Solomon v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 974 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 974 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E029 OF 2022

TM MATHEKA, J

JANUARY 26, 2024

BETWEEN

COSMAS KYALO SOLOMON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of Hon J.N Mwaniki (CM) in Makueni Chief Magistrate's Sexual Offence Case No. E08 of 2021 delivered on 18th May 2021)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st September 2020 and 31st December 2020 in Mbuvo Location, Kathwonzeni Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JNN, a child aged 17 years.
2. In the alternative, he was charged with the offence of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that during the same period and at the same place, he intentionally touched the vagina of JNN with his penis, a child aged 17 years.
3. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 7 years imprisonment.

The Appeal

4. Aggrieved by that decision, the appellant filed this appeal on the following grounds;

    a. That the learned trial magistrate erred in both law and fact by failing to find that the key ingredients of the offence were not established against the accused person due to defects in the charges and the judgment contrary to sections 134 and 169 of the *CPC*.

    b. That the learned trial magistrate erred in both law and fact by holding that PW1 was a credible witness whereas the evidence therein was greatly uncorroborated and was full of explicit inconsistencies and contradictions that impugned on the overall burden of proof.

    c. That the learned trial magistrate erred in both law and fact by failing to find that critical witnesses were not called up to corroborate the prosecution's case thereby leaving waging gaps in the case contrary to the requirements of section 124 of the *Evidence Act*.

    d. That the learned trial magistrate erred in both law and fact by rejecting the cogent defence case which reasonably exonerated him from any wrongful doing as well as sentencing the appellant to mandatory minimum sentence without applying the requirements of law under Section 333(2) of the *CPC*.

5. The case for the prosecution was presented by three witnesses.

6. PW1 JNN testified on 18th March 2021 that she was born on 4th March 2003t. She produced her certificate of birth. She told the court that in the month of December 2020 she began to receive greeting messages from one Cosmas who was an employee at her Uncle's place. This person then began to approach her 'sexually'. She at first declined but eventually agreed to have sex. The sexual relationship began on 17th September 2021. On that day he gave her his phone to charge at her grandfather's home. He then came later at 8:00pm and they spent the night in the servant's quarters at her grandfather's having sex using a condom. After that they continued to have sex over the weekends in the same room and they did not use protection at all times. The last sexual intercourse was on 31st December 2020. When schools opened on the 5th January 2021 she missed her periods. She informed the appellant who told her not to worry. However, in school, she was taken to hospital, and found to be pregnant The matter was reported to the police, she told the police who was responsible and the appellant was arrested. She identified before court the P3 and post rape care forms, ultra sound and other forms. She testified that the appellant would send her Ksh 1000 every weekend and she knew his mobile phone number off head and gave I for the record. On cross examination she told the court that her elderly grandparent was always at home, that they had sex many times, that the appellant was aware that the complainant was a student.

7. PW2 Stella Nthambi Muasya testified that she was a clinical officer at the Makueni Referral Hospital. She completed the P3 for JNN who had a history of defilement by a known person. She had a broken hymen, normal genitalia, 8 weeks' pregnancy.

8. PNN was PW3 and the mother to JNN. In February 2021 she received a call from the Principal at her daughter's school that her daughter was pregnant. The complainant told them that one Cosmas Kyalo was responsible for the pregnancy. She told the court that her daughter would sleep at her elderly grandfather's homestead within the same compound, and the appellant was employed by a relative in the same home sated. She was aware that her daughter had a phone given to her by her cousin.

9. On cross examination she told the court that her wish was that the appellant be compelled to take care of the baby, that he used to take his phone to the home for charging, that she was not aware of the relationship between him and her daughter.

10. The prosecution closed its case and the accused was found to have a case to answer.

11. In his sworn statement of defence the appellant confirmed that he used to work for the complainant's uncle, that he knew her. He denied having any sexual intercourse with her. On cross examination he gave his phone number. He denied sending any texts to the complainant. He denied sending her any money on Mpesa. He denied making her pregnant. He denied having any sex with her.

12. The exhibits produced were; Birth Certificate (P. Ex 1), PRC Form (P. Ex 2), P3 Form (P. Ex 3) and treatment notes (P. Ex 4).

13. The parties elected to canvass the appeal through written submissions and appropriate directions were given.

Submissions by the Appellant

14. The appellant submitted that he suffered prejudice and his constitutional rights to a fair trial were violated when he was convicted and sentenced without being told the law under which the conviction had been entered; and which among the two counts he was convicted for. Relying on section 169(2) of the *Criminal Procedure Code (*CPC), he contended that the law on passing judgment was not followed. He relied inter alia on *Rattiram v State of M.P* (2012) 4 SCC 516 where the Supreme Court of India ruled;

> " Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such manner which would totally ostracize injustice, prejudice, dishonesty and favoritism... Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused..."

15. He submitted that the ingredients of the offence were not sufficiently established. That the only evidence available for consideration is that of PW1 and he asserted that the same was incredible, unbelievable and inconsistent. He submitted that the conclusion arrived at by the trial magistrate is not supported by the evidence tendered and there was no reasonable basis for the magistrate to dismiss the cross examination to the effect that the case was a frame up. That the medical examination also confirmed that the hymen was not freshly broken and there was no laceration noted or abnormality and if there was an injury, the scar would have been visible to PW4 and other doctors who observed the victim.

16. He submitted that he gave a cogent defence in which he denied committing the offence and that it was wrong for the trial court to state that it was an afterthought when the police had investigated it from an early stage.

17. He submitted that since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* and as appreciated in the *Francis Muruatetu* case. He urged the court to consider applying section 333 (2) of the *CPC* in case it disallows the appeal.

Submissions by the Respondent

18. The State, through Prosecution Counsel Margaret Muraguri, opposed the appeal in its entirety. She reminded the court of its duty as a first appellate court and placed reliance on the case of *Okeno v R* (1972) EA 32.

19. Relying on *Charles Wamukoya Karani v R* [2015] eKLR, she submitted that the ingredients of the offence of defilement are; age of the complainant, proof of penetration or indecent act and positive identification of the assailant.

20. With regard to age, she submitted that the birth certificate was sufficient proof that the complainant was 17 years at the time of the incident.

21. With regard to proof of penetration or indecent act, she submitted that the complainant testified and described the sexual intercourse episodes which she had with the appellant. That the medical evidence corroborated her testimony as she was examined and found to have a broken hymen and 8 weeks pregnant.

22. With regard to identification of the perpetrator, she submitted that the appellant was well known to the complainant as he worked at her uncle's place. That the evidence of the complainant and her mother was that the appellant would take his phone to their home for charging. That even the appellant confirmed that he worked at the complainant's uncle's place. She relied on *Wamunga v R* (1989) KLR 424 where the Court of Appeal stated;

> "It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

23. With regard to the appellant's contention that he was not informed of the charge he was convicted, Ms. Muraguri submitted that the trial court clearly indicated that he was convicted on count 1. It was also her submission that the appellant understood the charges he was facing and cross examined the witnesses on the particulars of the charge sheet.

24. She submitted that the appellant's defence was a mere denial and there was no indication of a possibility of a grudge. That the trial court exercised its discretion judiciously in arriving at the sentence and the same should not be disturbed.

25. In conclusion, she submitted that the appellant failed to establish that he deserved the reliefs sought.

26. It is now settled that the duty of a first appellate Court is to reevaluate, analyse and scrutinize the evidence on record, make it's own findings and draw its own conclusions always keeping in mind that the court never saw or heard the witnesses. See *Okeno v R*

27. I have carefully considered the grounds of appeal, the rival submissions and the entire record. The e following issues arise for determination;

    a. Whether the appellant was informed of the charge he was convicted of.

    b. Whether the case was proved beyond reasonable doubt.

    c. Whether section 333(2) of the *Criminal Procedure Code* is applicable.

Whether the appellant was informed of the charge he was convicted of.

28. Section169 (2) of the *CPC* provides that "In the case of a conviction, the judgment shall specify the offence of which, and the section of the *Penal Code* or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

29. The trial magistrate expressed himself as follows; "In the end, the court finds merit in the prosecution's case in regard to count one (i). The same has been proved to the required standard of beyond reasonable doubt."

30. Although the trial magistrate did not expressly in this final paragraph state that the appellant was convicted for the offence of defilement, it is clear enough that count one was defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The Judgment introduces the charges at the opening, and record shows that at the time of plea taking, the substance of the charges and every element thereof were stated to the appellant in the Kiswahili language which he understood. Further, the trial magistrate stated that; "Having taken into account everything, the accused person is sentenced to serve seven (7) years imprisonment."

31. It is evident that that the trial magistrate complied with Section169 (2) of the *CPC* and the appellant was sufficiently informed of the offence he was convicted of.

Whether the case was proved beyond reasonable doubt

32. The ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.

33. With regard to age, the complainant testified that she was 17 years in the year 2020 and the birth certificate produced as P. Ex 1 shows that she was born on 4th March 2003. The period of offence was indicated to be between 1st September 2020 and 31st December 2020. Taking the latter and computing the age from 4th March 2003, the complainant was approximately 17 years and 8 months. Considering that the age of majority in Kenya is 18 years, she was still a minor and it is my considered view that age was sufficiently proved.

34. As to whether the appellant was well identified, the evidence on record shows that he was well known to the complainant and her family. The complainant's mother, PNN, testified that; "Accused was arrested later. He was an employee at my relative's home within the same compound as ours...Accused had worked at our home for about 2 years." The appellant corroborated that evidence when he testified that; "I know the complainant, ...I used to work at complainant's Uncles place."

35. It is therefore not in doubt that the appellant was properly identified as he was well known to the complainant.

36. As to whether there was penetration of the complainant by the appellant, the complainant testified that;

> " In the month of September and December 2020, I started to get sms on my phone. These were greeting messages. The sender told me he was called Cosmas and an employee at my uncle's place. He then started to approach me sexually. I first declined but later accepted to have a sexual relationship with him. That started on 17th September 2021. We used to meet at my grandparent's home. On 17th September 2021, he gave me a phone to charge. He then came at about 8.00pm and we spent the night having sex using a condom... after that day, we had other acts of sexual intercourse over the weekend at the same place. We did not use protection at all times. The last sexual act was on 31st December 2020."

37. The date 17th September 2021 appears to have been a typo as the rest of the dates are consistent.

38. The complainant missed her periods and when schools opened on 5th January 2021 she was found to be pregnant and when the P3 was completed on 1st March 2021 it indicated that she was 10 weeks pregnant. The clinical officer testified that when she examined the girl she was 2 months and 2 weeks pregnant. This medical evidence corroborated the complainant's account with respect to the times they had sexual intercourse. There was nothing to indicate that the complainant was untruthful. The learned trial magistrate recorded that upon hearing the complainant he found no reason not to believe her. There were no differences between them or between the appellant and the complainant's family. It was confirmed that the complainant used to sleep at her elderly grandfather's home.

39. Section 124 of the *Evidence Act* provides that in Sexual Offences, the court can convict on the singular evidence of the victim provided it records the reasons for believing that the victim is telling the truth. In this case, the trial magistrate stated that; "The complainant did not portray herself as untrustworthy witness. She never gave court any reason to doubt her credibility. There was no existence of any differences between her and the accused as would make her make up a case against the accused person."

40. The evidence shows that the complainant, who was 4 months' shy of 18 years old, was a willing participant in the relationship with the appellant, but it is trite that minors cannot consent to sex and that is why adults are expected to know better. The learned trial magistrate put it this way: " The reason why consent is not an issue in defilement cases is not to guard minors against engaging in sexual intercourse whether they yearn for it or not but to protect them from the consequences of their actions."

41. The point is that minors may naturally have sexual desire but society does not expect them to carry out those feelings to their logical conclusions because they are not mature enough to deal with the consequences of the same and may not really understand what is happening within their bodies. Hence the rules put in place to protect them from abuse by those older and more mature than them and from themselves as well. That is why the *Children Act* gives parents 7 guardians an up hand because it is their duty to ensure that children understand these things and do not engage in sexual intercourse pre maturely. It is alwys the duty of the older person in the equation to know the age of the other person, where intersex, male or female

42. The appellant argued that his defence was cogent and enough to exonerate him. It is however noteworthy the phone number he gave in cross examination is the same number that the complainant gave during her evidence in chief. She specifically testified that "I had sex with accused as he had promised me nothing would happen. He would send me Kshs 1000 every weekend. I know his mobile contact off head. It is No. 072....884." In my view, that fact is highly indicative of contact between the two.

43. Further, I did not see anything in the evidence to suggest that there was bad blood between the appellant and complainant or between appellant and complainant's family. The evidence by the complainant's mother was that the appellant had worked at their home for about 2 years and it would appear that he was still working there at the time of his arrest. According to the complainant's evidence, their last sexual encounter happened on 31st December 2020 and the appellant was arrested on 26th February 2021. If indeed there was strife between the appellant and complainant's family, the working relationship would have been affected as well.

44. From the totality of the evidence, I find no reason to disturb the factual findings of the learned trial magistrate , who had the opportunity to observe the complainant, her mother and the appellant in court during their respective testimonies.

Whether section 333(2) of the CPC is applicable.

45. The section provides that;

> " Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

46. The section applies to the offender who was in custody during trial so that once they are convicted, the period between arrest and conviction is taken into consideration during sentencing. I t is evident from the record that the appellant was out on a bond of Kshs 100,000/= and his mother was the surety. Consequently, the section is not applicable.

47. On the sentence, section 8(4) of the *Sexual Offences Act* provides that;

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years"

48. The appellant was sentenced to 7 years and in doing so, the trial magistrate stated; "I do take into account the complainant's age and minimum sentence by law imposed though not compulsory." It is evident that the complainant was not sentenced to a minimum mandatory sentence and that the trial magistrate exercised discretion after considering the circumstances of the case. The appellant's complaint is therefore unfounded.

49. In the end I find that the appeal is unmerited and the same is dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH JAN DAY OF JANUARY 2024

.....

MUMBUA T MATHEKA

JUDGE

Court Assistant

Appellant

For the State