Khavoi v Prosecution (Criminal Appeal E042 of 2022)
[2024] KEHC 5131 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5131 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E042 OF 2022

SC CHIRCHIR, J

APRIL 25, 2024

BETWEEN

DAN AMIANI ALIAS KHAVOI ..... APPELLANT

AND

DIRECTOR OF PUPLIC PROSECUTION ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Njalale PM delivered on 24th May 2022 at Butali Law courts)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) and 8(4) of the *Sexual Offences Act* (The Act).
2. The particulars are that on 17th day of June 2016 at [Particulars withheld], shirugu location in kakamega North sub- county , within Kakamega County intentionally and unlawfully caused his penis to penetrate the vagina of MWC a child aged 13 years.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. He was convicted of the main charge after a full trial and sentenced to 15 years in prison.

Petition of Appeal

5. He was aggrieved by the judgment and filed this petition of Appeal setting out the following grounds:
    a. That the learnt Magistrate grossly erred in both law and fact by failing to accord the Appellant the right to fair trial by violating Article 50(2(b)(j) of the *Constitution*.

b. That the learned magistrate erroneously convicted the Appellant on the basis of evidence that was contradictory in nature ,inconsistent, uncorroborated and malicious.

c. That the learned magistrate erred in both law and fact by imposing a harsh and excessive sentence

d. That the learned magistrate grossly erred in both law and fact by convicting and subsequently sentencing the Appellant on evidence that did not prove the offence beyond reasonable doubt as required by law.

e. That the learned magistrate erred in law and fact by failing to appreciate his plausible defence.

6. The Appeal was canvassed by way of written submissions.

Appellant's submissions.

7. The Appellant submits whereas the Appellant was charged with defiling the minor on 17th June 2016, she told the court that she was defiled on 16th June 2016. To the Appellant this raises questions on whether the minor was defiled at all.

8. It is also his submission that since it was dark, and she did not have any torch light, the Appellant could not have identified the perpetrator.

9. On penetration , he submits that the presence of epithelial cells alone is not evidence of penetration.

10. The Appellant further submits that the court failed to consider his defence of *alibi*, which evidence was corroborated by his supervisor.

11. Finally on the sentence , it is the Appellant's submission that the maximum sentence of 15 years was excessive and unconstitutional in any event. He has relied on the case of *Maingi & 5 others v DPP & another* (2020) eKLR

Respondent's submissions

12. It is the respondent's submissions that there was no violation of the Appellant's Right to fair trial, as he was well informed and understood the charges he faced, and was given reasonable access to the evidence that the prosecution intended to rely on.

13. On identification of the perpetrator , the prosecution submits that the Appellant was known to the complainant; that when she reported to her parents she told them it was the son of her Aunt, Irine.

14. On penetration, the respondent argues that the presence of epithelial cells signified friction which signified penetration. On the defence of *alibi*, the respondent contends that it was brought late in the day, denying the prosecution a chance to investigate it. The respondent further points out that though the Appellant had told the court that he was with his friend Oscar , the person he eventually brought to testify about his *alibi* was not the Oscar but one Yusuf.

Analysis and determination

15. This is the first Appeal and the role of this court is to review the evidence presented , re- evaluate it and arrive at its own conclusion.(Ref: *Oneko v Republic* (1972 E.A 132)

16. I have perused the memorandum of Appeal, the evidence tendered in the lower court and the parties submissions. I note that the 1st and 2nd grounds of appeal is on the question of a fair trial. However in

his submission , the Appellant has not addressed this complain. I will, in the circumstances , consider it not to have been prosecuted, and hence abandoned.

17. I have identified the following issues for identification:

    a. Whether the offence of defilement was proved beyond reasonable doubt

    b. Whether the Appellant's defence was considered

    c. Whether the sentence was excessive.

Whether the defence of defilement was proved .

18. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) .....
>
> (3) .....
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen to eighteen years is liable upon I conviction to imprisonment for a term of not less than fifteen years,

19. The offence of defilement is rooted on three main ingredients, that is the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. The prosecution must prove each of the aforesaid ingredients beyond reasonable doubt.

The age of the victim

20. From his submissions, the appellant has no issue with the age of the complainant at the time of defilement. He however argues that while the charge sheet indicates the date of defilement as 17th June 20, the complainant testified that she was defiled on 16th June 2017. He argues that this cast doubts as to whether the complainant was defiled.

21. In my view what the Appellant is essentially complaining about is not the age of the complainant but rather the contradiction between the the particulars of the charge sheet and the evidence tendered.

22. Section 382 of the *Criminal Procedure Code* provides:

> " Subject to the provisions hereinbefore contained , no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on Appeal or revision on account of an error , omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether , omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether whether the objection could and should have been raised at an earlier stage in the proceedings"

20. The difference that the Appellant is complaining about is whether the incident took place on 16th or 17th June 2016. All the witnesses talked of 16th June 2016. The error therefore was in the charge sheet. The issue of discrepancies on the date was never raised during the cross- examination of the complainant or any of the other prosecution witlessness. Further in my view the discrepancy did not go into the core of the case and therefore did not occasion any failure of justice. This complain is without merit and I hereby dismiss it.

21. A birth certificate was produced showing that the complainant was born on 9th April 1999 and therefore she was 17 years during the age of the incident. The age of the complainant was therefore proved.

22. The next ingredient for determination is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as: "The partial or complete insertion of the genital organ of a person into the genital organs of another person."

23. Penetration is proved through the evidence of the complainant and may or may not be corroborated by medical evidence of a medical practitioner. In the case of *Bassita v 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. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

Penetration

24. On the matter of penetration, the complainant (PW1) told the court: ".....he emerged from the feeder road and grabbed me and slapped me on my right cheek and bite me. He then told me if I scream , he will kill me and he removed a knife and pulled me near the river, the accused was assaulting me . He asked me if I knew him but I told him I did not know him for my security reasons. He then removed my skirt and my panty and defiled me. When he finished , he went to the river and when he came he kicked me then I went home in pain"

25. Further her skirt she wore on that day, described as maroon in colour had a tear on the side and dirt at the back . It gives credence to the complainant's testimony that she was dragged along for 500 metres.

26. This was a 17-year-old child, she clearly understood what was being done to her. Thus I have no issue with the words used " then he defiled me". She was also outside the bracket of a child of "tender years" and her testimony did not need any corroboration. It is now generally accepted that for purposes of section 19 of the *Oaths and Statutory Declarations Act* a child of tender years is 14 years and below. (Ref: *Samuel Warui Karimi v Republic* (2016) KECA 812(KLR) In this particular case though the court ensured compliance with the aforesaid section and section 124 of the *Evidence Act* , am of the view that for the complainant herein section 19 of the *Oaths and Statutory Declarations Act* and the proviso to section 124 of the *Evidence Act* was not necessary

27. Further her evidence was actually corroborated by the evidence of the clinical officer(PW3). Who testified that there were epithelial cells in the complainant's vagina which signified friction, and the hymen was broken. He concluded that the complainant had been defiled. The Appellant has argued

that it was incumbent upon the prosecution to elaborate whether penetration was partial or full. However as per section 2 of the Act as aforesaid, it is immaterial whether penetration was partial or complete.

Identification of the perpetrator

28. On identification of the Accused, it is important that I highlight some of the relevant sections of her testimony in this regard. She told the court in her evidence in chief: "From the school our motor cyclist told us he could take us home. I boarded the motorcycle and he carried me together with two of my colleagues who are violet and stella. He left us at the market and it was now getting dark. Our Rider used his headlight and I saw the accused with another person, he was at the shop. I started going home alone and I saw the accused following me ..... I ducked to a nearby homestead and he proceeded towards his home. I then left and he emerged from a feeder road..... he asked me if I knew him and but I told him that I don't know him for my own security reasons..... I told my mother . I told her it was the accused who is the son to my Aunty Irine" On cross-examination she stated: "On that day it was not very dark. The accused was standing near the shop and it had bright lights. The motor cyclist also used the headlights.... I could tell it was the accused as it was not vey dark. The accused first started by assaulting me. He dragged me for about 500 metres towards the river . The said place is near his home so he knows it well". On re- examination she said " I had known the accused, and I even saw him at the shop and when he was following me"

29. I find the narrative of the events by the complainant very plausible. Her testimony remained unshaken in cross- examination. When she saw him in the shop, she could tell it was someone she knew. He dragged her for about 500 metres, a fact that was not put to test in cross examination. Further the Appellant first started by assaulting the complainant. Am satisfied that the prior to the defilement the complainant had spent enough time with the Appellant to identify him. When she reached home, she told her mother that it was the son of her aunty called Irine. This was therefore a case of identification by recognition.

30. I have considered the Appellant's defence in this regard. He told the court that the whole time he was away on training between the year 2014 and 2018.. On the material date he says he was at kakamega with his colleague. He said he had a witness called Oscar who was teaching him welding works. He said he did not know the complainant but he knew Joseph Chibei Liru (pw2) as his uncle. Pw2 was the father of the complainant and I therefore find it insincere for the Appellant to claim to know his uncle but not his cousin the complainant.

31. The produced a register which showed that he was at work on that day. The register was being made by one yusuf who was not a witness in the case. I this regard I entirely agree with the observations of the trial court: the register was not signed, and hence was lacking in authencity; the person who eventually came to testify on behalf of the Appellant is one Asimani simiyu yet the Appellant had told the court that he was with one Oscar.

32. In *Victor Mwendwa Mulinge v Republic* [2014] eKLR:

> It was held: It is trite law that the burden of proving falsity , if at all , of an accused's defence of *alibi* lies on the prosecution " but as was held in the case of *R v Sukha Singh & another* (1939) 6 EACA 145 cited by the trial court, this defence must be raised early in the proceedings to enable the prosecution investigate the such a defence.

33. The defence did not raise this during the cross- examination of the prosecution of the witnesses. Thus he denied the prosecution a chance to investigate this defence.

34. The defence of *alibi* is implausible and I dismiss it .

35. Am satisfied that the ingredients of defilement were proved beyond reasonable doubt and the Appellant's conviction is hereby upheld.

The sentence

36. In mitigation ,the Appellant told the court, that he was remorseful , that he was a child of a single parent and had no siblings ; He further stated that he had a young family . The accused also had no previous record.

37. However, I have considered the circumstances of the crime. I take note of the fact that apart from defilement the appellant threatened and assaulted the deceased. He used a knife; he threatened her with death; and dragged the complainant for a distance of 500 metres. All these acts in my view, were to instill fear on the complainant, and force her into submission. Apart from the defilement, these acts must have caused her humiliation escalated the trauma she went through.

38. Whereas I take note of the recent court of Appeal decision on *Manyeso v Republic* (Criminal Appeal No 12 / 2021 [2023) KECA(7 JULY 2023Judgment) where it applied the reasoning in *Muruatetu Case* in concluding that the indeterminate sentences under the *Sexual Offences Act* was unconstitutional , the courts are not barred from meting out a maximum sentence where the circumstances call for it . The circumstances surrounding the commission of the crime in this case as noted above calls for maximum sentence. I therefore have no reason to interfere with the sentence as passed by the trial court.

39. In the end , the entire Appeal fails. It is hereby dismissed.

DATED , SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

The Appellant