Farah v Republic (Criminal Appeal E027 of 2021) [2024] KEHC 6716 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E027 OF 2021

JN ONYIEGO, J

MAY 24, 2024

BETWEEN

ABDIKANI ABDULAHI FARAH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. M. Kimani (S.R.M.) in S.O.C No. 12 of 2020 Mandera PM'S court delivered on 23.07.2021)

JUDGMENT

1. The appellant herein, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006.The particulars of the main charge were that on 28.02.2024 at Lafey in Lafey Sub county he caused his male genital organ to penetrate the genital organ of one female Somali juvenile child aged 11 years namely DBF.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, 2006. Particulars were that on 28.02.2020 within Mandera County he intentionally and unlawfully touched the genital organ of a female child DBF aged 11 years with your male genital organ.

3. At the conclusion of the trial, the trial magistrate acquitted the appellant of the main charge but convicted him in respect of the alternative charge. The appellant was thus sentenced to serve a term of imprisonment of ten (10) years to be calculated from 16.09.2020.

4. Aggrieved by both the conviction and sentence, the appellant filed a petition of appeal dated 03.08.2021 setting out the following grounds:

i. The learned magistrate erred in law and fact by not taking into account that there were no samples taken from both the appellant and the complainant to clinically establish if indeed there was any sexual intercourse between them to prove defilement.

ii. The learned trial magistrate erred in law and fact by convicting the appellant when no identification parade was conducted as the complainant was not familiar with the appellant at the time of the alleged incident.

iii. The learned magistrate erred in law and fact by failing to appreciate that the prosecution's evidence was marred with contradictions that made its case unreliable and speculative.

iv. The learned magistrate erred in law and fact by convicting the appellant on a balance of probability and disregarding the fact that there was an issue between the appellant and the complainant's family.

v. The learned magistrate erred in law and fact by convicting the appellant when there was no evidence connecting him to the offence apart from a mere allegation of him being the defiler without any corroboration.

vi. The learned magistrate erred in law and fact by sentencing the appellant on evidence not on record regarding medical evidence on the age of the complainant and reached an erroneous finding that the complainant was 12 years old.

vii. The learned magistrate erred in law and fact by convicting and sentencing the appellant by allowing extraneous circumstances relied upon when sentencing the appellant.

5. The court directed that the appeal be canvassed by way of written submissions which order only the appellant complied with.

The appellant's submissions

6. The appellant in his submissions dated 28.02.2024 urged that the prosecution did not prove its case beyond any reasonable doubt and further, the said evidence by the prosecution was marred with contradictions. That the act of penetration was not proven based on the victim's evidence and that it was necessary for DNA test to be conducted. Reference was made to section 36 of the *Sexual Offences Act* that a court is empowered to order for DNA testing where necessary. That in the instant case, noting that sperms were allegedly found in the complainant's vagina, it was imperative for the court to call for DNA testing to authoritatively determine the complainant's aggressor.

7. On identification, the appellant argued that he was not positively identified. It was contended that no identification parade was conducted to support the claim that it was the appellant who committed the offence. Reliance to that end was placed in the case of Kariuki Njiru & 7 Others vs Republic, Criminal Appeal No. 6 of 2001 (unreported) where it was held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

8. Counsel opined that there cannot be conclusive identification through identification of the clothes won by the suspect. It was counsel's submission that since the alleged offence took place during the broad day light, an identification parade was necessary.

9. It was further contended that the prosecution evidence was contradictory in nature in that, the complainant testified that she met the appellant for the first time when the incident occurred while PW5 stated that the complainant told him that she knew the appellant and his name was Abdikani

Abdullahi; That the same complainant told PW2 that she did not know the names of the appellant. In the same breadth, that the date of his arrest as stated by the investigating officer was clearly different from the actual date when he was arrested.

10. Additionally, that the complainant testified that upon being defiled, she was taken to the hospital on the very day while the PW4 testified that the complainant was seen at the health facility a day later. As such, the appellant decried that the said evidence did not corroborate each other to support a conviction.

11. In conclusion, the appellant urged that he was simply framed up given the grudge that existed between him and the complainant's uncle, PW2.He thus urged this court to quash his conviction and set aside his sentence as the case was not proved to the required standards.

12. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated: -

> " 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."

13. PW1, BDF testified that on 28.02.2020 at about 11.00 a.m., she was herding goats in the bush in Matama in Lafey when a stranger approached and grabbed her. That the man who was not known to her wrestled her to the ground. It was her testimony that the said man removed her clothes and then penetrated her vagina with his penis. She stated that the act took some while as she struggled with the appellant and in as much as she screamed, the appellant did not stop. That when the appellant finally finished defiling her, he warned her of dire consequences should she tell anyone.

14. She told the court that after the act, she fled back home and proceeded to inform one Rukia, a neighbour what had befallen her. That it was Rukia who rang Habiba, PW1's aunt thus informing her of what had happened to PW1 while herding goats in the field. That the matter was subsequently reported to the police where she gave the description of the appellant and thereafter recorded her statement before being taken to hospital where it was confirmed that she was indeed defiled.

15. PW2, MMA testified that the complainant was his niece and that in as much as his other children are educated, the complainant was tasked to take care of the goats. That on the material day, he visited a health Centre at Mandera after having undergone an eye surgery. While there, his wife rang informing him of the incident herein.

16. That Upon returning home, the complainant narrated to him that she did not know the suspect in as much as she saw his clothing during the material time. He stated that it was the footprints from the scene of crime that led him and other villagers to the appellant's home. He further told the court that the appellant fled his home for a period of one week and was only arrested after police got wind of his whereabouts. That while at the police station, PW1 identified the appellant to the police as the person responsible for her injuries. According to him, the complainant was aged 12 years in as much as he did not know the date of her birth. He stated that he was not able to know the exact age of birth as the complainant was orphaned at four months and that he was simply her guardian.

17. PW3, AMF testified that on the material day, he received a call from his aunt informing him that PW1 had been defiled. That he was told that the incident happened at Mataua between Lafey and Alungu. He stated that he visited the scene with three other people where they saw footprints which led them to the home of the appellant.

18. It was further his evidence that the complainant looked unwell and that she had physical injuries and her pants were torn. That the matter was reported to the police station and thereafter the complainant was taken to the hospital. On cross examination, he stated that they followed footsteps that led them to the appellant's home.

19. PW4, Abdi Maalim testified that the complainant was examined by one Dr. Victor Ouma now deceased. He stated that his colleague examined the complainant whom he found to have been defiled severally by a person well known to her. That the estimated age of the complainant was 11 years. That from the observations made, her genitalia was normal, no bruises and no discharge was noticed. He stated that after urinalysis was performed it revealed presence of spermatozoa with puss cells. That the same was not a normal occurrence hence suggestive of a sexual attempt. The complainant was prescribed contraceptives, antibiotics and pain killers. He thus produced a P3 Form and treatment notes as Pex 1 (a) and (b) respectively.

20. PW5, 105366 PC Charles Muriithi testified that he was the investigating officer in the case herein. He stated that on 29.02.2020 at 6.00 p.m., he was minuted a defilement case by the OCS to investigate. That the complainant told him that she was aged 12 years as at the time when the alleged incident happened. It was his evidence that he issued her with a P3 Form and further accompanied the complainant to Lafey Sub County hospital where the said P3 Form was filled. The witness stated that from the examination, it was proved that the minor had been defiled by a person known to her.

21. By a ruling dated 17.05.2021, the trial court found that the prosecution had proved a prima facie case against the appellant thereby placing him on his defence.

22. DW1, Abdikani Abdullahhi in his sworn testimony denied committing the offence herein. He stated that there existed a grudge between his family and PW2 hence the charges herein. It was his evidence that he had previously worked for PW2 but instead, he refused to pay him his dues. That on 28.02.2020, he was arrested in the guise of having defiled a minor. He contended that the complainant had testified that she had not been defiled and further, he was not examined at the hospital. Upon being released on bond, he was informed that there was an out of court settlement in that PW2 approached him with Kes. 5,000/- to settle the matter. He stated that the complainant was a stranger to him in as much as PW2 was his neighbour.

23. Having considered the grounds of appeal herein and the submissions thereof, the following issues does germinate for determination; whether the complainant was defiled on the material day; if so, who defiled her; was there positive identification; was there corroboration; whether there was material contradiction in evidence.

24. It is trite that to prove the offence of defilement, there are specific elements arising from Section 8 (1) of the *Sexual Offences Act* which prosecution must prove beyond reasonable doubt: Therefore, the critical ingredients constituting the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." [See Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013].

25. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2022 which defines a "Child" as "...any human being under the age of eighteen years."

26. In the case of Martin Okello Alogo v Republic [2018] eKLR the court stated that: -

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The 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. See Alfayo Gombe Okello v Republic Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated: -
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1)…"

27. In regards to the age of the complainant, in her testimony, she stated that she was aged 12 years while the charge sheet showed 11 years. In the same breadth, the investigating officer testified that the complainant was aged 12 while PW4 stated that the age assessment performed by the previous doctor indicated that the complainant was aged 11 years as at the time when the offence was allegedly committed. The prosecution in submission urged the court to rely on the age assessment stating that the complainant testified on her age on 30.10.2020 while the alleged offence took place on 28.02.2020 hence the difference of 7-8 months which gives credence to the evidence of the medical expert.

28. It follows that by the time the complainant was testifying, some period of time had passed thus leading credence to the evidence by the prosecution. The trial magistrate who heard and saw the complainant testify was convinced that indeed the complainant was aged 11 years as at the time when she was allegedly defiled.

29. It therefore follows that at the material time when the complainant was defiled, she was aged 11 years. See Francis Omuroni vs Uganda Criminal Appeal No. 2 of 2000 where the court held that age of a child can be proved by way of production of a birth certificate, medical evidence, testimony of the victim or parent or guardian or common sense. To that extent, I am satisfied that pw1 was a minor at the material time.

30. On penetration, the *Sexual Offences Act* defines "penetration" as

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

31. The Court of Appeal in the case of Sahali Omar v Republic [2017] eKLR, observed that:

> " …penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*."

32. In the instant case, PW1 testified that on the material day, the appellant penetrated her vagina with his penis and the act lasted for a while as she struggled with the appellant. Further, that it was the first time she encountered the appellant. PW2 and PW3 also stated that the complainant was defiled. PW4 on the other hand testified that upon being examined, the observations made from the same denoted that the complainant's genital was normal, no bruises and no discharge. Urinalysis was performed which showed presence of spermatozoa with pus cells. That the same was not a normal occurrence and to the contrary, the same suggested asexual assault.

33. Having perused the P3 Form, this court notes that the complainant's genital had no bruise or any discharge or bleeding. But the same notwithstanding, spermatozoa were seen in urine and on high vaginal swab which denotes penetration. See Kassim Ali v Republic [2006] eKLR.

34. However, the trial court was of the view that there was no penetration because of the absence of any injury on her genitals. Learned magistrate acquitted on the main count and instead convicted on the alternative count. I do not agree with the opinion of the trial court that failure to sustain bruises or injury automatically means that there was penetration. Nevertheless, the presence of spermatozoa a day after the incident would circumstantially imply penetration was evident.

35. Who then penetrated her or indecently assaulted her? Whose sperms were those found in pw1's body? Circumstantially, sperms found in the complainant's body can be relied on to connect an accused person with the offence if circumstances so dictate. Where necessary, DNA should be done by comparing the sperms found in the victim's genetalia and the accused person's DNA samples. In the instant case, there was no evidence to prove that indeed the sperms in question were from the accused bearing in mind that identification was an issue.

36. On identification, the appellant urged that he was not responsible for the offence herein. The complainant stated that the appellant was responsible although she did not know him before. However, when she was being examined by the clinical officer who filled the p3 form, she stated that she was defiled by a known person. When the investigating officer was interrogating her, she said that she knew the assailant. However, pw2 and pw3 stated that the complainant merely described the attacker as she did not know him. Further, pw2 said that pw1 described the appellant as having worn a black t-shirt and a kikoi while pw3 said, pw1 described the appellant as having worn a t-shirt and track suit.

37. Pw2 and pw3 further stated that they connected the appellant with the offence after following foot prints from the scene up to his home. From all these contradicting stories, it is apparent that the complainant did not know her assailant before. Secondly, the contradictory stories given by pw2 and pw3 goes a long way to explain that they were not creditworthy. See Ndungu Kimanyi vs Republic (1979)KLR where the court stated that;

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates or makes it unsafe to accept his evidence"

38. The tracking of foot prints leading allegedly to the home of the appellant does not automatically mean that he was the perpetrator. Supposing somebody decided to pass through the appellant's home to disguise his identity? The foot prints were not in any way specially associated with those of the appellant hence reasonable doubt. Therefore, the aspect of following foot prints is not conclusive evidence.

39. From the evidence of the complainant, she was a lone when she was attacked and when the appellant was arrested, she was called by the police to identify him. It is interesting that a police officer would casually call a complainant to identify an assailant without conducting identification parade. In Ajode vs Republic (2004) eKLR the court had this to say;

> " It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade".

40. Since there was no identification parade conducted, I am inclined to hold that there was no positive identification. Was there corroboration? From the evidence of pw1, nobody saw her being attacked. The element of foot prints leading to the home of the appellant is not conclusive enough to corroborate her testimony. I am however a live to the fact that a case may be proved based on the evidence of a single witness as long as the court cautions itself of the dangers of such evidence. See Muiruri and others vs Republic (2002)1KLR 274. In this case, there was no corroboration nor did the court caution itself of the dangers of relying on the evidence of a single witness.

41. Whereas a court can convict on the evidence of a single witness in a sexual offence under section 124 of the *evidence Act* after being satisfied of the truthfulness of the witness, in this case the court did not do so. See Mohamed vs Republic (2006)2KLR 138 where the court stated that;

> " it is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful"

42. For the above stated reasons, it is my finding that there was no positive identification. What would have motivated the accused to be charged? He alleged bad blood with pw2 the uncle to the complainant for refusing to pay him his dues after rendering services to him. In a nut-shell, I do not find sufficient reasons why the appellant was charged.

43. Having held that the prosecution did not prove its case beyond reasonable doubt, it will not be necessary to discuss the issue of the alleged excessive sentence. Accordingly, it is my finding that the appeal herein is merited and the same is hereby upheld. Accordingly, the conviction herein is quashed and the sentence set aside. Appellant is set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MAY 2024

J. N. ONYIEGO

JUDGE