Serem v Republic (Criminal Appeal 108 of 2019)
[2023] KECA 30 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 30 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 108 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JANUARY 26, 2023

BETWEEN

GEOFFREY KIPTOO SEREM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and judgement (Kimaru. J) delivered on 26th September, 2018) In HCCRA. No. 39 of 2015)

JUDGMENT

Background

1. The appellant was charged in the magistrate's court with defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* (SOA). The particulars were that on diverse dates between 8/5/2013 and 17/5/2013 at [Particulars Withheld] Village in Eldoret West District within Uasin Gishu County, the appellant unlawfully caused his penis to penetrate the vagina of LA a child aged 12 years.

2. He faced an alternative count under section 11 (1) of the *Sexual Offences Act*. The particulars were that on the mentioned date in Eldoret West District, the appellant unlawfully caused his penis to come in to contact with vagina of LA a child aged 12 years.

3. The prosecution called 5 witnesses to prove its case. At the material time the complainant was afew months shy of her twelfth birthday. A birth certificate produced on her behalf in evidence indicated that she was born on 24th August, 2001.

4. The minor testified that on 5th May, 2013, the appellant followed her home as she was walking from school and entered the house while the she was changing out of her school uniform. He held her, removed her underpants and his trousers and inserted his penis into her vagina. The minor stated that

she was alone at home and although she felt pain, she was too ashamed to mention the incident to anyone.

5. It was the minor's testimony that on 17th May, 2013, again the appellant followed her home as she was coming from school and for the second time forcefully defiled her. However, on this particular day PW4, DCB came visiting and found the appellant in the act. Upon seeing PW4 the appellant walked out of the house. PW4, impaired by a leg injury, was not able to apprehend the appellant on the spot.

6. PW4 informed PW3, SOO the complainant's mother, about the incident and she in turn made a report at Baharini Police Post. The complainant was examined by PW2 Dr. Joseph Embenzi, at Moi Teaching and Referral Hospital on 20th May, 2013. He established that her hymen was torn but had healed and he concluded that there was penetration.

7. PW5, PC Musa Ouma conducted the investigation and consequently charged the appellant as read.

8. When placed on his defence, the appellant denied that he committed the offence. He stated that on the said date of 17th May, 2013, he heard screams emanating from the neighbour's house to the effect that the complainant had been defiled. He was shocked to be implicated in the offence and accused members of the public of fabricating evidence against him to connect him with the charge.

9. At the end of the trial, the appellant was found guilty and convicted as charged in the main count. He was sentenced to serve 20 years imprisonment. Being aggrieved by the conviction and sentence the appellant filed an appeal in the High Court on the grounds that:

    i. He was convicted on contradictory evidence,

    ii. The medical evidence was fabricated and left reasonable doubt,

    iii. The charge was not proved to the required standard,

    iv. The evidence on record did not corroborate the evidence of the complainant,

    v. The court did not comply with the provision of section 211 of the *Criminal Procedure Code* when the appellant was put on his defence.

10. In the superior Court the learned Judge analyzed and re- evaluated the evidence on record and held that the prosecution had proved the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the *SOA* against the appellant to the required standard. The appeal was found to lack merit and was dismissed.

11. Undaunted by the dismissal of his appeal in the superior court, the appellant filed grounds of appeal in this Court on 9th October, 2019 and later still, he filed supplementary grounds of appeal. In sum, he alleges in his grounds of appeal that the superior court erred in upholding a conviction which was based on insufficient medical evidence that did not prove penetration and which had grave discrepancies. Further that, the case was not proved beyond reasonable doubt and lastly that the superior Court did not consider his defence.

Submissions

12. This appeal was disposed of by way of written submissions that were orally highlighted in the virtual Court. The appellant who was acting in person filed his written submissions that were undated. Ms. Githaga appearing for the state filed written submissions dated 26th April, 2021.

13. The appellant submits that the medical report that was heavily relied upon by the trial court to convict him and by the superior court to uphold the conviction, was not conclusive proof of penetration since

a broken hymen is not conclusive proof of penetration. He relies on this Court's decision in *David Mwingirwa v R*; Criminal Appeal No. 23 of 2015 and *Queen vs Manuel Vincent Quantanila* (1999) ABQB 769 to support this point.

14. The appellant contends that there was inconsistency in the prosecution evidence. He gives an example where, according to the prosecution, the incident was reported to the police on the 27th May, 2013 and the complainant was taken to the hospital on 28th May, 2013. However, according to PW2 the medical witness, the minor was examined on 20th May, 2013.

15. The appellant also submits that he told the trial court that he was unwell and needed time to recover, but the court turned down his request in total disregard of his constitutional right under Article 25 (c) of the *Constitution*, following objection from the prosecution. The court opted to continue with the proceedings. Therefore, that he was not accorded fair trial and was denied justice.

16. The appellant further argues that the complainant's evidence was not credible since she did not tell her mother what had happened to her, and that there was no evidence to support her allegations that she was threatened by the appellant.

17. It is therefore, the appellant's submission that based on the foregoing, the prosecution's case was not proved to the required standard and the appeal should be allowed.

18. In opposition, Ms. Githaga submits that Article 25 (c) of the *Constitution* was not violated as the appellant was given adequate time to prepare his defence. Counsel urges that the court was right not to grant an adjournment on account of sickness, since the appellant had been produced in court by the government of Kenya prison and there was no communication to the court, or prosecution, that the appellant was unwell or unable to stand trial.

19. Counsel points out that in as much as corroboration is not a requirement under Section 124 of the *Evidence Act*, the complainant's statement was corroborated by both PW4 who caught the appellant in the act of defiling the minor and the P3 form which confirmed that indeed there was penetration.

20. It is counsel's contention that the three key ingredients of defilement were proved. That the age of the complainant was established; the findings in the P3 form proved penetration, and here counsel relies on this court's decision in *Mark Oiruri Moses v R* (2013) e KLR and Erick Onyango Ondeng v Republic (2014); and that the appellant was not a stranger to the complainant. Moreover, that the appellant was also positively identified by PW4.

Determination

21. We have considered the record of appeal, the submissions of the parties, the authorities relied on and the law. We are cognizant of our role as the second appellate Court and the limit of our jurisdiction, to matters of law as defined in Section 361 of the *Criminal Procedure Code*.

22. The mandate of the Court on second appeal was restated by this Court in *David Njoroge Macharia v Republic* [2011] eKLR as follows;

> " That being so only matters of law for consideration -see section 361 of Criminal Procedure Code. As this court has stated many times before, it 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 *Chemagong v R* (1984) KLR 611."

23. In view of the principles set out above, the issues that arise for determination are first, whether the ingredients of defilement were all established to be present in this case and secondly, whether Article 25 (c) of the *Constitution* was contravened in the manner in which the trial was conducted.

24. The key ingredients that must exist to found a conviction in an offence of defilement are firstly, that the complainant/ victim is a child, secondly, that there was penetration and thirdly, that the person charged was positively identified as the perpetrator of the offence.

25. There was no dispute on two of the ingredients and neither did the appellant raise them as grounds of appeal. The complainant was said to be a minor aged twelve years at the material time and the birth certificate produced in evidence confirmed that she was born on 24th August, 2001.

26. On the identification of the appellant as the perpetrator of the act of sexual violence against the minor, The Court notes that the assault against the minor was carried out on two different occasions, in broad daylight and by a person who was well known to her. Both the complainant and PW3 her mother, testified that the appellant was well known to them. Further, PW4 identified the appellant as the person he found with the minor in '*flagrante delicto*'.

27. The appellant's main point of umbrage is on the ingredient of penetration, which he urges was not proved to the required standard. It is his spirited contestation that a broken hymen is not proof of penetration. On the other hand, Counsel for the state submits that there was sufficient evidence to prove penetration. The two courts below found that penetration had been proved.

28. The definition of Penetration under Section 2 of the *SOA* is:

> " The partial or complete insertion of the genital organs of a person in to the genital organs of another person"

The place of Penetration in sexual offences was elaborated in this Court's decision in *Erick Onyango Ondeng' v Republic* [2014] eKLR, relied on by the respondent, in which this Court quoted with approval the Uganda Court of Appeal decision in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6, as follows:

> " in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

29. Upon considering the testimonies of the complainant and PW4 and the medical evidence presented at the trial, we find no basis to fault the finding the two courts below arrived at on the ingredient of penetration. The medical evidence confirmed the presence of a broken hymen which was indicative of the act of penetration and the evidence of PW4 confirmed that the act of penetration was occasioned by the appellant's penis. Thus, we find that the evidence of the two witnesses corroborated that of the complainant.

30. The appellant also contends that the discrepancies in the prosecution case, should lead the Court to conclude that the prosecution witnesses were not credible.

31. Discrepancies in evidence were addressed in Twahangane Alfred *supra* as follows:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

32. Upon analysis of the record it is our considered view that the discrepancies that the appellant has pointed out in the prosecution case, are minor contradictions that do not affect the main substance of the prosecution case.

33. The appellant further argues that his rights under Article 25 of the *Constitution* were contravened. The appellant's contention is predicated on the trial court's proceedings dated 19/2/2014 which was recorded as follows:

> " Accused: - I am unwell. I am being treated at Prisons dispensary
>
> Prosecutor: I object to the application. The accused did not mention that he needed time. Last time, I had this matter adjourned. The excuse is lame, let hearing proceed.
>
> Court: We could have evidence of the minor."

In opposition the respondent submits that the appellant has not elaborated how the said rights were contravened.

34. Article 25 (c) of the *Constitution* provides that:

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-
>
> (a) .....
>
> (b) .....
>
> (c) the right to a fair trial;

35. The appellant's submission that he was not accorded fair trial is therefore based on his allegation that he was denied an adjournment when he was unwell. There is however, no evidence to indicate that the appellant was incapacitated, or was not capable of standing trial. He went on to participate in the trial and to cross examine the witnesses well. We therefore find no evidence that the appellant's right to fair trial was contravened.

36. We note that the appellant did not advance any grounds or submissions on the sentence. The birth certificate produced in evidence on behalf of the minor indicates that she was born on 24th August, 2001 and was therefore a few months shy of her twelfth birthday at the material time. Therefore, although the charge sheet indicates that she was a child of twelve years of age she was not quite there yet.

37. The age bracket of "a child age eleven years or less", which the minor was transitioning from required the appellant to be charged under section 8 (2) *SOA*, which carries a sentence of imprisonment for life upon conviction. The appellant is lucky to have been charged under section 8 (3) *SOA*, which covers the age bracket of "a child aged between the age of twelve and fifteen years", and which provides for a sentence of not less than 20 years imprisonment. We have therefore, not interfered with the sentence visited upon him.

38. In the end, having examined the analysis of the evidence by both the trial court and the superior court, we are satisfied that they evaluated the evidence properly and applied the law applicable as required. The two courts arrived at the right conclusion on the evidence availed.

39. In the premise, we find no justification to interfere with the conviction or the sentence meted upon the appellant. Consequently, this appeal is found to have no merit and is accordingly dismiss.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR