John v Republic (Criminal Appeal E043 of 2022)
[2024] KEHC 1868 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E043 OF 2022

GMA DULU, J

FEBRUARY 28, 2024

BETWEEN

JAPETH NGEI JOHN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 14 of 2020 delivered on 3rd September 2020 by Hon. Mayamba C. A (PM) in Kilungu Law Court)

JUDGMENT

1. The appellant was tried and convicted of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.
2. The particulars of the offence were that on December 5, 2019 at [particulars withheld] within Makueni County using his penis penetrated the vagina of ZKM a girl aged 17 years and 9 months.
3. On conviction, he was sentenced to twelve (12) years imprisonment.
4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal, and relied on the following grounds:-
    1. That the crime was fabricated on him by the complainant and parents.
    2. That the evidence of the prosecution was not proved beyond reasonable doubt.
    3. That the sentence be reduced to the time served in prison.
    4. That the remaining sentence be served under non-custodial imprisonment if found guilty.
    5. That he is a family person who is sole bread winner.

6. That he should be considered a first offender if proved beyond reasonable doubt that he is guilty.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic* [1972] EA 32.

7. I have evaluated the evidence on record. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and called three (3) other witnesses.

8. The main elements of defilement are the age of the complainant who should be below 18 years. Secondly, the fact of sexual penetration. Thirdly, the positive identity of the perpetrator.

9. On the age of the complainant PW1 ZKM , she relied on a birth certificate which was not contested or doubted. She was born on March 30, 2002. In my view the prosecution proved beyond any reasonable doubt that PW1 was 17 years 9 months at the time of the incident.

10. With regard to sexual penetration, the evidence on record is only that of PW1 the complainant and the medical evidence. In my view the evidence of PW1 a victim of a sexual offence is believable and satisfies the provisal to Section 124 of the *Evidence Act* (Cap.80), as the medical evidence of PW4 Eric Kasiamani the Clinical Officer is that PW1 was five (5) months pregnant at the time she was taken for medical examination. Thus, just like the trial Magistrate, I come to the conclusion that sexual penetration on the complainant was proved beyond any reasonable doubt.

11. I now turn to the identity of the culprit. The prosecution stated in evidence that the appellant was the culprit. The appellant denied the allegation.

12. It is clear from the evidence on record, that both PW1 and the appellant knew each other well as neighbours. There would thus be no possibility of mistaken identity.

13. In his defence however, the appellant asked for DNA testing, and also together with his defence witnesses maintained that the culprit was a cousin of his and not himself. This cousin was named by the appellant's witnesses DW2 SMJ, and PW3 AN, and PW4 EE to be one Muoki.

14. I have considered that the prosecution have argued on appeal that the defence story was an afterthought, as no question was asked by the appellant or a suggestion made by him to the complainant that the pregnancy was from Muoki.

15. In my view, even if the defence of the appellant was raised late, as the burden was on the prosecution to prove their case beyond reasonable doubt, the prosecution should have conducted a DNA test after birth of the child in four (4) months time, and also called evidence to controvert the allegation of the culprit being Muoki. The prosecution failure to take any action to disprove the defence allegation by tendering evidence under Section 212 of the *Criminal Procedure Code* (Cap.75), in my view, meant that the conviction herein was not safe, as convicting the appellant or sustaining the conviction herein in my view, would amount to shifting the burden of proof to the appellant, which would be wrong as the appellant had no burden to prove his innocence.

16. I thus find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit. On that account alone, the appeal will succeed, conviction quashed and sentence set aside.

17. For the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Kazungu for State