DOO v Republic (Criminal Appeal 2 (E002) of 2022)
[2024] KEHC 426 (KLR) (25 January 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 2 (E002) OF 2022

PN GICHOHI, J

JANUARY 25, 2024

BETWEEN

DOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in the judgment delivered by Hon. M.M.Nafula , SRM on 17th October, 2018 in original Ogembo PM's Court Sexual Offence Case No. 54 of 2018 State vs Dennis Ontweka Onsongo)

JUDGMENT

1. DOO (the Appellant), was charged with the offence of defilement contrary to Sections 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. 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.

2. The particulars of the main Count are that on 12th day of June 2018, in Gucha Sub - County within Kisii County, the appellant caused his penis to penetrate the vagina of CNO a child aged 7 years.

3. In what is indicated as Count II but which should be an alternative charge, the particulars are that on 12th day of June 2018, in Gucha Sub - County within Kisii County, the appellant intentionally touched the vagina of CNO a child aged 7 years.

4. After a full trial, the Appellant was convicted of the main charge of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* and sentenced to 30 years imprisonment.

5. Being dissatisfied with both conviction and sentence, the Appellant preferred the instant Appeal vide a Memorandum of Appeal (should be a Petition of Appeal) dated 4/1/2022 which can be summarized in the following four grounds: -

1. That the learned trial magistrate erred in law and in fact by convicting the appellant despite that the ingredients of the offence were not conclusively proved.

2. That the learned trial magistrate erred in law and in fact by convicting the appellant yet there was no proper medical evidence linking the Appellant to the commission of the offence.

3. That the learned trial magistrate erred in law and in fact by convicting the Appellant by failing to find that the Appellant's defence was cogent and believable.

4. That the learned trial magistrate erred both in law and in fact in convicting the Appellant yet the Prosecution did not discharge the burden of proof.

6. The Appellant prayed that this Appeal be allowed, conviction quashed and sentence be set aside.

7. The appeal was canvassed by way of written submissions. The Appellant filed his undated submissions on 3/3/2023. He submitted that there was no proper medical evidence linking him to the commission of the offence. That the trial court relied on the evidence by the doctor and the Complainant that the hymen was torn and there were injuries on the vagina but the trial court did not interrogate the medical report and the PRC Form where the DNA was not taken. It was submitted even the white discharge which PW4 stated as having seen on the Complainant's innerwear was not taken for examination to prove linkage to the Appellant.

8. The Appellant challenged the fact that PW3 (Peter Mogire) called PW4 in the first instance instead of calling the Complainant's (PW1's) parents and that the parents did not come to testify how their daughter was defiled and how they went to report. The Appellant submitted that these events are doubtful.

9. Further, it was submitted that the Complainant's age was indicated on the laboratory form as 10 years while at the back of the patient's card, the age indicated was 7 years. The Appellant therefore submitted that the correct age of the child was not proved. He further submitted that none of the members of the public who allegedly arrested him came to testify.

10. Lastly, he submitted that case was brought due to the grudge he has with his mother-in-law. While urging this Court to allow this Appeal in its entirety, he also prayed that this Court makes other appropriate orders and invoke the provisions of Section 333 (2) of the *Criminal Procedure Code* in regard to time spent in remand custody.

11. On behalf of the Respondent, Mr. Justus Ochengo, the learned Prosecution Counsel, opposed the Appeal and filed his submissions on 28/4/2023. On the age of the Complainant, he submitted that Complainant's testimony was that she was aged 7 years. That the Medical Officer (PW2), who carried out an age assessment concluded that the Complainant was 7 years of age and this was not contested. It was submitted that the discrepancy at the back of the patient's card must have been an error. That the Complainant's age was proved beyond any reasonable doubt as 10 years.

12. It was further submitted that penetration was proved by the Complainant's testimony that she was defiled by the Appellant. That this evidence was corroborated by a Medical Officer (PW2) who found that the Complainant's vagina had injuries and that the hymen was torn. He therefore submitted that this being a case of recognition and it was through this recognition that the Appellant was arrested, there was no need of carrying out a DNA test in the circumstances.

13. It was submitted that on cross - examination, the Complainant identified the Appellant as the person who defiled her and she told PW3 that the defiler was her uncle.

14. Terming the Appellant's defence of alibi as an afterthought as it was never raised during trial, the Respondent submitted that the defence did not in any case shake the prosecution case.

15. The Respondent further submitted that the Appellant ought to have been charged under Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* instead of section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* but argued that the minimum sentence provided for under Section 8 (3) of the *Sexual Offences Act* is 20 years and therefore, the sentence of 30 years imprisonment handed over by the trial court is still valid. Lastly, this Court was urged to dismiss the Appeal and find the conviction and sentence as proper.

16. This being a first appeal, this court has a duty to re-examine all the evidence adduced before the trial court afresh, analyse it and arrive at its own conclusions but always bear in mind that this court did not see or hear the witnesses testifying as it was held by the Court of Appeal in the case of *Okeno v. R* [1972] EA 32 thus :

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424."

17. As this Court evaluates the evidence before the trial court, the issues for determination are:-

    a. Whether the Appellant was properly identified.

    b. Whether the Appellant defiled the Complainant.

    c. Whether the Complainant's age was proved.

18. Before the trial court, the evidence was that the Complainant herein (PW1) knew the Appellant herein. He was her uncle. That fact was corroborated by Peter Mogire (PW3) who testified: "PW1 came to me crying and told me that her uncle had defiled her." The Appellant did not challenge that relationship that with the Complainant and that she knew him as such. Indeed, Complainant responded during cross- examination by the Appellant:-

> " You did bad manners to me in a forest. I was taken to Ogembo hospital. Nobody witnessed the incident. I did not tell the people I met on the road because I cannot speak Ekegusii. I did not bleed. I told my parents about it. I also told my sister about it."

19. His brief unsworn statement in defence was as follows:-

> " I am DOO. I am 32 years old. I am a mason . I say in Kisii town. On 12/6/2018 I was at work. At 6. 00 pm, I went to my home. The following day on 13/6/2018 I was arrested and taken to Nyamasege Patrol Base. I was taken to Ogembo Police Station. I was brought to court where these charges were read over to me. I did not defile PW1. I have a dispute with my step- mother. She took all the money when my father died."

20. This is an alibi defence and the Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to say on such defence:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

21. The Court of Appeal then went on to say:-

> " In considering an alibi, we observe that:
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

22. There is no doubt that the Appellant herein raised his alibi defence too late in the day thus giving no room for the Prosecution to test it in any way. The Appellant's defence regarding an alleged dispute with is step- mother is an afterthought. Further, his spirited submissions of an alleged grudge by his mother-in-law leading him to being charged herein does not hold any water.

23. The evidence led by Respondent placed the Appellant at the scene where the offence was committed on the material date. The identity of the Appellant was that of recognition. The offence occurred during the day. There was no possibility of mistaken identity. The alibi defence does not therefore affect the prosecution case in any way and it must fail in the circumstances.

24. On whether the Complainant was defiled, the Prosecution must prove there was penetration. Section 2 of the *Sexual Offences Act* defines "penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The Complainant herein testified that the Appellant inserted his penis in her vagina. The medical evidence on record produced by PW3 (Gilbert Simba) was that the Complainant's vagina had injuries and her hymen was torn.

25. Regarding the Appellant's grievance that DNA test was not carried out so as to link him with offence of defilement, the Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] eKLR held:-

> " Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

In George Kioji V. Republic, Cr. App. No. 270 of 2012 (Nyeri), this Court expressed itself thus, on proof of commission of a sexual offence:

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

26. In light of the above and from the evidence on record, it is not material that DNA was not done and DNA was not necessary to prove this offence. There was penetration and therefore, the Complainant was defiled. Further, failure to call as witnesses, the Complainant's parents and the members of the public who arrested the Appellant was not fatal in view of corroboration of evidence herein. In any event, the Proviso to 124 of the *Evidence Act* allows the court to rely solely on the victim of sexual assault evidence and convict if satisfied that the victim is telling the truth.

27. On issue of age of a victim in sexual offences, the Court of Appeal in *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR held as follows: -

"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R Cr. Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

28. Similarly, the Court of Appeal in *Evans Wamalwa Simiyu v Republic* [2016] eKLR held:-

"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

29. The charge sheet indicated the Complainant herein was aged 7 years as at the time this offence was committed on 12/6/2018. At the time she testified on 27/8/2018, she told the court that she was 7 years old. The P3 Form (Exh. 4) filled by PW3 on 13/6/2018 indicates her age as 7 years. The same age appears in Age Assessment report (Exh. 5) and the Clinical Appointment Card dated 12/6/2018. This Court therefore regards reference to age 10 years on the lab request form dated 12/6/2018 attached to the Clinical Appointment Card an obvious error. The Complainant's age was proved as 7 years.

30. That therefore leads this Court to examine the section under which the Appellant is charged. He is charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. Section 8 (3) provides that "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

31. In its judgment, the trial court stated:- " ...the evidence of PW1 was well corroborated by the evidence of PW2 and PW4. I find the accused person to be guilty and I shall convict him accordingly on the offence on the main charge." The trial court then proceeded to sentence the Appellant to 30 years imprisonment.

32. Effectively, having found the corroboration in evidence presented by the Complainant (PW1), PW2 and PW4 , the issue is whether the sentence of 30 years imprisonment imposed on the Appellant under Section 8 (3) of the Act would have been irregular in the circumstances.

33. Going by the age as stated in the evidence, the Complaint's age was within the age bracket provided for under Section 8 (2) and not Section 8 (3) of the Act. Consequently, the Appellant ought to have been charged under Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The reason is that Section 8 (2) provides that "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

34. Regarding the error on the charge sheet, Section 382 of the *Criminal Procedure Code* provides that:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

35. From the foregoing, this Court is satisfied that the error or irregularity in the charge sheet herein did not occasion any injustice on the Appellant even if the trial court proceeded to sentence under Section 8 (1) as read with Section 8 (3) of the Act as charged. Section 8 (3) carries a lesser sentence than that provided for under Section 8 (2). The Appellant testified that he was 32 years of age. The victim was an only 7 years old when the Appellant lured her to his trap and defiled her. This was a beastly act on a child of such a tender age. The 30 years imprisonment imposed on the Appellant was not harsh or excessive in the circumstances.

36. In the upshot, this Court is satisfied that the conviction was safe and the sentence sound. Lastly, there is nothing on the record to show that the trial court considered the mandatory provisions of Section

333(2) of the *Criminal Procedure Code* when passing the sentence. Accordingly, the Court makes the following orders:-

1. The Appeal herein lacks merit and is therefore dismissed.
2. The conviction is upheld and the sentence affirmed.
3. The period the Appellant spent in custody, that is from 13th June, 2018 when he was arrested to 17th October 2018 when he was convicted and sentenced, be taken into account in computing the thirty (30) years imprisonment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 25TH DAY OF JANUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant and his Counsel

N/A for Respondent

Laureen Njiru /Aphline, Court Assistant