Wawire v Republic (Criminal Appeal E046 of 2022)
[2024] KEHC 6800 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 6800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E046 OF 2022

GMA DULU, J

APRIL 30, 2024

BETWEEN

JOHN MUSUMBA WAWIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 22 of 2019 at Taveta Law Courts delivered on 3rd September 2021 by Hon. C. L. Adisa (RM)

JUDGMENT

1. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on diverse dates from the year 2017 to 18th October 2019 at unknown time of the night in Njukini village Taveta Sub County of Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of P.R.M a girl child aged 14 years.

2. In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same diverse dates and same place unlawfully and intentionally touched the vagina of P.R.M a girl aged 14 years with his penis.

3. The appellant was also charged under count II with assault causing actual bodily harm contrary to Section 251 of the *Penal Code*, the particulars of which being that on 20th October 2019 at about 1900hours at Njukini village unlawfully assaulted Pamela Rasowa thereby occasioning her actual bodily harm.

4. He pleaded not guilty to all the charges. After a full trial, he was convicted of defilement. The Magistrate did not address the second main count of assault causing actual bodily harm, and sentenced the appellant to twenty (20) years imprisonment for defilement.

5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-

   a. The learned Magistrate erred in law and fact by failing to find that the offence of defilement was not proved beyond reasonable doubt as required by law.

   b. The trial court failed to find that the evidence presented by the prosecution was full of inconsistencies, contradictions and had material defects that went to the root cause of the case and went against of Section 169 of *CPC*.

   c. The trial court failed to appreciate that the offence reported to the police and disclosed initially was that of assault which the appellant pleaded guilty for. The second count of defilement and alternative charge was afterthoughts intended to settle personal scores. Evidence presented did not prove penile penetration by the appellant as alleged.

   d. The trial court erred in law and facts by shifting the burden of prove from the prosecution to the appellant against the provisions of section 107 of the *Evidence Act*.

   e. The trial court erred in both law and fact when it amended the charge without giving the appellant the right to recall witness as per the provisions of Section 214 of *CPC*.

   f. Lack of legal representation to the appellant as prescribed by law violated fair trial of the appellant.

   g. That the sentence imposed was harsh and excessive since it was applied in mandatory terms as provided by the statute without considering the appellant's mitigation or the unique facts and circumstances of the case.

6. 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.

7. 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.

8. In proving their case, the prosecution called three (3) witnesses. On his part, the appellant tendered sworn defence testimony and called no additional witnesses.

9. The burden was on the prosecution to prove their allegations against the appellant. This burden is codified under Section 107 of the *Evidence Act* (Cap.80).

10. This being a criminal case, the standard of proof is beyond any reasonable doubt see Woolmington =Versus= DPP (1935) AC 462 and Sawe =Versus= Republic (2003) eKLR.

11. As stated earlier in this judgment, the appellant was charged under two main counts of defilement and assault causing actual bodily harm, but convicted of defilement.

12. The crucial elements of defilement for which the appellant was convicted herein, were stated in the case of *Charles Wamukoya Karani =Versus= Republic (2013)* eKLR. They are the age of the victim, penetration, and positive identification of the offender.

13. Was the age of the complainant (victim) proved to be 14 years as alleged?

14. PW1 the alleged victim stated in evidence that she was 15 years. She did not give her date or year of birth, nor rely on any document.

15. PW2 PC Ann Mbeki Awori the investigating officer, relied on an age assessment report to state in evidence that PW1 was 14 years of age.

16. No medical personnel testified to that age assessment report, nor did PW2 explain why no medical personal testified to it. In addition, PW1 did not acknowledge or identify that age assessment report, or mention in evidence that she was taken for age assessment. It was thus hearsay evidence. Thus also the entry on age of 14 years on the medical examination report form (P3), was not based on any tangible independent evidence.

17. In those circumstances, I find that the prosecution did not prove the age of PW1 beyond any reasonable doubt.

18. I now turn to sexual penetration. PW1 testified that she was sexually penetrated a day or two before she was allegedly assaulted. The medical evidence of PW3 George Ombaya a Clinical Officer at Taveta hospital was that from treatment notes, the complainant (PW1) had physical injury around the eye which was swollen. On sexual organs, the vagina had missing hymen, but of long standing. He could not identify the perpetrator nor time of penetrating the victim.

19. In my view, from the evidence on record, even assuming that the hymen was broken through sexual penetration, there was no proof that such penetration of a sexual nature occurred the way and at the time alleged in the charge sheet.

20. I thus conclude that from the evidence on record, the alleged sexual penetration was not proved.

21. Lastly, I turn to proof the identity of the culprit. From the evidence on record, though PW1 testified that the appellant was the culprit, the evidence on record points to the appellant assaulting her as chastisement to discipline her, which act made a good Samaritans take up the matter, but which was later twisted to a sexual offence.

22. In my view, though it was illegal for the appellant to assault and injure the complainant (PW1), such an act was not and could not be converted to a sexual act of defilement.

23. I find that the prosecution did not prove that the appellant was the culprit. I will thus acquit the appellant for defilement.

24. Though it is clear from the evidence on record, and the appellant admitted in his sworn defence to assaulting the complainant, the trial Magistrate did not address that charge of assault (count II), which was a mistake. The appellant having already served years from 2021 in prison for defilement, I cannot revisit that issue of count II now.

25. Consequently and 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 30TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.

GEORGE DULU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Alfred – Court Assistant

The appellant

Mr. Sirima for State