Hassan v Republic (Criminal Appeal E025 of 2022)
[2024] KEHC 4272 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E025 OF 2022

JN ONYIEGO, J

MARCH 15, 2024

BETWEEN

JEYLANI MUKTAR HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Mukhabi Kimani delivered on 6th May 2022 in sexual offence case No. E007 of 2021 Mandera PM's Court)

JUDGMENT

1. The appeal herein was instituted vide a petition of appeal filed in court on 08.06.2022 challenging the conviction and sentence in SPM's Court at Mandera S.O. No. E007 of 2021 where the appellant was convicted with the offence of defilement contrary to section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* and sentenced to serve 70 (Seventy) years imprisonment. Particulars of the offence were that on the diverse dates between 19th and 21st day of 2021 at Mandera East Sub - County within Mandera County he intentionally caused his genital organ to penetrate the genital organ of N.R., a girl aged 3 years.

2. The appellant being aggrieved with both the conviction and sentence lodged the appeal herein citing six (6) grounds of appeal summarized as below:

    i. That the trial court failed to recognize the fact that there existed a grudge between him and the mother of the complainant.

    ii. That the learned trial magistrate erred in matters of law by passing a harsh sentence in the circumstances.

    iii. That the learned trial magistrate erred in law and fact by failing to take cognizance of the fact that the prosecution evidence was marred with contradictions.

3. At the hearing of the appeal parties relied on their written submissions to argue the appeal.

4. The appellant submitted that the trial court failed to recognize the fact that there existed a grudge between himself and the mother of the complainant after he accused her of neglecting their children. That the wife therefore framed him up so as to revenge against him.

5. He also urged that the trial magistrate passed a sentence that was not commensurate to the alleged offence committed. That the said sentence did not consider articles 25(a), 28 and 29 of the *constitution* in so far as his dignity was concerned. Reliance was placed on the case of Abdullah *Mwanza v Republic,* Criminal Appeal No. 259 of 2012 where the Court of Appeal in meting out sentence took into consideration life expectancy of the appellant.

6. He submitted on grounds 3,4 and 5 jointly where he faulted the trial magistrate for not holding that prosecution did not prove its case to the required standards. That the offence of defilement was not corroborated by medical, Forensic or scientific evidence. He relied on the case of *Mutonyi v Republic* (1982) KLR where the Court of Appeal held that corroboration is an important element in proving sexual offences cases. He thus prayed that this court quashes his conviction and thereafter set aside the sentence.

7. Mr. Kihara while relying on his submissions dated 23.10.2023 stated that the prosecution did sufficiently prove the age of the victim, penetration and identification of the appellant as the person responsible for the sexual assault of the complainant. Counsel placed reliance in the cases of *Hudson Mwachongo v Republic* [2016] eKLR and *Erick Onyango Ondeng' v Republic* [2014] eKLR where it was held that ... age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim and further, that the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. That it is not necessary that the hymen be ruptured.

8. It was his view that the evidence adduced by the prosecution was sufficient enough to return a conviction. He urged that the grounds of appeal raised by the appellant were not merited in as far as they sought to contest the decision by the trial court to convict and sentence him. As such, it was submitted that the appeal is not only frivolous but also baseless and the same should be dismissed.

9. The duty of this court while exercising its appellate jurisdiction (1st appellate court) was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where it was held that the role of the 1st appellate court is to subject the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make due allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong legal principles [See *Gunga Baya & another v Republic* [2015] eKLR].

10. PW1, SAA on behalf of the complainant testified that the complainant was aged 3 years in as much as she could not recall her birth date. That after separating with her former husband, she got married to the appellant with whom they were blessed with a child. She testified that between 19.02.2021 and 21.02.2021 the appellant visited her hotel and ordered for food. That the appellant had previously left their matrimonial home after she accused him of not being helpful in as far as paying house bills was concerned.

11. It was her evidence that he visited her hotel at about 8.00 a.m., when he convinced her that he was in a position to take care of the children having in my mind that her maid was absent. That she declined

the request but the appellant persisted with his offer and so proceeded to take the children forcefully from her. The children were then returned at lunch time and upon keen observation, the complainant declined to eat.

12. She narrated that it took her two days to realize that the complainant had a problem as she complained that she had been bitten on her leg. When she removed the complainant's pants, she saw bruises on thighs, buttocks and her genitalia thus the same made her take her to Nima Hospital for medical checkup. It was later established that the complainant had been defiled.

13. PW2, Mohamed Abdi Adan, testified that on 22.02.2021 at 9.00 p.m., he received information from S who informed him that her child had been defiled. He stated that he is related to S. He therefore left for her house and upon reaching S's home, he enquired on what was happening. It was then that PW1 told him that the appellant had defiled the complainant. He later escorted PW1 and the complainant to the hospital and thereafter to the police station where they recorded their statements.

14. PW3,108013 PC Ngore Kivinya testified that on 23.02.2021, he was informed by the OCS of a prisoner who had been arrested on the night of 22.02.2021 on allegation of defilement. That together with PC Abdirashid, they took the minor to Mandera Referral Hospital for further examination and thereafter returned to the station where he proceeded to record witnesses' statements. It was his evidence that he discovered that the appellant was previously married to PW1 but had since separated and were living separate lives. He testified that after further investigations, he charged the appellant with the offence herein.

15. PW4, Dr. Abdirahman Hassan stated that the complainant was brought to the hospital with a history of defilement. That on examination, the child looked sick and was crying with fever and signs of trauma. The approximate age of injury was hours and, in her genitalia, there was bleeding and also a tear on the vagina. Hymen was absent and there was blood and white discharge. An age assessment was done and the same determined that the complainant was three years old. He further stated that there was tears and bleeding on the labia minora and bleeding and laceration in the anus.

16. On his defence, DW1, Jeylan Muktar Hassan testified that he was a cook by profession and that on 19.02.2021 at 6.00 a.m., he was called for work at Busley by Habiba Maalim. That he worked and thereafter left for home wherein he changed his clothes and then went to town. On 20.02.2021, he went to PW1's work place as he took them food but later on left at 4.30 p.m. It was his evidence that on 21.02.2021, he remained at home and left the house at 11.a.m. for town. That he returned back home at 2.00 p.m. and thus remained indoors. He denied defiling the complainant whom he claimed was his daughter. He stated that he was being framed by PW1 as a result of a misunderstanding between them.

17. I have considered the grounds of appeal and the submissions by both the appellant and the prosecution and in my view, the issue which this court ought to determine is whether the prosecution tendered sufficient evidence to prove its case to the required standards.

18. The prosecution under Section 107(1) of the *Evidence Act* bears the burden of proof on every element in a criminal charge. [See *Woolmington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273].

19. The Appellant was charged with the offence of defilement contrary to section 8(1) as read together with Section 8(2) and an alternative charge of indecent act with a child contrary to section 11(1) of the *Act*.

20. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As it was correctly held in Charles *Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, the critical ingredients forming the

offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. On the age of the complainant, the prosecution had to prove that the complainant was a child. Among the exhibits that were produced by the prosecution is an age assessment form which showed that the complainant was three years old. Besides, the court took into account that the victim was a minor incapable testifying thus allowing the mother to testify as intermediary. From the court's own assessment, the victim was a child. I have no doubt that the complainant was a minor at the material time when the offence was committed.

22. On whether there was proper and unlawful penetration, the evidence available to the court was that of the complainant who testified through her mother, to the effect that the appellant defiled her; PW4 also testified that she examined the complainant and found that there was bleeding and also a tear on the vagina. Hymen was absent as there was blood and white discharge in her vagina. He went further to state that there was bleeding on the labia minora and vagina tears with bleeding and laceration in the anus. He concluded that the complainant was defiled.

23. Penetration is defined under Section 2 of the *Sexual Offences Act* to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Having in mind the definition herein together with the testimony of the prosecution witnesses, it is my finding that indeed the complainant was sexually assaulted through both the vagina and anus.

24. On identification, PW1 narrated how the appellant took away her children among them the complainant herein and that upon their return, she noticed that the complainant was initially withdrawn as she declined to eat. That the same was unusual. It is not controverted that on cross examination, it was indicated that the appellant was apprehensive as he advised PW1 that should she take the complainant to the hospital, then he stood being arrested. It follows that this was someone who was well known to not only the complainant as his father but also as the previous husband to PW1. [See *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552].

25. It is my finding that the appellant in the instant case was properly and positively identified as this was a case of recognition. See the Court of Appeal holding in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR where it was held that prosecution is always under obligation to prove its case to the required standards.

26. Although there was no eye witness, the evidence of the complainant does place the appellant at the scene of the incident hence the culprit. In any event, Section 124 of the *evidence Act* does empower a court to convict based on the evidence of a single witness if satisfied that the witness is truthful. See *JMM V Rpublic* (2020)e KLR

27. On the grounds that the prosecution evidence was marred with contradictions, the appellant did not direct the court to any evidence to support the same. As already noted above, the prosecution evidence was proper as all the elements of the offence herein were properly proved. The finding of the trial court was based on the said evidence by the prosecution. As such, ground 3 is unfounded

28. The appellant submitted inter alia that the trial court failed to recognize the fact that there existed a grudge between the appellant and the mother of the complainant in that the appellant had previously got concerned over the wife neglecting the minors. That the wife therefore framed him so as to get even with him.

29. It is my humble view that in as much as there were disagreements between the appellant and the mother of the complainant, the appellant was responsible for taking away the complainant on two different days. In the same breadth, the complainant was reported to have acted differently after the said period

as she declined to eat. Further, the appellant was apprehensive to an extent of advising PW1 that should the complainant be taken to the hospital, then he would be arrested. The question that lingers is why was the appellant almost sure that he would get arrested should the complainant be taken to the hospital. It is against the reasons above that I find that the defence of existing grudges was just an excuse after realizing the burden that was unfolding right before his eyes.

30. On the ground that the sentence meted out was severe, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 which stipulates 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.

31. In reference to the developments recently seen in our jurisprudence, the Court of Appeal has interpreted life imprisonment to mean a term of thirty years' sentence. The Court of Appeal in the case of *Evans Nyamari Ayako v Republic* Criminal Appeal No. 22 of 2018 in para 26 stated that:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold that life imprisonment translates to thirty years".

32. Taking into account the above finding, I do not find any merit in the appeal against conviction hence the same is dismissed and the conviction upheld. However, considering the mitigation on record and the fact that the appellant needs an opportunity to reform and be useful in society, the sentence of 70 years is substituted with that of 20years imprisonment.

ROA 14 Days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY MARCH 2024

J.N.ONYIEGO

JUDGE