Osore v Republic (Criminal Appeal E030 of 2023)
[2025] KEHC 5460 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E030 OF 2023

SC CHIRCHIR, J

APRIL 29, 2025

BETWEEN

GRIFFIN OSORE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars are that on 11/7/2021 at Kakamega Central Sub Location in Kakamega County the accused intentionally and unlawfully caused his penis to penetrate the anus of BW a child aged 16 years.

2. He faced an alternative charge of having an indecent act with a child contrary to section 11(1) of the *sexual offences Act* (The Act). The particulars on the later charge are that on the 11th day of July 2021, at Kakmega central sub- county, within kakamega county, intentionally and unlawfully caused his penis to come into contact with the anus of BW a child aged 16 years.

3. The Appellant denied the charges and the case went to full trial. In the end he was acquitted of the main charge but was convicted of alternative charge, and sentenced to 5 years in prison.

4. He was aggrieved by the outcome and came to this court. On Appeal

Petition of Appeal

5. The appellant has set out the following grounds;

    1. The Learned trial magistrate erred in law and in fact by convicting the Appellant whereas the evidence did not meet the required standard of proof beyond reasonable doubt.

2. The learned trial magistrate erred in law and in fact by allowing the complainants evidence which founded the judgment where the same was not corroborated by medical evidence as required by the *evidence act*.

3. The learned trial magistrate failed to observe that the prosecution failed to organize for the examination of the appellant so as to establish whether he was penetrator of the alleged offence.

4. The learned trial magistrate failed to adequately consider the appellants defence.

5. That the learned magistrate erred in law and fact by shifting the burden of proof to the Appellant contrary to Section 124 of the evidence in favour of the complainant while bluntly dismissing the evidence of the defence thus rendering the judgment an opinionated judgment.

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

Appellant's submissions

7. It is the Appellant's submission that there was no evidence of penetration as per the evidence of the doctor(PW6) while it indicated that it did not completely trust the testimony of the complainant. It is further submitted that the court relied on the evidence of PW4, who testified to have seen the complainant and the accused in bed, but casts doubt on PW4's ability to see what was going on in the house. However ,I have noted that the Appellant's submissions is on the main charge in respect of which, he was acquitted.

8. The respondent did not file any submissions.

Analysis and Determination

9. This being a first Appeal, the role of this court is to review the evidence, evaluate it and arrive at its conclusion, while making allowance for the fact that the trial court had the benefit of seeing and hearing witnesses first – hand. (Ref : Gitobu Imanyara & others vs AG(2016) e KLR.

10. I have considered the trial court record, and the grounds of Appeal. The only issue for determination is whether the offence of committing an indecent act with a child, was proved.

11. Section 2 of the Act defines the offence as follows;

> " Incident act " means any unlawful intention which causes:
>
> a). Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not intrude an act that causes penetration.
>
> b). Exposure or display of any phonographic materials to any person against his or her will."

11. The medical evidence presented by PW6 did not show any evidence of sexual assault. The doctor stated: " The anal opening was intact with no bruise or tears noted and no discharge" , though the medical examination was done within 6 hours of the incident.

12. The complainant's evidence is that he was given a cake by the Appellant and he immediately lost consciousness. On coming around , he found the Appellant penetrating him on the anus.

13. I have anxiously considered the complainant's testimony . How long was he unconscious ? He further told the court that he is the one who requested for the cake, not that it was offered. If it was offered, then

one may infer ill intention on the part of the Appellant. But that was not the case. The complainant also told the court that the incident was not the first. In which case the complainant would have known better and not agree to be left alone with the Appellant. However the complainant's acquiescence is a non- issue in as far as the offence is concerned, because children are incapable of consenting. Rather the scenario painted by the complainant, as observed by the trial court , indicates an apparent shame on the part of the complainant and hence an attempt to cover it with allegations of being drugged. This taints his testimony and the trial Magistrate was right when he declined to rely on his testimony.

14. The other piece of evidence in this regard came from PW2 and PW4 who stated that they peeped under the door and saw the Appellant sodomising the complainant on a mattress placed on the floor . The photograph of the alleged door was produced in evidence by the defence, and I have looked at it. I have my doubts as to whether, peeping under such a door, could have allowed for a good view of what was going on inside house and in particular whether the two witnesses could identify the Appellant as the person assaulting the complainant.The rest of their evidence relate to what happened thereafter. Identification of a perpetrator is critical in sexual offences. Therefore, there must be clear evidence that the two witnesses " peeping" were positive that it was the Appellant and not any other person who was on top of the complainant.

15. I remind myself that the standard of proof in Criminal cases is beyond reasonable doubt. Any doubts must be resolved in favour of the accused. In the case of Elizabeth Waithiegeni Gatimu Vs Republic (2015) KEHC 1136 (KLR) Justice Mativo stated as follows: "To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right".

16. The Appellant did admit that the complainant, in the company of another, had gone to his house to buy cakes. Also his attempt to buy the silence of PW2 and PW4 makes his conduct very suspicious. But suspicion however strong can never be a basis of conviction. In the above sated decision , the Judge cited with approval the Canadian case of R vsLifchus 1997}3 SCR 320 where it was held: " Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt."

17. In conclusion, it is my finding that there are doubts on whether the Appellant was correctly identified as the perpetrator of the crime, and I consider his conviction to have been unsafe.

18. Consequently, the Applicant's conviction is hereby quashed and the sentence set aside. He shall be set free forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF APRIL 2025

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant.

Ms . Kagai for the state

Griffin Sore – The Appellant.