Kipkoech v Republic (Criminal Appeal 95 of 2023) [2024] KEHC 1766 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1766 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 95 OF 2023

DR KAVEDZA, J

FEBRUARY 27, 2024

BETWEEN

COSMAS NGETICH KIPKOECH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. R. M. Kitagwa (RM) delivered in Chief Magistrates' court (Kibera) S.O. Case No. 43 of 2020 on the 23rd day of February 2023)

JUDGMENT

1. The Appellant was charged with the Subordinate Court of the offence of sexual assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 22.05.2020 in Nairobi County, he unlawfully used his finger to penetrate the anus of A.S., a child aged 5 years old. After full trial, the appellant was convicted on the alternative charge of committing an indecent Act with a child contrary to section 11 (1) of SOA. The particulars were that on 22.05.2020 in Nairobi County, he intentionally and touched the buttocks of A.S., a child aged 5 years old with his hand.

2. The Appellant was sentenced to serve 8 years' imprisonment. He appeals against conviction and sentence in line with his petition of appeal dated 7.03.2023. The Appellant has amended the grounds of appeal and the parties have filed written submissions which I have considered.

3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze 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 but bearing in mind that it never saw the witnesses testify.

4. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the Appellant has raised three grounds of appeal. He complains that the trial magistrate

failed to appreciate that the prosecution did not prove its case against the appellant beyond reasonable doubt. He further complains that the trial court trivialised his rights and convicted him on very little evidence that should alternatively have secured his liberty.

5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt.

6. Section 2 of the *SOA* defines an indecent act as:-

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;

7. From the facts outlined in the charge sheet, the appellant fell within the first part of the definition of an indecent act. Evidence of the indecent act was given by the victim, (PW2), who gave sworn testimony after voire dire, testified that on the material day, while playing with his brother A (name withheld), a security guard asked him to go to his room. While in the room, the guard removed PW2's clothes and inserted something in his buttocks. He did not know what was inserted in his buttocks. The guard then opened the door and asked PW2 to go play football. PW1 went home and reported the incident to his mother (PW1) who reported the incident to the police.

8. In his testimony, PW2 stated that the appellant before court was not the guard that he was referring to; that the one being referred to was fat. He added that there were two guards, and that the one who worked during the day was the perpetrator.

9. In his testimony, while PW2 gave clear and graphic testimony of the ordeal, the identification of the perpetrator was contentious. PW1 told the court that the appellant in court was not the perpetrator he was referring to. However, on cross-examination, he stated that he is the one who locked him in his room. I take note of the fact that PW2 was a child of tender years, aged 5 years at the time of the alleged incident, and despite voire dire being conducted, and him being affirmed to be intelligent appreciate the consequences of giving evidence on oath, he was not quite consistent with the happenings of the alleged incident. This is particularly perceivable when he is unable to tell the object that was inserted in his anus and the inconsistency of who the perpetrator was.

10. PW2's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW2 testified with the innocence of a child and that the evidence as to what transpired remained consistent throughout. While I acknowledge that PW2's testimony was tendered with the innocence of a child, his grasp of the events were not quite clear. For this reasons I find that there was need for corroborating evidence to ascertain the facts.

11. To this end, the prosecution called the child's mother who testified as PW1. She told the court how PW2 told her that she had been sexually assaulted by a security guard, who inserted his hand in his anus. PW1 stated that the appellant was the only security guard at the gate during the day. In cross-examination, she denied having refused the CCTV to be checked.

12. From PW2's testimony, there usually were two security guards at the place. At the risk of repetition, in his examination in chief, PW2 told the court that the appellant was not the perpetrator; that the perpetrator was bigger in size. I also note that while PW2 reported to PWI that a security guard had sexually assaulted him, he did not describe the said security guard. PW1 only confronted the appellant on the basis that he was the only security guard during the day.

13. The circumstances of the case make it difficult to find that indeed, the appellant is the one who committed the offense. Despite the incident happening in broad daylight, PW2 was inconsistent on the identity of the perpetrator.

14. Being that there were more than one security guard in the place, I hold the view that it was incumbent upon the prosecution and the investigating officer to conduct an identification parade to ascertain the identity of the perpetrator, also considering that PW2 was a child of tender years and his grasp of events was not so clear.

15. The appellant in his defence alluded to the fact that he asked that the CCTV footage of the place be extracted to ascertain the allegations, but no action was taken. The fact of the CCTV footage was not only brought up in defence but also during the cross-examination of PW1, who stated that she did not refuse that the CCTV be examined. Suffice to note that PW1 did not deny the existence of CCTV cameras in place and that she only denied having refused that the same be checked. This fact cannot therefore be said to be an afterthought.

16. If indeed there existed CCTV cameras in place, It is my view, that such evidence would be crucial to corroborate the testimony of PW2 on the circumstances of the incident.

17. In the upshot, I find that while PW2 was sexually assaulted, the perpetrator of the said acts has not been conclusively identified. To this end, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt and the appellant's conviction cannot stand. The appeal therefore succeeds.

18. Consequently, I hereby quash the appellant's conviction for the offence of committing an indecent act with a child contrary to section 11(1) of *SOA* and set aside the sentence.

19. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

    It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2024

....

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Mr. Mutuma for the Respondent

Omwoyo Court Assistant.