Rioba v Republic (Criminal Appeal E004 of 2023) [2024] KEHC 6499 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E004 OF 2023

WA OKWANY, J

MAY 30, 2024

BETWEEN

BRIAN AGOKI RIOBA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the Conviction and Sentence in the Chief Magistrate's Court at Nyamira Criminal Case (SO) No. E039 of 2022 delivered by Hon. C.W. Waswa, Senior Resident Magistrate on 3rd January 2023)

JUDGMENT

1. Brian Agoki Rioba, the Appellant herein, 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. The particulars of the charge were that on 14th July 2022, in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his penis to penetrate the anus of DGM (particulars withheld), a child aged 9 years.

2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 14th July 2022, in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely anus of one DGM (particulars withheld), a child aged 9 years.

3. The Appellant denied the charges and the matter proceeded to a full trial where the Respondent (Prosecution) called a total of 5 witnesses.

The Respondent's (Prosecution's) case

4. PW1, NBM (particulars withheld) the victim's mother, produced a Birth Certificate (P.Exh1) to show that he was born on 9th August 2013. She testified that she was on the morning of 14th July 2022, on her way to school when her aunt informed her that her son had been defiled. She went back home and escorted the victim to Ekerenyo Sub-County Hospital and later to the police station where she reported the incident and was issued with a P3 Form. The victim informed her that the Appellant forcefully defiled him while he was at the river.

5. PW2, DGM (particulars withheld), the victim, testified that he saw the accused at the river on 14th July 2022 where his grandmother had sent him to fetch water. He explained that the accused pulled him as they crossed the river and defiled him. He stated that the accused threatened that he would kill him if he screamed. The victim thereafter ran home and informed his grandmother of what had transpired.

6. PW3, EM (particulars withheld), the victim's grandmother, testified that she sent the victim to the river to fetch water on the material day only for him to come back crying. The victim informed her that someone had defiled him at the river. She then called PW1 who escorted the victim to the hospital.

7. PW4, Dr. Tom Nyairo, examined the victim at Ekerenyo Sub-County Hospital on 14th July 2022 and noted faecal matter on his anus and buttocks. He also noted that the victim's anus was dilated. He formed the opinion that the child had been penetrated. He produced the P3 Form (P.Exh2) and Clinic Attendance Card (P.Exh3).

8. PW5, No. 234941 P.C. Ochieng Ludfine, received the victim and his mother at Ekerenyo Police station on 14th July 2022 when they reported the sodomy case. She stated that DGM explained that he had been defiled by a person who was not known to him. He accompanied the minor and his mother to Ekerenyo Sub-County Hospital for examination. He testified that the Appellant was arrested by the Assistant Chief after which he was charged in court. He produced the victim's soiled blue trousers as (P.Exh4).

9. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and was consequently placed on his defence. He elected to give a sworn testimony and called one witness.

The Defence Case

10. The Appellant (DW1) testified that he was 14 years old. He denied the defilement allegation and explained that he had, on the material date, accompanied his father (DW2) to the tea farm where they plucked tea from 7.00 a.m. to 3.00 p.m. He further stated that he was arrested by the Assistant Chief on 28th July 2022 over the claim that he was not attending school.

11. DW2, Justus Rioba, the Appellant's father, testified that he was on 14th July 2022, with the Appellant in his tea farm before going to the tea buying center. He returned home at about 3.00 p.m.

12. At the close of the hearing, the trial court convicted the Appellant upon finding that the prosecution had proved its case beyond reasonable doubt. The Appellant was thereafter sentenced to serve 3 years imprisonment at Shikusa Borstal Institution. The trial court however revised the sentence later on and enhanced it to 10 years' imprisonment upon receiving an age assessment report dated 12th January 2023 which indicated that the Appellant was 18 years old.

13. Aggrieved by the trial court's decision, the Appellant instituted the present Appeal wherein he listed the following grounds of appeal in the Petition of Appeal: -

    1. That the learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant to serve ten years imprisonment without giving adequate consideration to the Appellant's mitigation.

    2. That the learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant on evidence which did not meet the required standards since the prosecution did not state how and which criteria was used to arrest the Accused.

    3. That the learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's mitigation more particularly that he was a first offender and grant him a non-custodial sentence.

    4. That the learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant on evidence that was not tallying with the charges and was unfavourable to him.

    5. That the learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant by imposing a very harsh, improper and/or excessive sentence in the circumstances.

    6. That the learned Trial Magistrate erred in law and in fact by failing to consider the pre-sentencing report before imposing sentence on the Appellants stating that the Appellant was a minor and that he should be given a non-custodial sentence.

    7. That the conviction and sentence by the learned trial magistrate was unfair and unjust to the Appellant.

14. The Appeal was canvassed by way of written submissions which I have considered.

15. The duty of the first appellate court were discussed in David Njuguna Wairimu v Republic [2010] eKLR, where the Court of Appeal held thus:-

> "The duty of the first appellate court is to analyse 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. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

16. The main issue for determination is whether the Prosecution proved its case against the Appellant to the required standard and whether the sentence meted out was proper and legal.

17. Section 8 of the *Sexual Offences Act* stipulates as follows: -

    8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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.

18. In order to secure a conviction for the charge of defilement, the prosecution must prove, beyond any shadow of a doubt, three ingredients namely; that the victim was a child within the meaning of the Children's Act; that there was penetration and that the accused was positively identified as the assailant. (See George Opondo Olunga v Republic [2016] eKLR).

19. In Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000, the Court of Appeal held thus:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."

20. In the present case, PW1 testified that the victim was born on 9th August 2013. She produced his birth certificate (P.Exh1). I find that prosecution proved that the victim was a minor aged 9 years old at the time the offence was committed. It is my finding that the first ingredient of age was proved to the required standard.

21. Penetration is defined under Section 2 of the Act as follows:-

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

22. The Supreme Court of Uganda held as follows in Bassita Hussein v Uganda, Criminal Appeal No. 35 of 1995: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence."

23. The Respondent called the evidence of PW2 the victim and PW4 the Medical Doctor to prove penetration. PW2 testified as follows: -

> " …While I was at the river, the accused came and pulled me and we crossed the river. The accused removed my trousers, and he removed his shorts. The accused told me to lay down facing downwards on the ground. The accused 'alinifanyia tabia mbaya' (did bad manners to me). He used his private parts kunifanyia tabia mbaya. He did not use any protection. I felt pain during the incident. The accused told me if I scream, he would kill me….."

24. The above extract of the victim's testimony shows that he used euphemism to explain what his assailant did to him, Courts have generally held that the use of euphemisms such as "did bad manners to me" to refer to penetration in sexual offences is admissible. This is the position that was taken in Daniel Arasa vs. Republic, HCCRA 1035 of 2013 [2014] eKLR where it was held that: -

> " It is common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim

of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act.

Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement. The learned trial magistrate was therefore correct in his finding that penetration as defined by the *Sexual Offences Act* was proved."

25. Taking a cue from the holding in the above cited decision, I find that the victim described the act of penetration when he testified that the accused 'did bad manners' to him.

26. The victim's testimony was corroborated by the medical of PW4 who testified that he found faecal matter on the victim's anus and buttocks and that his anus was dilated. He concluded that there was penetration. I find that the medical evidence confirmed the Appellant's claim that he was defiled on the fateful day.

27. On identification of the Appellant as the the victim's assailant, I note that the victim testified that he did not know his assailant prior to the incident but that he was able to see him and his dressing during the incident. PW5, P.C. Ochieng, testified that the Appellant was arrested by an Assistant Chief and that he was identified by the victim. He stated that he did not record the statement of the said Assistant Chief.

28. It is instructive to note that the arresting officer (Assistant Chief) was not called to testify on the circumstances under which he arrested the Appellant and the person who identified the Appellant at the time of the arrest. It was also clear to this Court that an identification parade was not conducted following the Appellant's arrest. It did not also escape the attention of this court that the Appellant was arrested at least two weeks after the incident.

29. I find that no tangible evidence was presented to show who and how the Appellant was identified at the time of the arrest. This Court is at a loss as to what informed the Assistant Chief's decision to arrest the Appellant and not any other person in the absence of any identification by the victim. It is also noteworthy that the Assistant Chief was not called to testify on the circumstances under which he arrested the Appellant thus lending credence to the Appellant's claim that he was arrested because he had not been enrolled in school.

30. I find that the evidence, on the identification of the Appellant, as the perpetrator of the offence of defilement, was not sufficient to support a conviction. I find guidance in the decision in Wamunga v Republic (1989) KLR 426 where it was held thus: -

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

31. In the case of Anjononi and Others v Republic, (1976-1980) KLR 1566 (Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR), the Court of Appeal held that: -

"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or

other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)....”

32. I further find that there are many unanswered questions that raise doubts on the prosecution’s case. Those doubts must be resolved in favour of the Appellant. In John Mutua Munyoki v Republic [2017] eKLR, the court held thus: -

> “ ....It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

33. In Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373) the court discussed the degree of proof expected in a criminal case and held that:-

> “ That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

34. Having found that the evidence presented by the prosecution does not meet the threshold of proof expected in the charge of defilement, I find that instant appeal is merited and I therefore allow it. This means that the second issue for determination on the legality of the trial court’s sentence is now moot.

35. Consequently, I quash the conviction and set aside the sentence passed by the trial court and direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 30TH DAY OF MAY 2024.

W. A. OKWANY

JUDGE