath and that trial magistrate did not form an opinion whether the child understood the duty of the telling the truth. The appellant thus sought refuge in the provisions of Section 124 of the *Evidence Act* CAP 80 of the Laws of Kenya.

55. Section 124 of the *Evidence Act* that the appellant sought to rely on provides as follows:

> " Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act* (CAP 15), where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him." (Emphasis Ours).

56. A proviso to that Section further provides:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

57. In the instant case, it is evident that the appellant misapprehended the provisions of Section 124 (supra) as the appellant was not solely convicted based on the evidence of PW1 as there were other witnesses namely; PW2, PW3, PW4 and PW5. The provisions of Section 124 of the *Evidence Act* were therefore not applicable in the instant case. Suffice to state that PW1's evidence was corroborated by the medical evidence that there had been penetration.

58. The trial court was further faulted for failing to take into account the appellant's defence. The appellant in his evidence denied having committed the offence and stated that on the material day PW1, who was well known to him, did not come to his barber shop. He further alluded to an alleged grudge between him and PW1's father. It is imperative to note that the appellant never raised these issues during cross examination and he only raised them in his defence.

59. The trial court while considering the appellant's defence stated as follows in its judgment:

> " The accused on his part has denied that he defiled the complainant and he states that the complainant never went to his shop on the material day. He went to great lengths to explain the layout of the place where the shop is situated.
>
> It would appear that she was insinuating that the place is so crowded that such a thing could not have happened. The accused further went on to say that he and the father of the complainant had not been in good terms because he refused to give up his shop for (sic) the father of the complainant.
>
> The complainant was clear that the day the accused defiled her, her father was not in the shop and her mother PW2 corroborated this. The complainant herself said that she did not scream hence there was no likelihood that the incident would have attracted attention of others.
>
> It appears that the accused is insinuating that he may have been framed because of the issues concerning the shop. The issue about grudges over the shop was not mentioned in cross examination of the prosecution witnesses more so the complainant and her mother. Further the accused himself confirmed that he is the one who usually cuts the complainant's hair. If indeed it was true that the issue of the shop had caused a grudge between the complainant's father and the accused to the point where they were not talking to each other anymore, I don't think he would allow his children to go to the accused person's shop for haircuts. It appears to me that the defence by the accused is an afterthought.
>
> I find that the accused is the one who defiled the complainant."

60. From the above excerpt of the judgment of the trial court and contrary to the appellant's contention, it is evident that his defence was considered and in our view rightly dismissed as a mere afterthought. In any event, it never dislodged the evidence tendered by the prosecution which evidence remained consistent and firm throughout the trial. Consequently, we find no merit in this ground of appeal and the same must fall flat.

61. Lastly, we note that the appellant took issue with the failure to call one Nzula as a witness, PW1's age and failure to conduct a DNA test.

62. PW1, the complainant in this case testified that one Nzula, who was their house girl, found the appellant in the act while defiling her. PW2 as well testified that Nzula told her that she found the appellant in the act defiling PW1. Whereas it may have been appropriate to call the said Nzula as a witness to testify as she was alleged to be an eye witness, it is our considered opinion that failure to call her was not fatal to the prosecution's case as pursuant to the provisions of Section 143 of the *Evidence Act* CAP 80 of the Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact" and the evidence in this case was, to say the least, overwhelming. Further, we take judicial notice that offences of this nature happen in private and there are no eye witnesses. Consequently, nothing turns on this point.

63. Turning to the issue of the complainant's age, PW1 who was the complainant in this case stated during voire dire examination that she was 8 years old. PW2 who was her mother equally stated in her examination chief that PW1 was aged 8 years as at the time she was testifying and there was nothing on the record to suggest that she was aged otherwise. The appellant did not even raise this issue to the complainant during cross examination. Indeed, this Court has stated previously that nobody can know

better the age of a child than its mother. Consequently, we find that the complainant's age was proved without contravention, to the required standard. We say no more regarding this issue.

64. On the issue of DNA test, it is now well settled that DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See the case of A M L Versus Republic (2012) eKLR where this Court stated:

> " The fact of rape or defilement is not proved by D.N.A test but by way of evidence".

65. In light of the overwhelming evidence by the prosecution pointing towards the appellant as the perpetrator of this offence, coupled with the medical evidence on record, we are of the considered opinion that a DNA test was not necessary in the circumstances. The totality of our finding, therefore, is that these grounds of appeal are unmerited and we consequently dismiss them.

66. Similarly, the contention by the appellant that the judgment was delivered in his absence remained largely unsubstantiated and he did not even make attempt to address us on the same.

67. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant. We do not entertain any doubt as to whether it was the appellant who defiled PW1.

68. We therefore find and hold that the appellant's conviction was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

69. Turning to sentence, the appellant was sentenced to life imprisonment which is the mandatory minimum sentence provided under Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. The sentence was therefore lawful.

70. Accordingly, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

However, before we pen off, we wish to apologize to the appellant for the delay in the delivery of this judgment. Regrettably, it is one of those that fell through the cracks and it was not until a few weeks ago when going through our records that we discovered it was undelivered. This inadvertence is highly regretted.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

P.O KIAGE

.....

JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.