ASS v Republic (Criminal Appeal 89 of 2021) [2023] KECA 873 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 873 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 89 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 7, 2023

BETWEEN

ASS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Conviction and Sentence in a judgment of the High Court at Nairobi (L. Kimaru, J.) delivered on 7th October 2020 in Milimani High Court Appeal No 69 of 2017)

JUDGMENT

1. The appellant, ASS was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on June 25, 2016 in Ngong within Kajiado County, the appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the vagina of EK (PW1), a child aged 11 years.

2. There was an alternative charge, where he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day in Ngong within Kajiado County, he intentionally and unlawfully touched with his hands the breasts and buttocks of EK.

3. The appellant pleaded not guilty and at the hearing, the prosecution called 6 witnesses. Upon considering the evidence, the trial court found the appellant guilty and convicted him of the main charge of defilement and sentenced him to life imprisonment.

4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court, against the decision. The High Court dismissed his appeal and upheld the conviction but substituted the sentence of life imprisonment with 20 years' imprisonment.

5. The appellant was once again aggrieved by those findings and filed this appeal on grounds that; the learned judge failed to find that the elements of the offence were not conclusively proved to warrant

a conviction; it relied on the evidence of EK whose integrity was questionable and by so doing improperly applied section 124 of the *Evidence Act*; failed to find that the charge against the appellant was duplicitous; failed to find that the voir dire examination was badly conducted.

6. The appellant filed written submissions, and when the appeal came up for hearing, the appellant appeared in person from Kamiti Prison, and informed us that he would rely on his submissions in their entirety. In the submissions, he stated that the prosecution failed to prove its case beyond reasonable doubt as required by law; that the elements of the offence of defilement were not conclusively proved, particularly since the prosecution did not demonstrate that there was penetration of the genital organ of EK by the appellant; that EK was of questionable integrity and the appellant faulted the trial magistrate for believing EK's evidence, yet her family did not believe her and all the prosecution witnesses demonstrated openly before the court that she was not a credible witness.

7. The appellant further submitted that the voir dire examination was not properly conducted on the EK and PW2, as they were only asked elementary questions; in particular, she was not asked whether she knew the reason for telling the truth or the meaning of an oath.

8. Learned prosecution counsel for State Mr. Omondi opposed the appeal, and submitted that this being a second appeal, only issues of law were to be considered. Counsel submitted that, the High Court had addressed the issues raised and consequently, this Court should not interfere with the decision; that all the ingredients for the offence were established through the evidence of EK and PW2 and the medical evidence, and therefore this Court should accordingly uphold the appellant's conviction and sentence.

9. This is a second appeal. The mandate of this Court is specified under section 361(1) of the *Criminal Procedure Code* to the effect that in second appeals, this Court's jurisdiction is limited to matters of law only. The Court ought not to interfere with factual matters save for instances where the findings made are not supported by the evidence on record. See *Adan Muraguri Mungara v Republic* [2010] eKLR and *David Njoroge Macharia v Republic* [2011] eKLR.

10. In view of our mandate on a second appeal, the issues that fall for determination are;

    i) whether the offence of defilement was established beyond reasonable doubt;

    ii) whether the trial magistrate was entitled to rely on EK as a credible witness; and

    iii) whether the voir dire examination of EK and PW2 was properly conducted.

11. To enable us determine the issues raised, we consider it important to briefly highlight the facts that the prosecution adduced before the trial court.

12. After the conduct of a voir dire examination, EK, (PW1), a girl aged 11 years gave a sworn statement; that on June 25, 2016, she was returning home from school in the company of her brother PW2, when O, the appellant who used to be their caretaker did bad manners to her; that it was a Saturday, and after he called her, he removed her clothes and inserted his penis in her vagina. Thereafter she was afraid to tell her elder sister with whom they lived of what had happened, as the appellant had told her that if she told anyone, he would stab her; that when her sister came home in the evening, PW2 told her that EK had been to the appellant's house, and that was when she told her sister what had happened to her. They reported the matter to the police station and EK was later treated at Adams Nairobi Women's Hospital. She had felt pain when the appellant sexually assaulted her and she screamed but no one was around to hear her.

13. In cross examination, she stated that the incident took place on Saturday at about 4.00 p.m., and that the appellant had asked her for water. There was no one else in the compound when the incident happened.

14. A voir dire examination was also conducted on PW2, EK's younger brother, and he also gave a sworn statement. He stated that he was 9 years of age at the time; that he often saw EK go to the appellant's house and that she used to give him sugar, water and ugali. On the material day, the appellant locked himself and EK in his house, and afterwards, PW2 saw her leave the house. Later that night, he informed his sister that EK was in the appellant's house. He confirmed that the appellant was a caretaker at the plot where they resided. He also stated that EK would cry every time he threatened to tell their sister that she had visited the appellant's house.

15. PW3, EK's elder sister lived with her husband, EK and PW2. She testified that sometime in June 2016, PW2 informed her that the appellant often asked EK for sugar and that she would go to his house. When she interrogated her, EK told her that the appellant had called her to send her to the shop and had sexually assaulted her. PW3 reported the matter to the police, and EK was examined at Nairobi Women's Hospital.

16. On cross examination, PW3 stated that the offence had occurred one week before EK informed her and that EK had been afraid to tell her.

17. Dr. Kizzie Shako, (PW4), examined EK on July 8, 2016. She found that her hymen had a tear at 7 and 6 o'clock positions. The tears were old but had not properly healed; that EK was alleged to have been sexually assaulted 13 days prior to the medical examination. The doctor also examined the appellant on the same day and found that his genital area was normal. She produced P3 forms in respect of EK and the appellant.

18. Simon Nzabo, (PW5), was a clinical officer at Nairobi Women's Hospital who examined EK on July 2, 2016. She was alleged to have been sexually assaulted on June 25, 2016. Upon examination, he found her hymen was ruptured with old tears which occurred about a month prior to the examination. She had a whitish foul discharge from her vagina, and dirt, which was indicative of an infection. An HIV test that was conducted was negative. The appellant was also examined and found to be HIV positive. He also had syphilis. It was explained that HIV and syphilis have an incubation period, and it would take up to 3 months to show in the blood.

19. PC Anne Wanjiku Karimi, (PW6) based at Ngong Police Station investigated the case, and narrated the events as they occurred from the date EK was violated on June 25, 2016, until the appellant was charged with the offence.

20. When placed on his defence the appellant gave unsworn evidence. He stated that he was a caretaker at the plot where EK lived with her sister, PW3. On June 25, 2016, he went to PW3's house and was welcomed for tea by PW3's husband, but he declined the invitation. He left her house at about 10. 00 a.m. PW3's husband asked to see the landlord. The landlord came to the plot in the evening. While there, a plumber known as Davy came to ask the landlord for his pay. A man known as Simon was also present. The appellant later left for Ngong at about 6.00 p.m. On July 2, 2016, PW3 came to the plot in the company of two people who stated that they were looking for a house. They however arrested him. He was accused of defiling EK. He was taken to the police station and later arraigned before the trial court. DW2, Samuel Mugo, stated that he went to the plot on June 25, 2016, at about 5.00 p.m. The appellant, the landlord and a plumber were standing outside. The landlord paid him his dues and he left.

21. Returning to the issues, and beginning with whether the offence of defilement was proven to the required standard, the offence of defilement is founded on three main ingredients; namely, the age of the victim, penetration and the proper identification of the perpetrator. These ingredients for the purposes of the offence are specifically provided for under section 8(1) as read with section 8 (2) of the *Sexual Offences Act* which specifies that;

> "8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

22. On the first element which is age, this Court in the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

23. In the instant case, PW3 EK's sister testified that she was aged 11 years at the time of the incident. This was corroborated by the P3 form, the treatment notes from Nairobi Women's Hospital and the Post Rape Care form. We find therefore that EK's age was sufficiently proved.

24. As to whether penetration was proved, under section 2 of the *Sexual Offences Act* as "penetration" is defined as,"...The partial or complete insertion of the genital organ of a person into the genital organs of another person."

25 In concluding that penetration was proved, the trial court had this to say;

> "I found PW1 truthful in her testimony and I believe her narration to the court. I'm also convinced that the child told this court the truth. I do not see a reason why the child would fabricate such a story as there was no grudge between the accused and the child's sister. Furthermore, they had moved to the plot a few days to the incident. I observed the demeanour of PW 1 she did not want to face the accused person although she was candid in her testimony. I found her to be telling the truth".

26. Undoubtedly, after considering her evidence, the trial court found EK to be truthful and candid in her narration of the incident, and in so finding, the court was entitled to convict the appellant under section 124 of the *Evidence Act* on the basis of EK's evidence.

27. That said, the appellant has however complained that EK was not a credible witness, and that the court ought not to have relied on her testimony. This notwithstanding, the appellant has not however specified any reasons for describing EK as a witness who was not credible.

28. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR this Court explained the nature and effect of section 124 of the *Evidence Act* thus;

> " as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:
>
> 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

29. So that, it is irrefutable that section 124 of the *Evidence Act*, allows a court in cases involving sexual offences to convict an accused on the basis of evidence of the victim alone without the requirement for corroboration, where the court is satisfied that the victim has been truthful.

30. The critical question to address is whether EK was indeed truthful. In this case, EK's evidence was that the appellant called her on the afternoon of the June 25, 2016, while in the company of her brother PW2, took her into his house, and defiled her. She felt pain. Her evidence was corroborated by PW2 who saw the appellant lock her in his house, and he thereafter reported the incident to their elder sister PW3. The trial court found her to be a truthful and honest witness and believed that she was indeed sexually assaulted by the appellant. On the basis of this evidence, and in accordance with section 124 of the *Evidence Act*, we find that the trial court was entitled to convict the appellant on the basis of her evidence.

31. But that is not all, the Post Rape Care form and the P3 form showed that her hymen was broken. In particular, the P3 form indicated that her hymen had tears at 7 and 6 o'clock positions and that they were old tears. She had a whitish foul discharge from her vagina, which was also dirty, hence indicative of an infection. The medical evidence adduced by PW4 and PW5 established that penetration had occurred, which corroborated EK's evidence.

32. As observed above, the appellant did not specify in what way EK was not considered a credible witness. But what is evident is that the trial magistrate who saw and heard EK's testimony believed that she was telling the truth and came to the conclusion that her evidence considered together with the evidence of PW2 and the medical reports of PW4 and PW5, sufficiently proved that there was penetration. Likewise, the High Court reached the same conclusion, and in view of the concurrent findings of the two courts below, we have no reason to reach a different finding.

33. On the appellant's identification, EK stated that he was known to her, and to her family. He was the caretaker of the houses on the plot where they lived. It is trite that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant. See *Anjononi & Others v Republic*, [1980] KLR 59. Given the aforegoing, we find that the appellant was properly identified.

34. So that contrary to the appellant's allegations, the findings of both the trial court and the High Court were that the prosecution proved all the ingredients of the offence of defilement to the required standard. Likewise, our reanalysis of the evidence leads us to the same conclusion, that the appellant defiled EK, as a consequence of which we have no reservations upholding the appellant's conviction.

35. Finally, we turn to address the issue that the voir dire examination of EK and PW2 was not properly conducted. The appellant's complaint is that the questions asked of the prosecution witnesses did not

include whether they appreciated what it meant to tell the truth and the meaning of an oath. The record indicates that the trial court did conduct a voir dire examination, the proceedings were as follows;

> " PW 1
>
> "Do you go to church? yes
>
> What Church? [Particulars Withheld] Church. Do you tell the truth? Yes
>
> If you lie what will happen to you ? A person goes to hell "
>
> PW 2
>
> Do you go to church? yes Catholic Church Will you tell the truth? I will tell the truth.
>
> What will happen if you lie? I will be beaten, in church I am told that a child who does not say the truth is big headed and not a good child."

36. Section 19 (1) of the *Oaths and Statutory Declarations Act*, specifies the procedure of receiving evidence of a child of tender years. It provides that;

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

See *Japheth Mwambire Mbitha v Republic*[2019] eKLR.

37.. In other words, it is the court's sole prerogative to determine whether a child of tender years will understand the solemnity of an oath and if not, at the very least, the importance of telling the truth, so as to ascertain whether they will testify under oath or not.

38. From the excerpt of the proceedings set out above, it is clear that following the conduct of the voir dire examination of EK and PW2, the trial court was satisfied that both witnesses were intelligent and understood the importance of telling the truth and of taking an oath, and under its sole prerogative EK and PW2 were ordered to give sworn testimonies. We are satisfied that the trial magistrate having undertaken the voir dire examination in the manner that she did, appropriately directed questions to the witnesses, and there being nothing that demonstrated that examination was improper, we dismiss this complaint.

39. In sum, the appeal fails in its entirety and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7/TH DAY OF JULY, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR