Republic v Walunywa (Criminal Appeal 212 of 2019)
[2024] KECA 1813 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1813 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 212 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

REPUBLIC .... APPELLANT

AND

ERNEST WALUNYWA .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (R. N. Sitati, J.) dated 13th June 2019 in HCCRA No. 43 of 2015)

JUDGMENT

1. Ernest Walunywa, who is the respondent in this appeal, was charged before the Magistrate's Court at Bungoma, for the offence of defilement of a child contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence alleged that on 7th September, 2011, in Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of EW (name withheld), a child aged 16 years old.

2. Following the trial, in which five witnesses testified for the prosecution, including EW, her brother PW, and mother VN, while the respondent gave a sworn statement in his defence and called one witness. The magistrate found that the prosecution evidence, was not sufficient to prove the case to the required standard, because there was no corroborative evidence to prove the alleged defilement. This was because the clinical officer who examined EW did not find any evidence of physical assault, and although EW's hymen was missing, there was a possibility of her hymen having been broken earlier due to sexual intercourse or strenuous exercise. The trial magistrate also found that there was evidence of bad blood between the complainant's family and the respondent's family and that in the absence of any further evidence in support of the evidence of the complainant and her brother, it would not have been safe to convict the respondent.

3. The State, being dissatisfied with the judgment of the trial magistrate, lodged an appeal before the High Court challenging the respondent's acquittal. Upon hearing the appeal, the High Court delivered a judgment in which it dismissed the appeal, finding that there was contradiction between the evidence of EW and PW; that the clothing of EW including the panties which were alleged to have been handed over to the police, were not identified by EW; and that the evidence of the clinical officer was not conclusive on whether EW was defiled. The learned Judge, therefore, upheld the judgment of the trial court, acquitting the respondent, and dismissed the appeal.

4. The State is still not satisfied, and has, therefore, lodged this second appeal against the entire judgment of the High Court dismissing its appeal. Our efforts to trace the grounds of appeal, if any, that were filed by the State against the judgment of the High Court, have not been successful. However, the State filed written submissions that were duly prepared by Ms. Grace Gachau, a Senior Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP).

5. In the written submissions, the State addressed several issues.

   The State submitted that the key ingredients of the offence of defilement which include proof of the age of the complainant, proof of penetration and proof of the respondent as the perpetrator of the offence, were all established beyond reasonable doubt.

6. On the issue of proof of age, the State relied on the Court of Appeal decision in Richard Wahome Chege -vs- Republic, Criminal Appeal No. 61 of 2014, in which the Court accepted the oral evidence of the mother to the complainant to establish age. Also cited was Francis Omuron -vs- Uganda, Criminal Appeal No. 2 of 2000, where the Court of Appeal Uganda stated that:

   > "Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

7. On penetration, the State cited Section 2 of the *Sexual Offences Act*; and Mark Oiruri Mose -vs- R. [2013] eKLR, in which the Court of Appeal stated that penetration need not be deep in the girls' organ, as it is sufficient even if it is merely on the surface. In regard to identification, the State cited Reuben Anjonini & others -vs- Republic [1980] eKLR, arguing that the respondent was well known to EW and was identified by virtue of recognition.

8. On the issue of contradictions and inconsistencies, the State submitted that there were no contradictions or inconstancies, and even if they were, they were very minor, and did not go to the root of the prosecution's case, and the court should therefore, have ignored them. In addition, that the inconsistencies if any, were satisfactorily explained, and the record clearly reflects the prosecutions witnesses as truthful witnesses. In this regard, the State cited Joseph Maina Mwangi -vs- Republic, Criminal Appeal No. 73 of 1993; and Erick Onyango Odeng' -vs- Republic [2014] eKLR.

9. Another issue addressed by the State is the issue of corroboration.

   Citing Section 124 of the *Evidence Act*; and JWA -vs- Republic [2014] eKLR, the State submitted that EW's evidence was corroborated by the evidence of her brother, PW, her mother VN and that of Elias Odoka, the clinical officer, who found that EW's hymen was not intact. It was argued that the torn hymen was a result of the defilement of EW by the respondent. It was noted that the trial court did not question the truthfulness of EW's evidence, and, therefore, she was found to be a candid witness whose evidence could be relied on under section 124 of the *Evidence Act*, to found a conviction. The Court was therefore urged to allow the appeal.

10. The respondent also filed written submissions in which they argued that the prosecution did not prove its case beyond reasonable doubt. On age, the respondent submitted that although the age of EW was indicated on the charge sheet as 16 years, EW stated her age in examination in chief as 16 years, but in cross examination said she did not know her date of birth, while the clinical officer stated that EW had informed him that she was 12 years. However, in the P3 form, there was alteration of EW's age from 12 to 16 years. The respondent argued that VN having been present when the report was made to the police, she must have been the one who gave EW's age as 12 years.

11. On penetration, the respondent argued that this was also not proved, as the clinical officer noted that there was no evidence of physical assault on EW, that her genitalia was normal, and that her hymen could have been broken from an earlier sexual intercourse or strenuous exercise. It was therefore argued that the absence of the hymen could not be attributed to the alleged defilement.

12. On identification, it was submitted that the respondent having stated that he was at his home with his children and could not therefore have committed the offence, the prosecution had the burden of dislodging the respondent's defence of alibi, which burden they did not discharge. The respondent pointed out inconsistencies in the prosecution case and urged the Court to find that EW was not a truthful witness.

13. This being a second appeal, this Court's jurisdiction is limited under Section 361(1) of the Criminal Procedure Code to matters of law only. As stated in Stephen M'Irungi & another -vs- Republic [1982-88] 1 KAR 360:

> "Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mix findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence no reasonable tribunal could have reached that conclusion which would be the same as holding that the decision is bad in law."

14. The main issue for our consideration is whether the High Court erred in coming to the conclusion that the evidence which was adduced before the trial court was not sufficient to prove the charge of defilement against the respondent.

15. Both the appellant and the respondent have addressed the ingredients required to prove the charge of defilement and it is common ground that age of EW, penetration of her sexual organs by the respondent had to be established beyond reasonable doubt in order to sustain a conviction.

16. The evidence regarding the age of EW, was her own evidence, that of her mother VN, and that of the clinical officer who examined her. An examination of the evidence before the trial court reveals that EW claimed to be 16 years in her evidence in chief, and although she did not know her date of birth, she claimed her mother informed her that she was born in 1996. This was consistent with the evidence of VN who claimed that EW was born in April, 1996, although she had nothing to confirm that allegation. The contradiction arises from the P3 form, where the age of EW was altered from 12 to 16 years. There is also the clinical officer who filled the P3 form estimating EW's age at section 'C' as 12 years and who testified that EW told him she was 12 years old. Although both EW and the clinical officer talked of an age assessment having been done, no evidence of the age assessment was produced, nor was the person who did the age assessment called as a witness.

17 In light of the foregoing evidence, the submissions that the evidence regarding EW's age was inconsistent, was not without substance. Be that as it may, the respondent was charged under Section

8(1) of the *Sexual Offences Act*, as read with Section 8(4) of the *Sexual Offences Act*. This required proof that the child victim was between 16 and 18 years of age. While the fact that EW may have been younger than 16 years, would not have been prejudicial to the respondent, because it would merely confirm that EW was a child under 18 years old, the inconsistency in the age cannot be ignored because it is not the only inconsistency.

18. The evidence regarding penetration was equally perturbing.

While EW claimed that the respondent inserted his private parts into her private parts, and her brother PW claimed he went to where EW was, and found the respondent on top of EW, with her dress which was torn having blood, and her panties also having blood on it, and that the respondent escaped when PW moved closer. PW was not consistent in his narration of what he saw. This is because in cross examination, he stated that he found EW lying on the ground, her panties and petticoat lying aside, while the respondent was "escaping while belting his long trouser", and that EW picked her panties and her clothing which had blood. In other words, he does not seem to say that the respondent was on top of EW as he had alleged in his evidence in chief.

18. Both the two lower courts noted that beside the evidence of EW's brother, there was no other evidence to confirm her allegation. This is because the evidence of the clinical officer, was not conclusive, as he noted that the external genitalia was normal, and there was no evidence of forceful, first, sexual intercourse. The evidence of EW was complicated further by the fact that the matter was reported to the police about five days after the incident.

18. It is appreciated that the absence of medical evidence to support the fact of defilement is not necessarily decisive, as defilement can be proved by the oral evidence of a victim or by circumstantial evidence. This is the purport of Section 124 of the *Evidence Act*, which allows the Court to convict on the evidence of the victim alone, provided the trial court is satisfied that the victim is telling the truth. (See Muhendu -vs- Republic [2024] KECA 322 (KLR)). In this case, the truth of EW's evidence was in doubt, and, therefore, Section 124 would not have been applicable.

19. This being a second appeal, we have to deferto the concurrent findings of the two lower courts. We also appreciate that the trial magistrate who saw and assessed the demeanor of the witnesses was in a better position to assess their credibility. In addition, it was not disputed, as noted by the learned Judge of the High Court, that the home of the family of the respondent and that of EW, were separated by a common boundary, and that the respondent's sister who was EW's step mother, was given land while VN was not given any. The respondent's contention that there was bad blood between the two families, which could have provided a motive for fabricating a case against him, was therefore not ruled out.

18. It is a principle of law that the prosecution in a criminal trial bears the burden of proof and this burden never shifts. We concur with the dictum of the Supreme Court of Nigeria in Bakare -vs- State [1985] 2 NWLR, as quoted by the Court in Siele -vs- Republic [2023] KECA 165 (KLR):

> "Proof beyond reasonable doubt stems out of the compelling presumptions of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

18. We come to the conclusion that this appeal lacks merit as the evidence which was relied on by the prosecution, in proof of its case did not establish, to the required standard, all the ingredients of the

offence that the respondent was charged with. There was a doubt, the benefit of which had to go to the respondent. Consequently, we uphold the judgment of the High Court upholding the acquittal of the respondent by the trial court, and dismiss this appeal.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR