Dahiye v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 1099 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E025 OF 2024

JN ONYIEGO, J

FEBRUARY 27, 2025

BETWEEN

MOHAMED BILOW DAHIYE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Aganyo R. (PM)in Wajir Criminal S.O No. E013 of 2023 on 23.05.2024)

JUDGMENT

1. The appellant, was charged with the offence of sexual assault contrary to section 5(1) as read with section 5(2)(a)(i) of the *Sexual Offences Act*. Particulars of the offence were that on 20.08.2023 at around 1600hrs at Wajir East Sub County within Wajir County he unlawfully used his fingers to penetrate the vagina of R.A.M., a child aged 4 years.
2. In the alternative, he was charged with the offence of committing an indecent Act with a child contrary to 11(1) of the *Sexual Offences Act*. Particulars of the offence were that on 20.08.2023 at around 1600hrs at Wajir East Sub County within Wajir County he intentionally touched the vagina of H.M. a child aged 4 years old.
3. Having been taken through a full trial, the appellant was convicted on the main charge and subsequently sentenced to serve 15 years' imprisonment.
4. Dissatisfied with both the conviction and sentence, the appellant filed an amended petition of appeal dated 19.09.2024 on the following grounds:
    i. The learned trial magistrate erred in law and fact by holding that the prosecution proved its case beyond any reasonable doubt.

ii. The learned trial magistrate erred in law and fact by filling the evidential gaps by the prosecution.

iii. The learned trial magistrate erred in law and fact by rejecting the appellant's defence without any cogent reason.

iv. The trial magistrate erred in law and fact by considering a faulty probation report in sentencing the appellant.

v. The trial magistrate erred in law and fact by meting out a manifestly excessive sentence.

5. The appeal was canvassed by way of written submissions.

6. The appellant via submissions dated 18.11.2024 urged that the prosecution did not prove its case to the required standard. That the evidence by the prosecution did not point to the guilt of the appellant and without sufficient eye witnesses, credible and conclusive medical evidence, the prosecution failed to shift its burden of proof.

7. It was contended that the complainant was inconsistent in her evidence in that it was alleged that the appellant inserted in her vagina his fingers and thereafter her anus and a stick in her ear. To that end, reliance was placed on the case of Republic vs Silas Magongo Onzere alias Fredrick Namema [2017] eKLR where the court held that the judge has the total cumulative effects of all the facts before him which reinforce the conclusion of the guilt of the accused person.

8. On sentence, it was contended that the sentence meted out by the trial court was manifestly harsh. That the appellant was entitled to a minimum sentence in the given circumstances. To buttress the foregoing, the appellant relied on the case of R vs Scott [2005] NSWCCA 152 where Howie J. Grove reiterated that there is a fundamental and immutable principle that sentence imposed must reflect the objective seriousness of the offence committed. Therefore, this court was urged to allow the appeal as prayed.

9. The respondent in opposing the appeal filed submissions dated 27.11.2024 in which it was contended that the prosecution properly proved all the necessary elements forming the offence herein to the required standard and therefore, the finding of the court cannot be faulted. That the prosecution was expected to prove penetration and positive identification. It was urged that the complainant through the intermediary stated that the complainant was penetrated and the same was corroborated with the evidence of PW3, the clinical officer.

10. On the element of positive identification, it was reiterated that the appellant was a person well known to the complainant as previously they had lived together as a family member. In the end, this court was urged to find that the appeal lacks merit and uphold the finding of the trial court.

11. This being a first appeal, the court is tasked with the duty of reappraising the entire evidence and coming up with independent conclusions on whether the prosecution proved its case. The court must however be cautious that, unlike the trial court, it never saw nor heard the evidence of the witnesses and therefore must give room for this exception. [See the case of Kiilu & Another vs Republic [2005]1 KLR 174].

12. During the hearing, the court found out on voire dire examination that PW1 the victim herein was not capable of giving evidence due to her tender age. The prosecutor made an application under section 31 (1)(b) of the *Sexual Offences Act* that the court declares the complainant a vulnerable witness owing to her age so that she could testify through her mother as an intermediary. The court thus granted the prayer and the complainant's mother testified on behalf of the complainant.

13. PW2: AAH stated that the complainant is her first-born child born in 2019. That she used to attend duksi which is not far from their home. That on the 28.08.2023, the victim was taken to duksi at 2pm and in the evening, she sent her niece to go and pick her. She stated that upon reaching home, the baby looked unhappy as though she had been crying for a long time. While washing her, the victim expressed pain around the virginal area and started crying. Upon examining her, she noted lacerations and reddishness around the vaginal area. When she enquired from her, the victim mentioned Mohamed Billow alias 'Korof' as the perpetrator.

14. That while the rest of the children were taken to the mosque for prayers, the victim and another child remained behind. It was her testimony that, this was the time that the perpetrator came by the window and called the victim promising to take her home. That Since she knew him, she complied. That the appellant carried her bag and took her near a corner within the duksi compound where the children go for short call. That the appellant removed her pants, held her by his laps and inserted his finger in her vagina thus causing her pain hence the cry.

15. She went further to state that, the following day and in the company of the father to the victim, they reported the matter to the police station and consequently took her to the hospital. Upon examination by the doctor, it was confirmed that a finger was inserted into the baby's vagina. It was her testimony while at home in the night hours, the victim started to diarrhea and complained of anal pains. That the victim told her that the accused person inserted his finger in the anus.

16. That it was the victim's allegation that the appellant took a stick and pricked her left ear and inserted the same to her mouth. When he saw the other children were watching, he dropped her down and walked slowly towards the duksi. He threatened to kill her if she disclosed to anyone. That the appellant used to live with the victim's family before he was sent away by her husband. On cross exam, the witness stated that the duksi did not have a name although located within the same plot with the mosque.

17. PW3: Siyad Sanei, a clinical officer held brief for his colleague Julius Kalia who is also a clinical officer at Wajir County Referral Hospital. He stated that on 21.08.2023 at around 1600hrs the victim was brought to the hospital by the parents accompanied by police officers. That upon examining the victim, the same showed small lacerations on the labia minora at the 12 O'clock but the hymen was intact. She was treated and given antibiotics to prevent infection. No physical injuries were noted. The minor lacerations on the labia minora indicated that there was an injury possibly caused by the finger penetrating the vagina. On cross exam, the witness stated that there was vaginal but not anal injury.

18. PW4: No. 233334 PC Cornelius Mnyonga attached at the Wajir police station gender office recalled that on 21.08.2023 at 0940hrs, the complainant accompanied by her mother made a report that the appellant had defiled her. That the same happened while the minor was at duksi school. He reiterated PW1's evidence and further stated that he rushed the minor to Wajir County Hospital for medical examination and treatment. Thereafter, he embarked on the process of investigation wherein he established that the minor was sexually assaulted. He produced a birth certificate as Pex 1.

19. Upon being placed on his defence, the appellant in his sworn evidence denied committing the offence. He further stated that the medical officer only examined the vagina of the complainant and no evidence was adduced to confirm whether the anus of the minor was equally injured as alleged.

20. He decried that he was framed as the complainant stated that she did not attend duksi in as much as the mother of the complainant stated that the complainant had stopped attending duksi on the alleged fear that he had threatened to remove the victim's eyes. He stated that the complainant was known to him and that there was a disagreement as the complainant's mother desired to have a relationship with him but he declined such move.

21. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. The only issue for determination is whether prosecution proved its case beyond any reasonable doubt.

22. The appellant was charged of the offence of sexual assault contrary to section 5(1)(a)(i) of the *sexual offences Act* which provides that:

(1) Any person who unlawfully—

(a) Penetrates the genital organs of another person with—

(i) Any part of the body of another or that person; or

(ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

23. In the case of John Irungu vs Republic, (2016) eKLR, the Court of Appeal held that the essential ingredients of the offence of sexual assault are as follows;

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

24. The appellant argued that the evidence by the prosecution did not point to the guilt of the appellant and without sufficient eye witnesses, credible and conclusive medical evidence, the prosecution failed to shift the burden. It was argued that the complainant was inconsistent in her evidence in that it was alleged that the appellant inserted his finger into her vagina and thereafter her anus and a stick in her ear.

25. The evidence of the complainant is mirrored against that of PW3 the clinical officer who stated that the minor had lacerations on the labia minora thus indicating that there was an injury possibly caused by a finger. On cross exam, pw3 stated that there was vaginal but not anal injury. Having perused the PRC Form, I note that the same supported the fact that the complainant had no anal injury as opposed to the allegations by PW2. In the same breadth, PW3 stated that no physical injuries were noted despite PW2 stating that the complainant was injured in the ear.

26. From the evidence of pw2 and pw3, it would appear that the victim might have suffered some laceration in her vagina. However, the laceration could not specifically be connected with the appellant. Nobody saw the appellant assault the victim. The circumstances and environment under which the offence was allegedly committed raises some questions which were not answered. The offence was said to have been committed within the Duksi yet there were some children. How come none of those children gave evidence to corroborate the evidence of pw1 through pw2. That notwithstanding, the testimony of pw3 and pw2 is at variance in so far as the injuries occasioned is concern. Who is telling the truth.

27. Although a court can convict based on the evidence of the victim alone under Section 124 of the *evidence Act* upon the court being satisfied that such witness is telling the truth, in this case the trial court did not. Besides, the evidence of pw2 is that of a vulnerable witness which requires corroboration.

28. In my view and upon a proper consideration of the evidence on record, I hold the view that the evidence of the mother of the complainant (PW2) is untrustworthy. In the case of Ndungu Kimanji vs Republic [1979] KLR 282 it was held as follows: -

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

29. As a consequence of the foregoing, it is my view that it would be unsafe to allow the conviction of the appellant to stand on account of lack of corroboration and contradictory testimony of pw2 and that of pw3. In a nutshell, it is my finding that prosecution did not discharge its burden of proof to the required degree.

30. Consequently, the appeal is allowed, conviction quashed and sentence set aside. To that extent, the appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025

J. N. ONYIEGO

JUDGE