SMG v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 4186 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E036 OF 2023

RPV WENDOH, J

APRIL 25, 2024

BETWEEN

SMG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. A. N. Karimi – Senior Resident Magistrate in Kehancha Senior Principal Magistrate's Court S.O. NO. E011 OF 2021 delivered on 21/06/20)

JUDGMENT

1. SMG, the appellant, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*.

2. In the alternative, he faced a charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

3. The particulars of the charge were that on diverse dates between 14th and 18th March, 2021, at [Particulars Withheld], intentionally caused his penis to penetrate the vagina of CRJ, a child aged 14 years or that he touched the CRJ's vagina.

4. The appellant was convicted on the main charge and was sentenced to serve twenty (20) years imprisonment. No finding was made on the alternative charge.

5. Aggrieved by both conviction and sentence, the appellant filed this appeal citing the following grounds of appeal:-

    1. That the charge sheet was defective for lack of an OB number;

    2. That the appellant was 17 years old at the time of conviction;

3 . That penetration was not proved;

4. That the identity of the perpetrator was not proved;

5. That age of the complainant was not ascertained;

6. That there was medical evidence connecting the appellant to the offence.

6. The appellant therefore prays that the conviction be quashed, sentence set aside and the Applicant be set at liberty.

7. The appellant also filed submissions in support of his appeal.

8. The Respondent opposed the appeal and also filed submissions.

9. This is a first appeal and it behoves this court to re-examine all the evidence tendered before the trial court, analyse and evaluate it and arrive at its own determination. This court is guided by the decision in Okeno vs. Republic (1972) EA 32.

10 The prosecution called a total of five witnesses PW1 CRJ, the complainant; PW2 MNI, the complainant's mother. PW3 JIM, the complainant's father, PW4 Goerge Omondi, a clinical officer' and lastly PW5 PC Magdaline Kibe, the investigating officer in the matter.

11. PW1 told the court that on 14/3/2021, she went for a hair cut at Ikerege. She met the appellant Simion Mwita whom she knew very well. He invited her to go to his home where they arrived at 6:00p.m. She slept with him in his house on the same bed where they engaged in sex by the appellant inserting his penis in her vagina. She remained in the appellant's house for 3 days till 18/3/2021 when his mother took her home. Her father called police who went to arrest the appellant while she was taken to Kehancha District Hospital. She told the court that she was born on 22/4/2006 and was therefore 14 years old.

12. PW2 confirmed that PW1 was born on 22/4/2006; that on 14/3/2021, PW1 went for a hair cut at Ikerege but did not return. She searched for her for 2 days and reported to the school, Chief and village elder (Balozi) and the police post. On Wednesday the appellant's father went to her home to report that PW1 was in his home and that they were ready to pay dowry for her but she declined and told him to go and bring her daughter but he did not do so. Her husband reported to police and the appellant's mother brought the complainant back home. She found the appellant arrested at Ikerege police post.

13. PW3 confirmed the complainant's age to be 14 years; that she did not return home on 14/3/2021 after she went for a hair cut. He also learnt that she had not gone to school. He reported to the police and learnt that the daughter was at a village elder's home, MG and that on same day, she was taken home by a woman. Police informed him of Appellant's arrest by members of public. PW1 was escorted to hospital for treatment.

14. PW4 examined PW1 on 18/3/2021. He did not get any tears or lacerations to the labia manora but the hymen was broken but not freshly. A high vaginal swab revealed, presence of spermatozoa epithelial cells and pus and she was put on VTI treatment. He formed the opinion that she had been defiled due to presence of spermatozoa. He produced treatment notes and the P3 form.

15. PW5 PC Magdaline Kibe of Kehancha police station is the investigation officer in this case. PW5 recalled on 18/3/2021 a suspect was taken to the station from Ikerege Police Station, for allegations of defiling a girl. He escorted the victim to Kuria West Sub County Hospital where she was examined and the P3 form filed which she produced together with the complainants birth Certificate.

16. In his sworn statement, he denied knowing anybody by name of CRJ; that one day while at home, a man called Peter Wurumbe called him to accompany him to the police station and when there, the portion alleged that he had eloped with a young girl following which he was arrested. He said he first met the girl after his arrest. He denied that the complainant ever went to his house. He said he was at home all the time.

17. DW2 FW who first described herself an an aunt to the appellant admitted having met the complainant CRJ who went to greet her friends who are the appellant's sister; that the complainant slept in the girl's room for two days, and that on the two days the appellant was not home; that she is the one who took the complainant back home. In cross examination DW1 admitted that the appellant was her son and that she had earlier lied to the court.

18. It was the appellant's submission that the offence of defilement was not proved because the clinical officer testified that the complainant was 15 years old but not 14 years and that the same clinical officer found that there was no defilement; that the appellant was convicted based on evidence of a single witness which evidence was not corroborated; that there was no birth certificate provided to prove the age; no age assessment. He relied on the case of Alfayo Gombe Okello vs. Republic Criminal Appeal No. 203 of 2009 where the court observed that the age of the victim was a necessary ingredient of the offence of defilement; that appellant also relied on the Court of Appeal case of Kaingu Elias Kasomo vs. Republic 2016 eKLR where the Court underscored the need to prove the age of a victim.

19. The appellant also submitted that the alibi defence raised by the appellant was not disproved. He relied on the case of Killu & Another vs. Republic 2005 EKLR and Dominic Mwilaria vs. Republic Criminal Appeal 52 of 2017

20. On penetration; It was also submitted that it was not proved because the complainant did not have any injuries to her private parts. It was also the appellant's submission that the complainant's evidence was not credible because she was reluctant to testify on the issue of defilement and the appellant relied on the decision of Mgingu Kimenyi vs. Republic (1979) KLR 283 and that therefore it was unsafe to rely on her testimony.

21. The prosecution counsel on the other hand submitted on Articles 50 2(g) and (h) but the same were not one of the grounds in the appellants grounds of appeal or submission.

22. Counsel also submitted that a birth certificate was tendered in court as proof of the complainant's age; that penetration was proved by PW1's testimony as she stayed with the appellant for a whole 3 days; that PW1's testimony and the evidence was corroborated by the evidence of PW4; that PW3 testified to the complainant disappearing from home and being found after a report was made to the police; that the defence was considered that but did not dislodge the prosecution evidence. On sentence, counsel urged it was lawful but left it to the courts discretion to decide in the sentence.

23. I have duly considered all the evidence on record, the grounds of appeal and the rival submissions. The appellant alleged that the charge sheet was defective for lack of an OB number. Section 134 Criminal Procedure Code makes provision for the contents of charge sheet. It provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged...."

24. The Court of Appeal in Benard Ombura vs. Republic stated this: -

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to

the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

25. An OB number is not a requirement. The charge sheet all the requirements under the above section. Besides if there was any defect, it is curable under Section 382 Criminal Procedure Code which provides

> " Subject to the provisions hereinbefore contained, no finding, sentence e or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an eerier, 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 the Code, unless the trial or in any inquiry 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".

26. In this case however, there is an OB number 03/17/2021, on the charge sheet. that ground must fail.

27. The appellant also claimed to have been 17 years old when he was charged. However, an age assessment was done and he was found to be 19 years old. In the judgment, the trial court also observed that he had an Identity Card indicating that he was born in 2000 and was therefore 21 years at the time of plea.

28. On the allegation that there was no medical evidence to prove the charge, the law is clear that defilement is not necessarily proved by medical evidence. In the case of AML vs. Republic the court said:-

> " The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

29. The appellant was charged for the offence of defilement under Section 8 (1) and 8(3) of the Sexual Offence Act. To prove the said offence, the prosecution has to prove beyond reasonable doubt the following ingredients:-

    1. Proof that the complainant was a minor;
    2. Proof of penetration;
    3. Proof of the identity of the perpetrator.

30. In the case of Charles Wamukoya Karani vs. Republic Criminal Appeal 72 of 2013, the court stated this: -

> The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

31. In Section 2 of the Childrens' Act, a child is a person under the age of 18 years. In this case, the charge reads that the complainant was 14 years of age which the appellant contests.

32. In the case of Mwalango Chichoro Mwanjembe vs. Republic (2016) eKLR the court said as follows:

> The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof.

33. Again in Fappyton Mutuku Ngui vs. Republic (2012) EKLR the Court of Appeal said as follows:-"

> "..... that 'conclusive' proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other."

34. In Francis Omuroni vs. Uganda Criminal Appeal No. 2 of (2000) the Court of Appeal of Uganda reiterated the view that age may be proved in many other ways including common sense.

35. In this case, it was not just a matter of common sense but PW1's birth certificate was produced in evidence and confirmed that she was born on 22/4/2006. PW1's parents PW2 and PW3 attested to that fact. The birth certificate was produced in evidence as PEX No. 1. The offence herein was committed in March 2021 just about a month before the complainant reached her 15 birthday. The closest estimate to her age is 15th years but she was still within the 14th year. I have no doubt in my mind that the age of the complainant was proved by the best evidence, a birth certificate and the parents. Whether 14 or 15 years, the complainant was a minor and the age bracket still fell within Section 8 (3) of *Sexual Offences Act*.

Penetration:

36. Penetration is defined under Section 2 of the *Sexual offences Act* as:-

> The partial or complete insertion of the genital organs of a person into the genital organs of another person."

37. PW1 vividly narrated how she knew the appellant, she met him and they went to his home where they stayed in his house from 14/3/2021 to 18/3/2021 when his mother took her back to her home. All this time she engaged in sexual intercourse with the appellant. She said "he used his penis to insert into my vagina". PW4 who examined PW1 did not find the complainant with any injuries on her labia minora but that a high vagina swab revealed presence of spermatozoa and opined that there was penetration. The appellant totally denied knowing the complainant and claimed that he never left home on the dates of 13th to 18th March, 2021. However, his mother (DW2) who first lied to the court that she was an aunt of the appellant, admitted in cross examination that in fact the complainant visited her daughters who were her friends and stayed in her home for two (2) days thus placing two appellant at the scene. This court is satisfied that there was sufficient evidence to prove penetration, that is the Complainant's uncontroverted testimony and the Clinical Officer's evidence on the presence of spermatozoa in the vaginal swab.

Proof of the perpetrators identity:-

38. The appellant raised an alibi defence that he was not at his home between 14th to 18th March, 2021.

39. The law is that when an accused puts forward an alibi defence, he does not bear any burden to prove its falsity or truth. The burden always remains with the prosecution. In Victor Mwendwa Mulinge vs. Republic (2014) EKLR the court said:-

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

40 In SSentale vs. Uganda 1968 EA 365, the Eastern Court of East Africa E.J. said:-

> that a prisoner who puts forward an alibi as a defence as an answer to a charge does not assume any burden of proving that answer."

41 Although the appellant denied knowing the complainant and being at his home on from 14th to 18th March, 2021, as observed earlier that alibi was controverted by the evidence of his own witness (DW2) who denied that the appellant was home when PW1 visited the home. The contradiction goes to demonstrate that the appellant and his witness were lying.

42. In this case the appellant's alibi defence was self-contradictory and did not dislodge the prosecution evidence.

43. The appellant claimed that PW1's evidence was not corroborated. Under Section 124 of the *Evidence Act*, there is no requirement for corroboration provided that the court gives reasons for it believing the complainant's evidence. In this case the trial court found the appellant to be very untruthful when it said at line 4 – 9 of the page 35 of the Record of Appeal "Moreover, I have noted the insatiable appetite of accused to give false information to the court since the beginning of the case. Accused first lied to this court of his names and age responding to the name Simon Mwita Giyabe yet from the Identity card presented bearing is picture shows accused name to be Simon Nkongai Mwita born in the year 2000 which information he did not dispuite". The court also pointed out that the appellant's mother also lied to court. The court believed the complainant and noted that the appellant never challenged PW1's testimony by way of cross examination.

44. In the end I find that the conviction of the appellant is well grounded and I affirm it.

45. The appellant was sentenced to 20 years imprisonment which is the minimum sentence under Section 8 (3) of *Sexual Offences Act*.

46. I however, find that there are no aggravating circumstances and the courts are tending to move away from mandatory minimum sentences because they feter the court's discretion. In exercise of my discretion, and considering the circumstances of the case, I find 20 years to be excessive, I set aside the said sentence. I hereby substitute it with a sentence of 15 years imprisonment. The sentence to commence from 19/3/2021 when the appellant was arraigned in court for plea. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant