Hakizimana v Republic (Criminal Appeal E091 of 2024)
[2025] KEHC 578 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEHC 578 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E091 OF 2024

DR KAVEDZA, J

JANUARY 29, 2025

BETWEEN

ELIZA HAKIZIMANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 31st July 2024 by Hon. Z. Abdul (P.M) at Kibera Chief Magistrate's Court Sexual Offences Case No. E117 of 2022 Republic vs EH)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*, No. 3 of 2006. After a full trial, he was convicted for the offence of attempted defilement contrary to section 9 of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve ten (10) years imprisonment.

2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal dated 14th August 2024, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that crucial prosecution witnesses were never called to testify. In addition, the trial court shifted the burden of proof to the defence and failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.

3. The appeal was canvassed by way of written submissions. Both parties have filed their written submissions, and they have been duly considered and there is no need to rehash them.

4. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).

5. The starting point would be to look at what the law states in regard to the offence in question. Section 9(1) (2) of the *Sexual Offences Act* provides that;

> "(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
>
> (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

6. The prosecution in an offence of attempted defilement must therefore prove the other ingredients of the offence of defilement except penetration.

7. The prosecution called four witnesses. The complainant gave unsworn testimony following a voir dire examination. She stated that she was seven years old and travelled in the school van with other pupils, where the appellant, a French teacher, was often present in the evenings. On one occasion, the appellant showed them some signs, asked them to watch a movie titled Queen of the Devil, and then instructed them to dance.

8. She went on to state that the appellant asked her to sit on his lap and he proceeded to touch her private parts and also inserted his penis in her vagina whereby she felt a lot of pain. She stated that they were alone in the stationary bus at the time, as the other children had already been dropped off, leaving her as the only one remaining. The appellant instructed her not to tell her mother, but she disclosed the incident to her mother that night.

9. In her testimony, the complainant gave clear and graphic testimony of the ordeal. She remained steadfast that it was the appellant who touched her private parts and used also used his penis. The victim maintained that she saw the appellant and the identification was by recognition. I therefore hold that the appellant's identification was proper.

10. As discussed in the *Kenya Judiciary Criminal Procedure Bench Book* 2018 paragraphs 94-96 corroboration is necessary for the evidence of a child not taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

> "94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
>
> 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
>
> 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), *CoK*"

11. PW1's testimony required corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) In this regard, further evidence was given by her mother and the medical examiner.

12. PW2 testified that she is the mother of the complainant, born on March 21, 2016. In the third term of 2022, while attending Uthiru Genesis Academy, the complainant exhibited unusual behaviour. PW2 discovered her daughter engrossed in a movie, Queen of the Devil, allegedly recommended by their French teacher (the appellant). The complainant later disclosed being told to keep certain secrets. In November 2022, PW2 noticed her daughter's moodiness and stained undergarments, raising further concern. She asked her what was happening and that is when she told her that her teacher would ask her to sit on his lap while at the back of the bus and proceed to touch her between her legs and on another occasion he inserted his penis in her vagina and she felt a lot of pain. He made her swear not to tell anyone.

13. The next day, PW2 reported the matter to Kabete Police Station and was referred to Nairobi Women's Hospital, where the complainant was examined, and medical documents were completed. Under cross-examination, PW2 stated that the complainant had to be probed to provide information but denied coaching her on what to say. She added that she personally picked up the complainant from the bus and saw the appellant during these instances.

14. PW3, John Njuguna, a Clinical Officer at Nairobi Women's Hospital, testified on behalf of a former colleague. He stated that the complainant exhibited a foul-smelling white discharge, indicative of an infection or poor hygiene. The P3, PRC, and GVRC forms were admitted as evidence. Under cross-examination, PW3 confirmed the PRC form findings of a hyperaemic hymen, consistent with attempted penile penetration. This supported the complainant's account of traumatic stress inflicted on her genital area by the appellant.

15. PW4, the Investigating Officer, confirmed that PW2 reported the incident at Kabete Police Station. She reiterated the evidence and stated that PW2 and the complainant were referred to Nairobi Women's Hospital, where medical forms were completed.

16. On the age of the complainant, PW2, the complainant's mother testified that the complainant was born on 21st March 2016. Her birth certificate was produced confirming her age of 6 years at the time of the incident. There is therefore no doubt that the complainant was a child.

17. In his defence, the appellant gave sworn evidence, denying the charges. He confirmed being a French teacher at the school and stated that he accompanied pupils on the bus as part of his duties. He explained that he stood at the door to open and close it when pupils alighted and maintained that he was never left alone with the complainant on the bus.

18. I have already found above that the complainant's testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court.

19. The appellant contended that crucial prosecution witnesses were not called to testify. In particular, the driver of the bus and other passengers.

20. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that, in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an

adverse inference as a result of failure to call that witness. (see *Bukenya and Others vs Uganda* [1972] EA 549 and *Erick Onyango Odeng' vs Republic* [2014] eKLR).

21. It is my finding that given the totality of the evidence, the prosecution evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the *Evidence Act*. I therefore find that elements of the offence of attempted defilement were proved beyond reasonable doubt. The appellant's conviction by the trial court was therefore proper and is upheld.

22. The appellant was sentenced to serve ten (10) years imprisonment. During sentencing, the trial court considered the appellant's mitigation, the pre-sentence report, and the fact that he was a first offender.

23. Sentences are intended, *inter alia*, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.

24. In the premises, I find that the appeal is lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Achode Court Assistant

Kibera High Court Criminal Appeal No. E091 of 2024 Page