Sifuna v Republic (Criminal Appeal E094 of 2022)
[2024] KEHC 7868 (KLR) (27 June 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E094 OF 2022

SC CHIRCHIR, J

JUNE 27, 2024

FROM CRIMINAL SO NO. 17 OF 2021

BETWEEN

AMOS WANYONYI SIFUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

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 Act).
2. The particulars were that on 1/1/2021 at [particulars withheld], within Kakamega County, caused his penis to penetrate the vagina of M.A a child aged 9 years old.
3. He faced an alternative charge of having an indecent act with a child, contrary to section 11(1) of the *Act*.
4. He was convicted of the main charge and sentenced to 20 years in prison.

Petition of Appeal.

5. Aggrieved by the findings of the trial court he filed the present appeal and set out the following grounds:-
    a. The learned trial magistrate erred in fact and in law by failing to warn herself before convicting on the uncorroborated testimony of the complainant, as required by the law.
    b. The learned trial magistrate erred in fact and in law by failing to fully analyze and evaluate the evidence presented by the defence in relation to contradictions and the failure of the prosecution facts to support the charge as required by the law.

c. The learned trial magistrate erred in fact and in law by looking separately at the case for the prosecution and the case for the defence and misinterpreting the testimony of the accused person.

d. That the learned trial magistrate erred and/or misdirected herself in law in finding that the prosecution had proved their case beyond reasonable doubt.

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

Appellant's submissions

7. It is the appellants submissions that the evidence of the minor complainant , was not corroborated yet the trial court failed to comply with the provisions of section 124 of the *Evidence Act*. That the reason for believing the minor's testimony , ought to appear in judgment as required by the aforesaid section of the *Evidence Act*.

8. The Appellant further submits that the complainant was an untruthful witness as she could not remember the date of defilement, despite the date having been a new year.

9. He further questions why crucial witnesses such as one S and the complainant's grandmother were not called as witnesses.

10. It is further submitted that the prosecutions case was full of glaring discrepancies and gaps which the trial court failed to take note of.

11. The Appellant further Submits that the charge was defective to the extent that it was not supported by evidence, presented.

12. The appellant contents that the trial magistrate gave no reasons for disbelieving the accuseds testimony, and by casting the burden of disapproving the prosecution's evidence on the Appellant.

13. The Appellant further argues that the trial court erred in relying on the treatment notes, to find that the complainant had bruises in her vagina.

14. The respondent did not file any submissions.

Analysis and Determination

15. This is a first appeal and this court is under the duty to review the evidence , re-evaluate it and arrive at its iwn conclusions. In *Odhiambo =versus= Republic* (2005) eKLR the court of Appeal held

> " On a first appeal the court is mandated to look at the evidence adduced before trial afresh, re-evaluate and re-asses it and reach its own independent conclusions. However it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their direction (see *Pandya =vs= Pandya* (1957) EA 336)"

16. I have perused the lower court record, the memorandum of appeal and the submissions by the Appellant. In my view the following issues arise for the determination.

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

b. Whether there were material contradiction and discrepancies on the prosecutions case.

c. Whether critical witnesses were left out.

Whether the Offence of Defilement Was Proved.

17. The appellant was charged under section 8(1) and 8(3) of the *Act*. Section 8(1) of the *Act* states

> " a person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

Section 8(3) states

> " a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less that 20 years".

18. In the case of *Charles Wamukoya Karani versus Republic* Criminal Appeal No. 72 of 2023. The court held the critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. I will proceed to address each of the above ingredients and determine whether each of them was proved beyond reasonable doubt.

Age of the complainant.

19. The complainant told the court that she did not know her age; PW2 stated that she heard the complainant tell the doctor she was 9 years. However PW2 produced a Birth notification certificate (PExb. 1) showing that the complainant was born on 30/12/2006 and thus she was 14 years and 9 months at the time of defilement. The age of the complainant was therefore proved.

20. The appellant was aggrieved that the charge sheet was defective as the evidence presented did not support the charge. What the appellant was alluding to was perhaps the age indicated in the charge sheet, against what is stated in the birth notification.

21. However it is evident that the appellant was charged under the right section, that is section 8(1) and 8(3) of the *Act*. Section 8(3) covers defilement against children between 12-15 years. It is my observation that the error was only on the age of the complainant but otherwise the section indicate that the drawer of the charge sheet had in mind a child above 12 years.

22. The sentence of 20 years also show that the trial court was cognizant of the section under which the appellant had been charged. If the appellant had been sentenced in accordance to section 8 (2) which prescribe the sentence in respect of defilement against children under 11 years, then his complaint would have been valid.

23. Further as to whether the charge sheet was invalid or not, section 134 of the *Criminal Procedure Code* (CPC) provides as follows ''every charge or information shall contain and shall be sufficient it if contains a statement of the specific offence or offences with which the accused person is charged together with such particulars may be necessary for giving reasonable information as the nature of the offence".

24. Further section 382 of *CPC* provides guidelines on determining whether a defect if any , is curable or whether justice can still be met. The section provides

> " subject to the provisions, herein before 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 or other proceedings before or during the trial, any inquiry or other

proceedings under this code, unless the error judgment, omissions or irregularity has occasioned a failure of justice....”

25. Further in the case of *Bernard Ombuna versus Republic* (2019) eKLR the Court of Appeal held,

> “ in a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance whether is a defect on a charge sheet prejudiced the appellant to the extent that he was not aware or at least he was confused with respect to the nature of the charge preferred against him and as a result, he was unable to put up an appropriate defence”

26. In the present case, the only defect in the charge sheet was the age of the child, so it may be said that the accused was confused as to whether he was being accused of defiling a 9- year old or a 15- year old. However , I would call this a minor or indeed an “irrelevant” confusion. I state so because ,the bottom-line is, he defiled a child. The court ascertained the correct age and made sure that the sentence passed is the one provided under section 8(3) and not section 8 (2) of the *Act*. There was no prejudice suffered by the Appellant as a result of that defect.

Identification of the Perpetrator.

27. The complainant described the appellant as “Amos” a *shamba boy* at her grandmother’s home. The appellant too knew the complainant well. It emerged that he was working at a home which was in the same vicinity as the complainant grandmother’s house. In view of the Appellant’s admission that he knew the complainant well, then identification was a not an issue. This was a case of identification by way of recognition. It is instructive that the issue of identification is not a ground of appeal. Nevertheless I am satisfied that the Appellant was positively identified.

Penetration.

28. The *Act* defines penetration to mean the

> “ the partial of complete insertion of the genital organs of a person into the genital organs of another person ‘’(section 2) .

29. Penetration can be proved by the evidence of the complaint or by medical examination or both. In the case of *Kassim Ali vs Republic* (2006) eKLR, it was held as follows:

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

30. The appellant has argued that the evidence of the complainant was unreliable as she came out as an untrustworthy witness. To the Appellant, a victim who could not remember the date of defilement , when the date was a new year’s day, could not be trusted. The appellant further argues that whereas the complainant stated that she was defiled on an open ground, PW2 contradicted her, by stating that the place was full of trees.

31. On the issue of the dates, PW2 readily confessed, in her testimony that she may have been mistaken on the dated. On the other hand , the complainant told the court

> “ I don’t recall the month of the incident, I recall it was the month of December”

32. The complainant first said that she one could not remember the date, then later she stated that it was December. The Appellant argues that she ought not to have forgotten considering that it was the first day of the year.

33. I doubt whether children pay attention to the significance of the first day of the year. Most children tend to remember Christmas because it is associated with festivities. I disagree therefore that the complainant was being untruthful, merely because she could not state the exact date of defilement.

34. I will now consider her testimony in regard to the element of penetration. The complainants evidence went as follows...."he approached me where I was collecting firewood, he placed the *"Sukuma wiki"* (kales) on the ground and remarked *'' nataka kufanya na wewe tabia mbaya".* He then removed my pants and made me lie on the ground and then did to me *tabia mbaya ''*...he removed his trouser and did to me bad manners..." he applied saliva *"kwa kitu yake"* showing the court the position of the penis in the body (pointing at her vagina) he then lay on top of me and *''akanifanyia kwa uchungu* (it was very painful)".

35. The Appellant has submitted that there was no corroboration of this testimony, yet the magistrate failed to comply with section 124 of the *Evidence Act*.

36. That submissions is not true. The complainant's evidence on penetration was corroborated by the clinical officer (PW4). He stated that the examination showed lacerations around the complainant's vaginal wall, and the hymen was freshly broken. He also produced treatment notes from St Mary's Hospital, a P3 form and out-patient card and PRC form (Exhibit 4)

37. The treatment notes from St Mary's hospital state that there was fresh lacerations on the vaginal walls. The P3 form states that there were lacerations and bruises on the vaginal wall. PRC form equally shows that there were lacerations on the vaginal wall.

38. Thus the evidence of the complainant was corroborated by the testimony of the clinical officer and the medical records he produced. There having been corroboration of the complainant's testimony, there was no need for the trial court to state or indicate reasons for believing the minor's testimony. The requirements to record reasons for believing a child's testimony in sexual offences only come into play where the testimony of a child is not corroborated.

39. The Appellant has further argued that the medical evidence of penetration of the complainant in this respect was also inconclusive and could not determine who caused the penetration in the absence of such corroboration.

40. Firstly, the appellant has not explained why he considers the medical evidence inconclusive. Secondly, he seemed to be mixing the issue of penetration with identification. These are two, but separate ingredients of the offence, and each must be proved. The medical evidence was not for purpose of identifying the perpetrator but for ascertaining if penetration took place. Medical examination of the suspect only become relevant where the perpetrator was not positively identified. The medical examination then becomes necessary in establishing whether the suspect has been in contact with the victim.

41. The Appellant has further argued that the Clinical Officer did not make any findings as to whether there was defilement. It is true that the clinical officer did not use the word "defilement "but the words used were that there was lacerations and bruises in the vagina, observations which show that penetration, whether partial or full, had occurred.

42. The appellant has faulted the trial magistrate for relying on the treatment notes arguing that the same was not properly admitted. However the record does not show that there was any objection to the

production of the documents. If the appellant considered the documents as inadmissible, he ought to have raised an objection at the point of trial. He did not object to their admission and therefore ,he cannot turn around and discredit the documents on appeal.

43. Based on the testimony of the complainant, PW6, plus the medical documents produced, I am satisfied that penetration was proved.

Whether there were material contradictions and inconsistencies on the prosecutions case .

44. On the contradictions and inconsistencies the Appellant has pointed out that , whereas the complainants told the court that she did not know the date of the offence, PW3 on the other hand said it happened in January 2021 and that it was the complainant who gave him that information.

45. The testimony of PW3 in this regard was hearsay and hence inadmissible. It cannot be treated to be a contradiction to the complainant's direct testimony.

46. The Appellant further points out that the year in the PRC form is 2020, I agree with this observation, but the appellant never made an issue during trial. I further notice that the official hospital stamp reads 7/6/2021. If the appellant had addressed this discrepancy in cross examination, then it would have been tested at that point. Nevertheless considering that the stamp appearing on the document was current , I believe that was a clerical error .

47. Further the appellant did not insist on the maker of the document coming to court to provide the necessary clarification. The appellant could not acquiescence to the production of the document then turns around and faults its production when the case is on appeal.

48. The Appellant further refers to the contradiction in PW2's statement on whether she sent one Sheila to pick the complainant on the 3rd January or 4th of January. PW2 testified as follows:

> " I sent my daughter Sheila to my mother to pick MS Since schools were about to be opened on 3/1/2021. In the evening Sheila returned with MS in the evening."

49. On Cross-examination she stated

> " I send Sheila to pick M on 3rd January, I am certain about the date I sent Sheila on 3/1/2021 since schools were opening on 4/1/2021. ''I interrogated PW1 on 5/1/2021 when she disclosed what transpired. I do not recall the exact date. I interrogated her, but it was either 5th or 6th''.

50. To these contradictions, PW2 readily admitted that she could have mixed up the dates. Her outright admission shows that she was not being deliberately untruthful, or was on a missions to mislead the court.

51. The appellant further states that the testimony of PW3 (the Investigating Officer) and PW4 (the Clinical Officer) contradicted each other on whether there was a finding of defilement or not. Th e investigator's testimony in this regard was based on information given to him , while for the medical officer it was based both on information given and medical examination. PW4 was an expert witness, while PW3 was not. Further , no where is it indicated that the trial court made a finding on penetration on the basis of PW3's evidence.

52. Another contradiction pointed out by the Appellant is between PW1's reference to the crime scene as having had no trees, against PW2's evidence that there were trees. This contradiction in my view is minor. It does not go into the core of the three ingredients of the offence.

53. The other contradiction pointed out was on the age of the complainant. I have addressed this issue before in this Judgment, and I need not go back to it.

54. In conclusion on this item, while I agree there were several contradictions, the same were minor. They did not go into the substance of the prosecution's case, neither did it give the impression that the witnesses were out to mislead or were a manifestation of outright untruthfulness, on the part of the prosecution witnesses.

55. The trite law on contradictions and inconsistencies, is that they can be ignored unless they point to deliberate untruthfulness on the part of the witnesses or they affect the main substance of the prosecutions case (Ref. *Twehangane Alfred versus Uganda* Criminal Appeal No. 139 of 2002 (20023) UGCA6 as cited in the case of *Erick Onyango versus Republic* (2014) eKLR.

Whether vital witnesses were left out?

56. The appellant has questioned why the complainant's grandmother who used to stay with her, and Sheila, who went to bring the complainant from the grandmother's home, were not called as witnesses.

57. In this regard ,the complainant told the court she did not tell her grandmother what had happened to her. Thus there was nothing much, in terms of relevance, that her grandmother would have told the court. As for Sheila she only saw the child with an unusual walking style. Like the trial magistrate, I also pose the question as to what value the testimony of Sheila would have added to the prosecution's case. Further even if Sheila saw the manner in which the child was walking, that testimony would have been of no value in the absence of the complainant's and PW4's evidence.

58. The prosecutions is not expected to call superfluity of witnesses but only as such as are required to prove its case beyond reasonable doubt.(Ref. *Eric Onyango versus Republic* (*supra*).

59. Finally the appellant has argued that the trial courts approach to the burden of proof was faulty; that she cast upon the appellants the burden of disapproving the prosecution's case. I have perused the judgment of the trial court and this is what the trial magistrate stated in respect to the Appellant's defence

> " .....the accused's assertions that he went about his business of supplying milk is neither here nor there. In any event, the assertions do not displace the prosecution's case".

60. To this, I would say, it is the appellant who has misapprehended the trial magistrate's conclusion. This is not shifting the burden. In simple terms, it meant the prosecution's case remained firm, enough to sustain a conviction notwithstanding the Accused's testimony in support of his defence . This is not shifting the burden of proof.

61. I am satisfied that the prosecution proved the offence of defilement beyond reasonable doubt. I have no reason therefore to fault the conviction by the trial.

62. The conviction is hereby upheld and the appeal against conviction dismissed.

63. There was no appeal against the sentence and therefore I have not addressed myself to it. suffice to state that the sentence passed is prescribed by section 8(3) by the *Act*, is the Minimum, and is mandatory. I have no reason to disturb it.

64. The entire appeal is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF JUNE, 2024

S. CHIRCHIR

JUDGE

In the presence of:_

Godwin – Court Assistant.

The Appellant.