COM v Republic (Criminal Appeal 197 of 2016)
[2022] KECA 1113 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1113 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 197 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

COM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence by the High Court of Kenya at Homa Bay (D.S. Majanja, J) Dated 5th April, 2016) in HCCA No. 46 of 2016)

JUDGMENT

1. At trial, part of the case for the prosecution was that at about 8.30p.m. on 2nd June, 2014 from a bush in Osoi Beach, Kiabuya sub-location, came a cry of distress. George Owuonda Odira (PW5), responded to the call. On flashing his torch, he saw a young girl, known to him. Standing next to her was M, a man who was also known to him.

2. Two days later, COM (the appellant) was arraigned in court and charged with attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act*, Act No. 3 of 2006 (SOA), deliberately attempting transmission of a disease contrary to Section 211 of the SOA and committing an indecent Act with a child contrary to Section 11 (1) of the SOA.

3. The particulars were:

   Count 1:

   On the 2nd day of June 2014 at Osoi beach at Kiabuya sub-location in Suba within Homabay County in the Republic of Kenya, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of JAO a child aged 4 years.

   Count 2:

On the 2nd day of June 2014 at Osoi beach at Kiabuya sub-location in Suba within Homabay County in the Republic of Kenya, having knowledge that you were infected with HIV and intentionally, knowingly and unlawfully attempted to cause penetration of your penis to the vagina of JAO a child aged 4 years which would have caused the transmission.

Alternative count:

On the 2nd day of June 2014 at Osoi beach at Kiabuya sub-location in Suba within Homabay County in the Republic of Kenya, intentionally and unlawfully touched the vagina of JAO a child aged 4 years.

4. SA (P.W.1) a minor then aged 6 years, gave evidence that on the fateful day the appellant, a person known to her, hugged her and led her to a bush. There he removed her clothes and also removed his own. He promised her bread, presumably to lure her and then, in her words.

> " Mrefu did something to me"

Her evidence is that Mrefu slept on her. She sustained injuries on her hand and buttocks and bled from her vagina. She cried out and a neighbor George (PW5) came to her rescue.

5. The evidence of PW5, a fisherman, was that when he flashed his torch at him, M ran away. On asking the child what had happened, she responded that the man had done bad things to her. PW5 called out for help, he ran after M but could not catch him. Otieno Okoth Kennedy (PW3) heard some voices outside his house and when he stepped out he found a group of people who told him that Mrefu had been found trying to defile a minor. He joined them and proceeded to M's house. They did not find him then. The next day he and one Opinde, a village elder went to M's house, arrested him and led him to the house of Otieno Okoth Kennedy (PW3) at about 7.00a.m.

6. JOO (PW2) is the father of the minor. On that day (2nd June, 2014) at 7.00pm he was at the house having dinner with his family when he heard noises from his grandmother's place. He went there and found people surrounding the complainant. When he asked her what was wrong, she told him that M had taken her into a bush and had done bad things to her. In the company of the child, he reported the incident to the police and later took the child to hospital.

7. Dr. Anthony Komen examined the victim and completed a Police Form 3 (P3 Form). Since Dr. Komen was unavailable to testify, Dr. Carilus Owiti (PW7) produced the form on his behalf. The highlights of the doctor's findings are that the victim's hymen was intact with no lacerations and no blood or discharge was noted. However, her labia Majora was stained with dry seminal fluid. It was concluded that there was an attempt to defile her.

8. The appellant was also examined on 3rd June, 2014. He is a circumcised man but his penis has no lacerations. Mercy Adhiambo Magwesa (PW6) a nurse who previously worked at Got-Bura Health Centre gave testimony of the health of the appellant. He had, in the past, tested positive for HIV. She stated that the appellant was aware of this status since 2013. Fielding questions in cross-examination, the nurse stated that a second HIV test, usually taken 3 months after the first test, can differ from the first test and a negative test may occur on account of low viral loads.

9. Put to his defence, the appellant denied the three charges. It is his evidence that on 2nd June, 2014 at around 7.00pm he went fishing at the lake until 4.00 a.m and returned to his house at 6.00a.m. Villagers led by the area Chief came to his house and accused him of defiling a minor. On his health status he said:

> " I know my health status and the charges are false..... I have been going to hospital to take drugs though.....

It is not a vice to be sick from any disease"

10. It was on this evidence that the trial court convicted the appellant for the offences of attempted defilement and of deliberately attempting to transmit a disease and imposed sentences of 10 years' imprisonment for count 1 and 15 years' imprisonment for count 2. The sentences to run concurrently.

11. His first appeal failed when Majanja, J on 5th April 2016 dismissed the appeal on both conviction and sentence.

12. This self-crafted second appeal raises the following grounds; that the two courts below erred in law in failing to find that the charge sheet was defective and not amended in accordance with Section 214 of the *Criminal Procedure Code*; the circumstances at the scene of crime were not favourable for positive identification or recognition of the assailant; crucial witnesses including a medical officer did not testify for the reason that their evidence would have been detrimental to the prosecution's case; the prosecution evidence was contradictory and inconsistent; the conviction was based on unreliable evidence of a single witness; there was failure to comply with Section 211 of the *Criminal Procedure Code*; the appellant's semen was not extracted for purposes of DNA forensic tests contrary to Section 36(1) of the *SOA*; the P3 form was inadmissible since it was not produced by its maker; and the courts below erred in law and fact in failing to consider the appellant's defence and mitigation contrary to Section 12 of the Criminal Procedure Code.

13. In his written submissions, the appellant argues that there were three defects in the charge sheet. The name of the complainant was JAO and not SA as the victim herself stated in evidence. According to the charge sheet the victim was 4 years old yet the evidence put her at 6-7 years. As to the name of the appellant, the charge sheet read COM, yet the witnesses referred to him as Mrefu, an alias name which needed to be included in the charge. The rest of the submissions rehash the grounds of appeal.

14. Before us, the State was represented by Ms. Mogoa, learned prosecution counsel. It was submitted that JAO is the same person as SA and that in his testimony, PW2 gave the name of the victim JAO as he pointed to PW1 who was present in court. On the name of the accused, the argument by the State is that PW1 was able to identify the appellant as the perpetrator and the appellant also admitted that he is known as M. The State contends that all crucial witnesses were called to testify. On the age of the child, it was argued that it mattered not whether the child was 4 or 6 years old. As to the admissibility of the P3 form, it was submitted that it was properly produced by PW7 who is a medical officer and a basis as to why the maker could not produce it was laid. Section 77 of the *Evidence Act* was cited. On corroboration of the testimony of the minor, it was the position of the State that Section 124 of the *Evidence Act* allows the trial court to convict on the evidence of a complainant only so long as the trial Magistrate records reasons for believing the evidence. It is contended that the trial Magistrate believed the child and gave reasons for doing so.

15. We sit over this matter on second appeal and so our role is circumscribed by the provisions of section 361 (1)(a) of the Criminal Procedure Code. Elaborating on the provisions, this Court has in *Karani vs. R* [2010] 1 KLR 73 stated:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they

were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

16. We start with the supposed defects in the charge sheet. We understand the arguments of the appellant to be that the evidence led by the prosecution was at variance with the particulars of the charge sheet in three respects. On the charge sheet the complainant is named as JAO It is true nonetheless that in her testimony the victim refers to herself as SA Yet it is also true that, while pointing at her, PW2, the father of the minor, refers to his child as JAO. Nothing can turn on the victim not giving her other names in testimony being J and A and instead including her other name S.

17. Is the appellant also known as M? The appellant readily admits this in cross-examination;

> " People call me M."

It is singularly important that the name of an accused person is correctly captured in a charge sheet. Where the accused is also known by another name, then it is desirable that the alias name be included. This is because there should be absolutely no doubt that the person standing trial is the person named in the charge sheet. That said, and in the face of the appellant's own admission that he is also known as Mrefu, there is no doubt that the person standing trial and who was implicated by the witnesses was the appellant.

18. As to the apparent discrepancy in the age of the victim, we can do no better than endorse the following finding by Majanja, J:

> " 18. In the same vein, I also find that conflict between the age of the child stated in the charge sheet and the age that was proved was not fatal to the charge as the exact age of the child under section 9 of the *Sexual Offences Act* is not material so long as it is proved the complainant is a child. In this case, there is no dispute that PW1 was a child as confirmed not only by the age assessment conducted by the Dr. K. but also by the Child Health and Nutrition Card which confirmed that she was born on 30th December 2008 meaning that she was 6 years at the material time."

19. It is true that Dr. Anthony Komen who examined the child and prepared the P3 form did not testify and in his place, Dr. Carilus Owiti (PW7) produced the report. We, however, agree with the holding of Majanja J that section 77 of the *Evidence Act* permits the production of a medical document by a person other than the maker. The provision reads:

> 77. Reports by Government analysts and geologists
>
> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

20. We nevertheless take the view that, so as to give a proper opportunity for an accused person to challenge the contents of a document contemplated in section 77, a proper basis for production of that document by a person other than the maker needs to be laid. A proper basis would include when the maker is completely unavailable or when the maker can be availed only with great difficulty or inconvenience or at great expense.

21. Here there was an attempt to lay that basis:

> " Komen is still in Suba District but could not attend court today."

We do not think this to be good enough for excusing the maker. That said, the appellant did not protest the production of the report by a person other than the maker. At any rate, and as correctly pointed out by the first appeal court, the offence which the appellant faced was an attempted defilement and could still be proved even without medical evidence on the victim.

22. Let us turn to the quality of the evidence at trial. In doing so, we are alive to the need for a second appeal court to give due deference to the concurrent findings of the courts below on issues of fact. We can only upset those findings if they are perverse to the evidence or are arrived at in breach of the principles of law (see C*hristopher Nyoike Kangethe v Republic* [2010] eKLR (Criminal Appeal No 306 of 2005).

23. The strong and unshaken evidence is that the victim knew the assailant; she gave a vivid account of how the appellant attempted to defile her; of how she cried out for help and of how PW5 came to her aid. PW5 gave evidence in support of this testimony; PW5 found the appellant and the minor in the bush; the appellant was also known to PW5; and PW5 was able to see and recognize the appellant when he shone a torch on him. The medical report showed that there were traces of dry semen on the child's labia majora.

24. The evidence of the victim was therefore corroborated, yet, even if uncorroborated the proviso to Section 124 of the *Evidence Act* would be on the side of the prosecution;

> 124. Corroboration required in criminal cases
>
> 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:
>
> 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.

25. As correctly observed by the High Court, the trial court recorded why it was satisfied that the child was telling the truth. The trial court observed:

> " To a relevant extend (sic) the entire prosecution's evidence remained in logical synchrony, well corroborated and backed by circumstances on record. I am cautiously persuaded in the evidence as put forth that J.A.O spoke only the truth about this incident. It could not have been the intention of a minor of around 5 to lie herein or knowingly participate in a fabrication of serious criminal charges let alone the fact that her nature and mind at the time could barely sustain any coached evidence in court. She was indeed too young to know

whether a penetration occurred; whether she bled on defilement or to even comment on her genital (sic) after defilement."

26. We have not considered two grounds; that there was failure to comply with Section 211 of the *Criminal Procedure Code*, and that the appellant's semen was not extracted for purposes of DNA forensic tests contrary to Section 36(1) of the SOA. This is because they were not raised in the first appeal and could not properly arise before us (see *Alfayo Gombe Okello v Republic* [2010] eKLR Criminal Appeal No. 203 of 2009).

27. As regards the sentence imposed, we think it was deserved. The appellant, well knowing that he was HIV positive, attempted to defile a young girl aged 6 years. He may well have completed his act had the victim not cried out for help and PW5 responded. We affirm both the conviction and sentence and dismiss the appeal in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR