Mbavu v Republic (Criminal Appeal E121 of 2022)
[2023] KEHC 21406 (KLR) (Crim) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21406 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E121 OF 2022

DR KAVEDZA, J

JULY 31, 2023

BETWEEN

PATRICK KALULU MBAVU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. D. Kuto, SRM on 5th May 2022 at Kibera Magistrates Court in Criminal Case Number 50 of 2014)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on diverse dates between 13th May and 17th May 2014 within Nairobi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of VO a child aged 14 years. He was sentenced to 20 years imprisonment.

2. Being dissatisfied with the conviction and sentence, he filed a petition of appeal in which he raised 4 grounds. The main grounds raised are as follows. In a coalized form in ground 1, the appellant challenged the totality of the prosecution's evidence as insufficient to warrant a conviction. In ground 2 the appellant contended that the trial magistrate failed to find that the DNA results were questionable and could not link him with the commission of the offence. In ground 3 the appellant contended that his defence was disregarded and therefore the court arrived at a wrong conclusion. In ground 4 the appellant contended that the trial magistrate failed to appropriately exercise her discretion in sentencing the appellant, who was a first offender and applied the wrong principles of law.

3. As this is the appellant's first appeal, the role of this appellate court is well-settled. It was held in the case of Okeno v Republic [1972] EA 32 and further in the Court of Appeal case of Mark Oruri Mose v R [2013] eKLR, that this court is duty-bound to revisit the evidence tendered before the trial court

afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

4. VO (name withheld) (PW1) in her sworn statement stated that she knows the appellant and that she is 17 years old. She stated that on 13th May 2014 at 7 pm, F went to their home and asked her to take her to their place. When night approached, the complainant asked F to take her back home but F refused. The complainant then slept at F's place for fear of being reprimanded by her parents. Later in the night, the appellant returned to the said house with something in a bottle that looked like soda which he poured into a cup and they both drank it. The complainant later went to sleep with F, but when she woke up, she neither saw F nor Kalulu. She also realized that she did not have the clothes that she was wearing. There were also some used condoms on the side of the bed and she was feeling some pain in her private parts. When she left the house, she found her father outside who took her to the police station and later to Nairobi Women's Hospital for treatment.

5. EM (PW 2) testified that she is the mother of the complainant. She stated that on 13/5/2014, she left the complainant at home with other siblings. However, when she returned home she did not find the complainant and upon probing her other daughter, she was told that the complainant had gone to the toilet. She made efforts to search for the complainant but she did not find her. She later found the complainant on Saturday.

6. JA (PW3) the father of the complainant stated that the complainant was born on 27/1/1999. He told the court that on 13/5/2014, he went to work but on returning home at around 9:00pm, he did not find his daughter. He further stated that later on 17/5/2014 in the morning at around 9:00am, at [particulars withheld] area, while on his way to South B, he found his daughter with a 50 shillings note claiming that she had been sent to the shop. He then asked the complainant to take him to the person who had sent her which she did and upon knocking on the door the appellant opened it. Within a short time, people gathered and a neighbor stated that the complainant had been seen in that house for the past 5days. The complainant confirmed that she was sleeping with the appellant.

7. Kinuthia Mbugua (PW 4) a medical Doctor attached to Nairobi Women's Hospital testified that upon examination, he observed that the complainant’s outer genitalia had blood stains, and the vagina was reddish but there was no visible tear.

8. Dr. Kezia Shako (PW 5) a medical Doctor stated that he examined the complainant 8 days after the incident and noted the following. The genitalia was normal and there were no signs of inflamed urethra, the hymen was normal in structure but with multiple old tears.

9. NO. 90783 PC Jane Chepchumba (PW6), the investigating officer, told the court that the incident was reported by PW 1 in the company of PW 3. When she visited the scene, she found the door locked. She told the court that she received the items taken for DNA analysis and later arrested the appellant. She further produced 7 exhibits to support the prosecution case.

10. Dr. Joseph Kimani (PW 7), a Government analyst from the Government Chemist testified that he received items from the investigating officer on 21/5/2014. They were blood samples from the appellant, a spaghetti top, a red skirt, and a red t-shirt. On 9/6/2014, he received 5 condoms and a vaginal swab. He testified that while conducting his analysis, he noted that he could not finish without a sample from the complainant which he eventually got. Upon analysis, he made a finding that the inner swab of the condom matched the blood samples of the appellant. Condoms A and B outer swabs generated mixed profiles while condoms C and D outer swabs matched the complainant's buccal swab.

11. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence he stated that on 17/5/2014, at 7am, he was in his house when he heard a knock on his door. Upon opening the door, he found people outside who accused him of defiling the complainant. He was later taken to Kilimani police station. He called one witness, his wife (DW2) who gave similar testimony that they used the recovered condoms together. She denied knowing the complainant.

12. The trial court found him guilty and convicted him accordingly.

Analysis and Determination.

13. The appellant challenged the weight of the prosecution's evidence. He contended that the elements of the offence of defilement were not proved and his conviction was improper.

14. I will now analyze the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. I wish to state at the onset that the importance of proving the age of a victim, proof of penetration and positive identification of the assailant in sexual offences is paramount.

15. The significance of proving the ingredient of age in defilement cases was spelt out in Kaingu Elias Kasomo vs Republic; Malindi Court of Appeal Criminal Case No. 504 of 2010, where the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.

16. The appellant contends that the age of the complainant was not proved beyond reasonable doubt. According to the evidence on record, PW 1, the complainant, testified that she was 17 years old but she did not state her year of birth. PW 3, the complainant's father, testified that she was born on 27/1/1999. Her mother however told the court that she could not recall the complainant's date of birth. It was further submitted that no birth certificate or any other document was produced by the prosecution as proof of the age of the complainant.

17. I have perused the trial Court Judgement and note that the learned trial magistrate did not even attempt to interrogate this issue at all. The age of the complainant dictates the period of sentence. It must be noted that a birth certificate is conclusive evidence of age. The *Sexual Offences Act* promulgated some rules towards the achievement of its objectives which came into force on 11th July 2014 under legal notice no.101. By dint of Rule 4 of the Sexual Offences (Rules of Court) 2014, it is provided that:

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

18. Importantly, it was alleged that the complainant was attending school; however, the trial court was not informed of which school she was attending or of what grade she was in. Had this information been relayed to the court, the magistrate could have estimated the age of the complainant. In fact, a mere letter from the school would have sufficed as evidence. Therefore, it was incumbent upon the investigating officer to bring the said documents to court, as they could have easily been obtained from the victim or the victim's parents. There is no evidence that efforts were made to ensure any of the above-mentioned documents were brought before the trial court.

19. Furthermore, there are primary documents whose acquisition is mandatory for a child born within the boundaries of Kenya. These primary documents include birth notification which is issued upon the birth of every child, particularly, those born in hospitals. Further, every child is presumed to have

a vaccination card since vaccination of children of tender years is mandatory in Kenya. The said two documents contain prima facie evidence of the date of birth of their holders. There was no birth certificate, any school documents or any baptismal card produced to conclusively prove the age of the complainant in this instant case.

20. In the absence of the above-said documentary evidence, the court may resort to medical evidence. Thus, it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence. In Francis Omuroni vs Uganda, Court of Appeal No. 2 of 2000, it was 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 other evidence..."

21. The P3 form produced indicated the complainant was 14 years old. The PRC form did not indicate the complainant's age. The evidence in the P3 form was not corroborated by any documentary evidence such as a birth certificate, a birth notification or an age assessment report. Dr. Kezia Shako (PW 5) in her evidence did not lay a basis on how she came to the conclusion that the complainant was 14 years old.

22. Nonetheless, where the actual age of a minor is not known, proof of her apparent age is sufficient under the *Sexual offences Act*. Furthermore, in Evans Wamalwa Simiyu vs Republic [2016] eKLR, the Court observed that;

> " As whether the complainant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was 12years, she did not explain the source of this information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Doctor Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a specific age assessment. Nevertheless, we do note that under Part C of the P3 form the age required is estimated age and under *Children Act* "age" where actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

23. In light of the foregoing, the learned trial magistrate did not interrogate the issue of age in the lens of apparent age of the complainant. Neither does the record demonstrate that there was an attempt by the trial court to ascertain the apparent age of the complainant since it had the privilege to see her physical appearance and demenour. However, this court is not in a position to make such a finding owing to the fact that it had no opportunity to see and hear the complainant testify.

24. Taking into account the totality of the evidence on record regarding the age of the complainant, I'm convinced that the actual age of the complainant was not proved to the standard required by the law, which is beyond a reasonable doubt.

25. The question that I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the complainant as alleged. The complainant testified that she slept at her friend's house on the night of 13/5/2014, and stayed there up to Friday, 16/5/2014. She stated that the appellant later went to the said house on the Friday, 16/5/2014, and they shared a drink with him. However, the following morning, she woke up feeling pain in her private parts and neither Flora nor the appellant were present. She then left the house and met a group that had gathered outside the

house and it is also at the same time that she met her father. The incident was reported to the police and she was taken to hospital for treatment.

26. Her father PW 3 testified that he was going to work when he met the complainant. She had Kshs. 50 and told him that she had been sent to the shop by the appellant. He also told the court that the complainant had been missing for a week. The complainant told him that she had been locked up in a certain house and led him to the premises where he found the appellant and his wife. He told the court that neighbours informed him that the complainant had been seen on the premises for 5 days.

27. The medical evidence presented confirmed that the complainant's outer genitalia had blood stains and the vagina was reddish but there was no visible tear. This is consistent with penetration. However, I note from the P3 form that her hymen was normal in structure but with multiple old tears.

28. Regarding the identity of the perpetrator, the complainant in her testimony stated that she knew the appellant on the date of the incident. She also led the father to the appellant's house where he was arrested. During cross-examination, she told the court that she could not recall the appellant's residence. In addition, the testimony of PW 3 that she had been locked up contradicted her evidence that she went there voluntarily.

29. PW 7, the Government Analyst conducted a DNA analysis of the specimen handed over to him by the investigating officer (PW 6) on 21/6/2014. He also took the appellant to the government chemist where his blood sample was taken. However, it was the Investigating Officer's (PW6) evidence that when she visited the crime scene, she found it locked and got the other specimens from someone else. She did not indicate how she got the specimen or whether she collected them herself.

30. This court has looked at the record, and there is need to reconstruct the chain of custody regarding the DNA specimens in question. The investigating officer did not produce a chain of custody log. This was very important since from her evidence, she did not retrieve the samples herself. From the evidence on record, there was DNA specimen from an unknown individual. It is possible that the profile belonged to a third party who was involved in the alleged offence. The fact that the chain of custody of the material tested for DNA was not well documented, creates considerable doubt as to the guilt of the appellant. In the present case, the chain of custody was not full proof, ultimately casting doubt as to the culpability of the appellant. Nevertheless, as a rule, it is always good practice to have the chain of custody of samples whatever their nature, clearly established.

31. I remind myself of the Court of Appeal views on expert evidence in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139, where the Court held that:

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

32. I am also alive to the weight a court of law should place on expert opinion as I am reminded in Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR where the court expressed itself as follows:

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is

assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called."

33. The court in the above case considered that four aspects must be addressed by the court while considering expert opinions, namely; that such evidence should be tested against known facts as it is the primary factual evidence which is of the greatest importance; that such evidence must be considered alongside the rest of the evidence; that where there is conflicting expert opinion, the court should test it against the background of all the other evidence in order to decide which expert evidence is to be preferred and that a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.

34. From the foregoing, it is evident that expert evidence is an opinion, and the court must be satisfied that the said evidence is credible. Moreover, credibility begins with the handling of the evidence. In arriving at the conclusions of this case, I have taken this into account and considered all the evidence tendered alongside that of the expert. Indeed, I have reasons to question how the DNA was collected, stored and/or maintained before being handed over to the government analyst.

35. I note from the record that the DNA specimen was collected by the complainant's father. However, it remains unclear how he handled the specimen, to whom he handed it over, how it was stored, and the whereabouts of the container in which he carried the specimen. All these details have not been provided, and the chain of custody log has not been presented to prove that the appellant was not framed for the offence he was charged with.

36. Additionally, the complainant's father, PW3, told the court that he visited the scene, knocked on the door, and waited for thirty (30) minutes until someone opened it. He then saw two individuals inside the house; a lady and a man. However, it is not clear why he did not enter the house to inspect the bedding where the complainant had allegedly slept, nor did he inspect the number of rooms in the house. The question this court grapples with is whether the appellant could have defiled the complainant in the presence of his wife, considering they were found together in the same house. Regrettably, the answer to this question remains unclear.

37. Furthermore, the investigating officer stated that she was directed to the house where the complainant was allegedly defiled, but she found it locked. Consequently, she was unable to confirm the number of rooms in the house, or at the very least, examine the place where the complainant was defiled.

38. It is also noteworthy that the government analyst, PW7, indicated in his report that there was one DNA profile belonging to an unidentified person. Surprisingly, the Investigating Officer did not bother to investigate whether the complainant had been defiled by more than one person. Furthermore, no evidence was presented regarding the identity of the individual associated with the unidentified DNA profile.

39. As a result, this court is faced with crucial questions: firstly, who was the unidentified person? With whom did they engage in sexual activity in the same room where the complainant had spent four (4) nights? What transpired within that house, considering that the appellant's wife also resided there? These unanswered questions cast doubt to the credibility of the complainant's testimony as a truthful witness.

40. Moreover, the foregoing analysis coupled up with the fact that the complainant's father accidentally stumbled upon the complainant while she was going to the shop, points to a different conclusion from what is on record. The complainant's evidence that she had been locked up cannot be believed since she was going to the shop having been sent by the appellant when she met her father. She even returned to the house to retrieve her sweater, which she had left behind, indicating her intention to return to the same house.

41. Furthermore, the complainant stated that she was taken to the said house by a friend named Flora, allegedly the appellant's sister. In my view, Flora was a key witness who was competent and compellable to testify. Therefore, it was expected that the investigating officer would have questioned her; however, surprisingly, she did not.

42. Having considered the totality of the prosecution's evidence, there are serious gaps in their case. Notwithstanding that the complainant's age was not proved, no report was made by the complainant's parents on her disappearance. In addition, the investigations into the circumstances surrounding the disappearance of the complainant were not adequate. The prosecution's witnesses failed to show how the DNA specimens were collected and stored. Further, the investigating officer who ordered for the appellant's DNA sampling was a constable of police. She acted ultra vires her mandate contrary to the provisions of Section 122A (1) of the Penal Code (Cap 63) Laws of Kenya. (See Charles Mburu Wanjiru vs Republic [2017] eKLR). As such, the results of the DNA analysis were also inadmissible. I find the evidence that the prosecution adduced on identification was shaky and hold that the identification of the appellant was not proved beyond reasonable doubt.

43. The upshot of the above analysis is that, after evaluating the evidence on record afresh, I have come to the conclusion that the appellant's conviction was unsafe. The prosecution failed to prove the age of the complainant and the fact that the appellant was the perpetrator of the alleged offence. It therefore failed to prove its case against the appellant beyond reasonable doubt as required by law.

44. For the foregoing reasons, I find that this appeal has merit. Accordingly, I allow the appeal, quash the conviction, and set aside the sentence imposed. The appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State

Appellant present (virtually)