Ibrahim v Republic (Criminal Appeal E047 of 2022)
[2024] KEHC 986 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E047 OF 2022

JN ONYIEGO, J

JANUARY 31, 2024

BETWEEN

ADAN ALI IBRAHIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeal against the judgment of P.W. Wasike (SRM) in MCSO E.011 of 2021 delivered on 28.07.2022 at Mandera Law Courts)

JUDGMENT

1. The appeal herein arises from the judgment of the learned trial magistrate hon. P. W. Wasike delivered in respect of MCSO No.E011 of 2021 on 28.07.2022. The appeal filed by the appellant dated 05.08.2022 challenged the said determination on the grounds set out on the face of the petition filed on 10th August 2022. The grounds cited thereof can be summarized as follows:

    i. That the trial magistrate erred in law and fact by considering extraneous evidence which did not form part of the evidence tendered thereby reaching a wrong conclusion.

    ii. That the trial court erred in fact and law by failing to critically examine the evidence placed before him thus reaching a determination not supported by law or evidence.

    iii. That the trial magistrate erred in law and fact by convicting him and yet the prosecution did not prove its case to the required standard.

    iv. That the trial magistrate erred in fact and law by misdirecting himself in accepting circumstantial evidence without applying the principles governing such.

    v. That the trial court erred in meting out a harsh and severe sentence which was not proportionate to the circumstances.

2. The case against the appellant was one of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, 2006. Particulars of the main charge were that the appellant on 16.03.2021 at around 1300hrs in Mandera Central Sub County within Mandera County, intentionally caused his penis to penetrate the vagina of NAA a child aged 11 years.

3. Upon returning a plea not guilty, the matter proceeded to full trial with the prosecution calling four witnesses.

4. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 with particulars being that on 16.03.2021 at around 1300hrs in Mandera Central Sub County within Mandera County intentionally touched the vagina of NAA a girl aged 11 years.

5. At the conclusion of the trial, the trial magistrate convicted the appellant in the main count and sentenced him to life imprisonment.

6. The court directed that the appeal be canvassed by way of written submissions which direction the parties complied with. The firm of Kakai Mugalo Advocates, on behalf of the appellant filed submissions dated 26.07.2023 thus contending that the act of penetration of PW1 was not corroborated by any medical evidence.

7. That at the time the prosecution closed its case on 16.03.2022, no P3 Form nor Post Rape Care Form had been produced before the court. It was stated that no exhibit was produced in that the clothes of PW1 were only marked for identification but were not produced. It was contended that; PW1 herself testified that she was not examined by the doctor; prosecution closed its case without producing the P3 Form; PRC Form and also the evidence of the investigating officer were left out.

8. It was further submitted that the trial court did not warn itself that it was proceeding with a matter where no medical evidence had been produced to corroborate the allegation of penetration of PW1. Reliance was placed on the case of T.N.M. v Republic [2017] eKLR to buttress the fact that, in the absence of proper medical or other evidence in proof of the offence, the court ought not anchor a conviction on mere suspicion.

9. It was urged that the trial court misdirected itself by relying on circumstantial evidence that was not corroborated. That the court considered extraneous evidence that did not form part of the evidence tendered thereby reaching a wrong conclusion. The appellant relied on the case of Mathew Masese Mogaka v Republic [2020] eKLR to reiterate the point that unsworn evidence can be relied on to convict but it would require corroboration before it can form a basis for conviction. Regarding sentence, the appellant contended that the sentence meted out by the trial court was severe having in mind that he was a first offender and therefore, urged this court to review the same.

10. On the other hand, the respondent represented by Mr. Kihara relied on their written submissions dated 22.06.2023. Learned counsel basically supported the decision of the trial court. He contended that there was penetrative sexual intercourse as PW1 vividly gave details on how the appellant defiled her.

11. In regards to the age of the complainant, counsel submitted that the complainant's evidence that she was 11 years and court's own observation that she was below 14 years was sufficient proof. To support that position, counsel relied on the case Francis Omuroni v Uganda. Court of Appeal Criminal Appeal No. 2 of 2000 where it was held that: ...apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian, by observation or common sense'.

12. On sentence, it was argued that section 8(2) of the SOA, stipulates a minimum and mandatory sentence of life imprisonment hence the trial court did not err in any way. In conclusion, counsel urged the court to dismiss the appeal.

13. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

14. Brief facts of the case were that, on the material day PW1 one NNN. took their goats to grace in the bush. That she could not recall what happened to her but previously, she had seen the appellant. That she was taken to Mandera Hospital for she had lower abdominal pain. She testified that the appellant gave her a soda and thereafter, she became unconscious and so could not remember what happened thereafter. That she did not see any doctor and neither did any doctor examine her. On cross examination, she stated that no one did anything to her while she was at the fields herding goats.

15. PW2, AAE testified that he was the father of PW1. That on 16.03.2021, his daughter (PW1) had gone to herd goats but he became suspicious upon realizing that the goats had returned home by themselves without pw1. He stated that he left to look for and found her along the way crying. It was his evidence that PW1 was holding her lower part of the abdomen while crying. That PW1 did not tell him what had happened to her and so, he urged PW3 to examine her to determine if there was anything wrong.

16. He testified that upon reaching home, PW3 checked on the complainant's genitals and noticed that she had injuries. At that point, PW1 opened up and informed them that Watelxa was responsible for her injuries. That later on, she stated that it was the appellant who injured her. He testified that he took the complainant to the hospital where they were informed to report the matter at the police station before visiting Shimbir Fatuma for medical attention.

17. PW3, AAE testified that she was the mother of PW1 and that on the material day, PW1 had gone to graze goats as from 8.00 a.m. she stated that the goats arrived home first and so, the same prompted PW2 to go search for PW1. That pw2 brought her home and he told her to check on her. That upon doing so, she learnt that PW1 had been sexually assaulted. It was her evidence that the appellant gave her a biscuit and a soda which made her dizzy hence unconscious.

18. On cross examination, she stated that the incident happened in the bush and PW1 only opened up after 2 to 3 days. She stated that the appellant was a person well known to her. During re-exam, it was her evidence that in the bush, many people herd their animals but PW1 only picked on the appellant as the person who defiled her.

19. PW4, Dr. Mutalib Sheikh Abdirahman stated that PW1 was presented to th.e hospital on 19.03.2021. That the P3 Form was filed in El Wak Sub County Referral Hospital by his colleague but he did not have knowledge of the matter. He stated that he filled the PRC Form and also examined the patient who presented with complaints of lower abdominal pains.

20. Via a ruling delivered on 18.03.2022, the appellant was placed on his defence after the trial court reached a finding that a prima facie case had been established by the prosecution against the appellant.

21. DW1, Adan Ali Ibrahim in his sworn evidence stated that he stayed at Shimbir Fatuma and that he was a camel herder. He denied committing the offence herein in that he did not know the complainant. It was his evidence that PW1 complained that she was allegedly defiled at DabaCity yet Shimbir Fatuma and DabaCity are a distance apart. He faulted the prosecution for the reason that the case was not even investigated as the prosecution failed to procure the attendance of the investigating officer to come and testify.

22. DW2, Mohamed Ali Ibrahim testified that on 16.03.2021, he was at Wayamlencha herding camels together with the appellant. That the appellant was arrested at 9.30 p.m. by the KPR officers. On cross examination, he stated that he was together with the appellant all through and that there was no way the appellant could have committed the alleged offence without his knowledge. He also argued that the doctor who allegedly filled the P3 form was not availed in court to testify on his findings.

23. On cross examination, he stated that he is a herder and that he did not know the complainant and/or the prosecution witnesses who testified. On re-exam, he stated that the appellant was arrested on boma camel. He reiterated that the complainant came from DabaCity while he came from Shimbir Fatuma and there was no way he could be responsible for the charges herein.

24. The appellant is basically challenging the conviction on grounds that the offence was not proved to the required degree. It is trite that it is the onerous duty of the prosecution to prove its case beyond reasonable doubt and that the burden does not shift.

25. The key elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are:

    i. Age of the complainant;

    ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    iii. Positive identification of the assailant.

26. In the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, the court pointed out three salient elements to be proved in a defilement case as follows; age of the complainant, proof of penetration and positive identification of the assailant."

27. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 as "...any human being under the age of eighteen years."

28. In the case of Martin Okello Alogo v Republic [2018] eKLR the court stated that: -

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello Vs Republic Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated: -
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> > "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt.

That must be so because dire consequences flow from proof of the offence under Section 8 (1)....."

29. PW1 in her testimony stated that she didn't know her age but that her mother had told her that she was 10 years old. PW2 stated that PW1 was aged 11 years. The same was corroborated by PW3. The trial magistrate who heard and saw PW1 testify noted that the minor was under the age of 14 years as she looked not to have entered teenage stage. From the above evidence, this court is thus convinced that the age of the complainant was determined appropriately to be 11 years.

30. On penetration, the *Sexual Offences Act* defines "penetration" as

3 "the partial or complete insertion of the genital organs of a person into the genital organs of another person"

31. Further, the Court of Appeal, in the case of Sahali Omar Vs Republic [2017] eKLR, noted that:

"...penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*."

32. In the instant case, the complainant testified that she was taken to Mandera Hospital for she had lower abdominal pain. She testified that the appellant gave her a soda and thereafter, she became unconscious and so could not remember what happened thereafter. That the doctor did not examine her. On cross examination, she stated that no one did anything to her while she was at the fields herding goats.

33. PW4, Dr. Mutalib Sheikh Abdirahman stated that PW1 was presented to the hospital on 19.03.2021. That the P3 Form was filed in El Wak Sub County Referral Hospital by his colleague but he did not have knowledge of the matter. He stated that he filled the PRC Form and also examined the patient who presented with complaints of lower abdominal pains. It is important to note that the said PRC Form and P3 were not presented in court during the trial. As such, they did not form part of the evidence in the record.

34. Although a case of defilement can be proved if there are other sufficient evidence without necessarily producing medical evidence, in some situations it is important that such evidence be produced to solidify the prosecution case. In this case, the complainant said that nothing was done to her on the material day and that she did not feel anything when passing urine. She did not state whether she was injured in her private parts on the material day so as to corroborate the mother's assertion that she suffered a tear.

35. In the absence of any medical evidence and production of the allegedly soiled clothes with proof that they were blood stained, the evidence of pw1 remains uncorroborated. We can not completely ignore the importance of medical evidence if the evidence is insufficient to sustain a conviction in its absence. In my view, this is a case which would have been properly sustained if there was medical evidence. In the circumstances, I do not find any cogent evidence to prove penetration.

36. The next critical issue is identification. The complainant gave contradictory testimony regarding the appellant's identification. In her evidence in-chief she testified that she did not know the appellant and that they were not even related. When she was shown clothes allegedly stained with tears, she laughed and stated that nobody tore them. She later changed and stated that she knew the appellant. On cross examination, she stated that nothing was done to her. This is not evidence of a reliable and credible witness.

37. I am a live to the fact that under section 124 of the *evidence Act*, a court can convict based on the evidence of a single witness in sexual offences if the trial court is satisfied that such witness is truthful.

In this regard am guided by the case of Stephen Nguli Mulili v Republic [2014] eKLR where the court held that;

> " with regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

38. The above notwithstanding, the critical question to ask is whether the complainant was indeed truthful. I am alive to the observation made by the trial magistrate who saw the complainant testify and that she looked confused although truthful. The bar created for criminal cases that the same should be proved beyond any reasonable doubt cannot be ignored. Had the trial court taken into account the material contradictions in tpw1's evidence which are not minor, it would have arrived at a different conclusion.

39. I'm also guided by the Court of Appeal decision in Erick Onyango Odeng' v. Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

40. From the above analysis of the entire evidence and in particular the testimony of the victim, this court's finding is that there was reasonable doubt as to whether the complainant was indeed defiled by the appellant. The upshot of it all is that prosecution did not prove its case beyond reasonable doubt. To that extent, the appeal herein succeeds with the attendant consequence being that the impugned conviction is quashed and the sentence thereof set a side. Accused is accordingly set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY 2024

J. N. ONYIEGO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR