SK v Republic (Criminal Appeal 2 of 2020)
[2024] KEHC 1894 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1894 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL 2 OF 2020

RL KORIR, J

FEBRUARY 29, 2024

BETWEEN

SK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 24 of 2019 by Hon. Aduke P.J. in the Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant herein was convicted by Hon. P.J. Aduke, Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 5th May 2019 and 12th May 2019 within Bomet County, he intentionally caused his penis to penetrate the vagina of C.C, a child aged 15 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 12th May 2019 within Bomet County, he intentionally touched the vagina of C.C, a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, he was convicted of defilement and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 7th August 2020, Shadrack Kibet (Accused) appealed to this court on grounds reproduced verbatim as follows: -

i. That the Honourable trial Magistrate erred in both law and fact by convicting the Appellant but failed to appreciate that the Prosecution case was not proven beyond reasonable doubt as required in criminal law.

ii. That the learned trial Magistrate erred in both law and fact by not finding out that the evidence adduced by the Prosecution witnesses was not tangible and concrete to warrant a conviction.

iii. That the trial Magistrate erred in both law and fact by overlooking the defence case.

iv. That the learned trial Magistrate erred in both law and fact in convicting the Accused on a defective charge sheet.

v. That the learned trial Magistrate erred in both law and fact by convicting the Appellant and failing to appreciate that the burden of proof lies with the Prosecution.

vi. That the learned trial Magistrate erred in both law and fact by failing to appreciate the evidence of PW3 who was the clinical officer who had very important evidence.

vii. That the learned trial Magistrate erred in both law and fact in sentencing the Appellant without considering his mitigation and/or without allowing him to mitigate fully.

7. The Appellant filed Amended Grounds of Appeal on 26th April 2023 and relied on the following grounds that reproduced verbatim as follows: -

I. That the learned trial Magistrate erred in law and facts by convicting whilst the age of the Appellant was not sufficiently proved

II. That the learned trial Magistrate erred totally in law and fact and further not considering that the Appellant's constitutional rights were violated under Article 53, 27 and 25 of *the Constitution* and sentenced the Appellant wrongly to 20 years.

8. This being the first appellate court, I have a duty to re-evaluate afresh the evidence on record. The Court of Appeal in the case of Mark Ouiruri Mose vs Republic (2013) eKLR, held that:-

> " That this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that"

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled C.C (PW1) on the 5th and 12th day of May 2019. PW1 testified that on 12th May 2019 the Appellant removed his penis and inserted it into her vagina. That they had unprotected sex five times that night. She further testified that they had earlier had sex with the Appellant on 5th May 2019.

10. Julius Magut (PW5) who was the clinical officer testified that he examined the minor (PW1) on 14th May 2019 and found that she had no physical injuries. That she had normal external genitalia, had no bruises and tears and that her hymen was absent. He further testified that he found pus cells which were dead white blood cells in the body which signified an infection. It was his conclusion that there was no evidence of penetration.

The Accused/Appellant's Case.

11. The Appellant, Shadrack Kibet stated that on the material day while at work, he gave Dennis Chepkwony Kshs 4,500/= and his attempts to get the money back from Dennis later were unsuccessful. That they argued and Dennis framed him with this case. He further testified that he was shocked when the charges were read out to him.

12. The Appellant denied committing the offence and further stated that the doctor testified that there were no sperms on PW1.

13. On 7th March 2023, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

14. It was the Appellant's submission that despite the Prosecution's application for an age assessment Report, his age was not proved beyond reasonable doubt. That he was below 18 years when he was arrested. That the when the trial court ordered that he be detained at Kericho Juvenile Home, it was of the opinion that he was under 18 years old.

15. The Appellant submitted that the findings of the 2nd age assessment report was inconsistent with the 1st age assessment report. That this raised eye brows on the credibility of the results as the age assessment ought to have been done once.

16. It was the Appellant's submission that when the trial court went against Articles 53 (1) (d) and (f) when it sentenced him, a minor of 14 years to 20 years imprisonment. That the trial court was required to comply with sections 166 and 235 of the Children's Act. He relied on P.O.O (minor) vs DPP (2017) eKLR.

17. The Appellant submitted that it was unlawful for the Prosecution to charge one minor over the other and he relied on CKW vs Attorney General and another (2014) eKLR and G.O vs Republic Criminal Appeal No. 155 of 2016. That it was clear that the Appellant and PW1 ought to have been treated equally as they were both under age.

18. It was the Appellant's submission that this court finds that he was a minor and that he be given a second chance to go back to the society. That he was a first offender and a young man who was only 16 years of age. He prayed that he be released from custody.

The Prosecution's/Respondent's Submissions.

19. The Respondent submitted that the victim was aged 15 years at the time of the incident. That a Birth Certificate (P.Exh1) was produced and it proved that she was aged 15 years old.

20. It was the Respondent's submission that the victim testified that she had sexual intercourse on multiple occasions with the Appellant from 5th to 12th May 2019. That the P3 Form indicated that the victim's hymen was missing though no force was used. It was their further submission that this evidence corroborated the victim's evidence that she was not forced to have sex with the Appellant.

21. The Respondents submitted that the complainant had a sexual relationship with the Appellant who worked in a shop near her home. That PW2 and PW3 confirmed that the Appellant was well known to them. They further submitted that there was no doubt as to the identity of the Appellant.

22. It was the Respondent's submission that the Appellant gave an unsworn statement where he alleged the existence of a grudge between himself, the victim and her family. That there was no evidence to

prove his assertions. It was their further submission that PW2 and PW3 denied the existence of such a grudge. The Prosecution urged the court to dismiss the Appellant's defence.

23. The Respondent submitted that the trial Magistrate gave the Appellant an opportunity to mitigate which he did through his advocate. That further, the trial court called for and considered the pre-sentence report. They further submitted that the trial Magistrate properly exercised her discretion and properly meted the 20-year sentence.

24. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 2nd September 2020, the Appellant's Amended Grounds of Appeal and written submissions both filed on 26th April 2023, the Respondent's written submissions dated 16th March 2023. I sieve the following issues for my determination: -

    i. Whether there were procedural issues affecting a fair trial.

    ii. Whether the Prosecution proved its case beyond reasonable doubt.

    iii. Whether the Defence places doubt on the Prosecution case.

    iv. Whether the Sentence preferred against the Accused was just and fair.

i. Procedural issues affecting a fair trial.

a. Whether the Charge Sheet was defective.

25. It was a ground of the Appeal that the trial Magistrate erred by convicting the Appellant on a defective charge sheet. The substantive law on defective Charge Sheets is Section 134 of the Criminal Procedure Code which provides as follows:-

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

26. In expounding Section 134 of the Criminal Procedure Code, the Court of Appeal in the case of Isaac Omambia vs Republic, (1995) eKLR, stated as follows:-

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

27. Similarly in Benard Ombuna vs Republic (2019) eKLR, the Court of Appeal addressed the issue of a defective charge sheet in the following terms:-

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

28. There are two Charge Sheets on record. The first one was dated 15th May 2019 which indicated the age of the victim to be 14 years old. The second one is the Amended Charge Sheet dated 23rd September 2019 which indicated that age of the victim to be 15 years old. The existence of the Amended Charge Sheet was a result of the Prosecution's Application under section 214 of the Criminal Procedure Code to change the minor's age from 14 years to 15 years. The Appellant who was represented by an advocate did not object to the Application.

29. After the Application was allowed, the substance of the Charge and its particulars in the Amended Charge Sheet were read out to the Appellant in a language he understood and he pleaded not guilty. The Appellant was present during the trial and through his counsel cross examined all the Prosecution's witnesses. He thereafter presented his defence in person. This demonstrated that the Appellant fully understood the charge he faced. It is my finding therefore that the Amended Charge Sheet was not defective. It was plain from the Charge Sheet what charge the Appellant was supposed to meet and there was no ambiguity at all.

b. Whether the Appellant should have been tried as a juvenile.

30. The Appellant submitted that he was wrongfully tried as an adult despite him being under the age of 18 years. He submitted that at the time of the alleged commission of the offence, he was aged 14 years and he attached a copy of the birth certificate in his submissions.

31. Courts frown upon the practice where parties introduce new evidence on appeal. The law however allows an Applicant to make an application to the court to be allowed to tender new evidence at this level. In Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others (2018) eKLR, the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The court set out guidelines thus: -

> " Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> (e) the evidence must be credible in the sense that it is capable of belief;
>
> (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

32. Guided by the above precedent, I dismiss the Appellant's birth certificate because no application was made before this court for its production. Secondly, the Appellant's age was well within his knowledge during his trial and it would have been reasonable to introduce such evidence at the trial court. I particularly take note that the Accused was represented by counsel in the trial court who would have raised the issue of the birth certificate. I am therefore not convinced that the Appellant was unable to produce the birth certificate at the trial stage and this ground of the appeal is an afterthought.

33. The Appellant submitted that there were two age assessment reports which contained different results. That this caused uncertainty in regards to his age. I have gone through the trial court proceedings and I have noted that on 15th May 2019, the trial court ordered for an age assessment report on the Appellant and in the meantime ordered that he be remanded at Kericho. An age assessment report dated 22nd July 2019 was filed in court indicating that the Appellant was above 18 years of age.

34. On 24th July 2019, the Appellant's advocate applied for a second age assessment report. The second age assessment report was filed in court and it indicated that the Appellant was above 18 years of age.

35. I am satisfied based on the two age assessment reports that the Appellant was above 18 years and was tried properly as an adult. He may however have just crossed over into adulthood and was therefore a young adult.

ii. Whether the Prosecution proved its case beyond reasonable doubt.

36. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

37. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an Accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony.

38. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

39. John Mutai (PW3) who was the victim's father produced a Birth Certificate and the same was marked P.Exh 1. The Birth Certificate indicated that C.C (PW1) was born on 18th December 2003. The authenticity of the Birth Certificate or its production was not challenged during the trial.

40. C.C (PW1) testified that she was aged 15 years at the time of the alleged offence.

41. Flowing from the above I find the Birth Certificate (P.Exh 1) admissible and based on its contents and the testimony of PW1, it is my further finding that the time of the commission of the alleged offence, C.C was aged 15 years.

42. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

43. The victim testified that she had sex with the Appellant on 5th May 2019 which was about a week from the material day. From the victim's testimony, the Appellant was well known to her as she was sent by her father (PW3) to go and pay a debt they had incurred by purchasing rice from a shop where the Appellant worked. The victim further testified that on the night of 12th and 13th May 2019, she spent the night with the Appellant. The victim's parents, PW2 and PW3 also testified that they knew the Appellant as the person who worked at the shop.

44. This evidence in my view is more of recognition than identification. In the case of Peter Musau Mwanzia vs Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident....."

45. There is no doubt in my mind that the Appellant was well known to PW1. I am also satisfied from my analysis of the evidence that the Appellant was with the victim on 5th May 2019 and on the night of 12th and 13th May 2019 and as such he was positively identified by the victim as the one who had allegedly had sex with her.

46. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence....."

47. Penetration can be proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

48. C.C (PW1) testified that on the night of 12th and 13th May 2019, they had repeated sex with the Appellant and that they did not use protection. She further testified that it was not the first time as they had engaged in sexual intercourse on 5th May 2019.

49. Julius Magut (PW5) who was the clinical officer at Longisa Hospital testified that when he examined PW1 on 14th May 2019, he found that her hymen was absent. That she had no physical injuries, had normal external genitalia and she had no bruises or tears. He further testified that he found pus cells which were a sign of an infection. It was his conclusion that there had been no evidence of penetration.

50. PW5 produced P3 and PRC forms that were marked as P.Exh 2 and 4 respectively. The PRC form (P.Exh 4) indicated that PW1 had been examined on 14th May 2019 and she was found to have no bruises, had normal outer genitalia and had an old broken hymen. The P3 form (P.Exh.2) indicated that PW1 had been examined on 14th May 2019 and the findings mirrored those contained in the PRC Form.

51. From the medical evidence above, it is clear that there was no sexual activity on the night of the 12th and 13th May 2019. However, in such a case, courts can still convict solely on the testimony of the victim and the only caveat is that the trial court has to believe the testimony of the victim and record the reasons why it believed the victim. In Section 124 of the *Evidence Act* provides:-

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth

52. I have carefully gone through the victim's testimony and she does not seem to be a truthful witness. She testified that on the night of the 12th and 13th day of May 2019 she spent the night and had sex with the Appellant. Earlier in her testimony she stated that she refused to sleep on the Appellant's bed and that she sat up all night until morning. Later on, she changed her testimony and stated that at around 9.30 p.m., she went to bed and the Appellant removed her pant and he removed his and they had sex. She further testified that they had repeated sex of up to 5 times that night.

53. I am unable to find value in the victim's testimony as she offered contradictory evidence and as a result, her credibility was severely dented. Additionally, her testimony that they had sex 5 times on the material

night was not supported by the findings upon medical examination which was done a day after the incident. The examination revealed that she victim had normal external genitalia and had no bruises or tears. The old broke hymen was evidence of sexual activity but was not evidence of penetration on the material night.

54. From my evaluation of the evidence, due to the contradictory nature of the victim's evidence, her testimony required corroboration as the medical evidence found that there was no evidence of penetration. That she only admitted to having had sex with the Appellant when her father beat her the following day. She testified that on the material evening she had been sent to go and settle a debt at the Appellant's shop and he locked her in the inner room. That her father came looking for her and she hid and didn't scream to alert him that she was inside the shop.

55. It appears to me that PW1 and the Appellant were in s sexual relationship and they had been engaging in regular sexual intercourse on diverse dates. However based on the evidence presented before me, I am unable to find that there was penetration on either the 5th day of May 2019 or the night of 12th and 13th May 2019. There was insufficient evidence of sexual activity on those dates.

56. The three ingredients of defilement must be proved conjunctively and not disjunctively. When an ingredient cannot be adequately established, it creates doubt and that doubt however small must go to the benefit of an Accused.

57. In considering the alternative charge of committing an indecent act with a child, the offended section of the law is section 11(1) of the *Sexual Offences Act*. It states as follows:-

> Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

58. The *Sexual Offences Act* also defines what entails an indecent act. Section 2 provides as follows:-

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will.

59. Having found that the Prosecution failed to prove penetration, it is even harder for this court to find that there was any sexual contact between the Appellant and PW1 on 12th May 2019. PW1's whole testimony as previously found, was too incoherent to provide sufficient prove on the alternative charge.

60. In the final analysis, it is my finding that there was insufficient evidence adduced by the Prosecution to sustain the charges against the Appellant. What was clear from the evidence was that the Accused and the complainant were in a continuing sexual relationship which creates deep suspicion that they must have engaged in sexual intercourse on the material dates. It is trite however that suspicion alone however strong cannot found a conviction.

61. In the end, I find the Appeal merited. The Appellant's conviction was unsafe owing to insufficiency of evidence. I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

62. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief for Mr. Njeru for the State, Appellant present in person and Siele (court Assistant)