SON v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 13291 (KLR) (Crim) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13291 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E054 OF 2023

LN MUTENDE, J

OCTOBER 28, 2024

BETWEEN

SON .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against the original conviction and sentence in S. O. Case No. 169 of 2021 at the Chief Magistrate's Court Makadara)

JUDGMENT

1. Pursuant to leave of court obtained on 21/2/2023, Stephen Okumu Nyangoro, the Appellant, proffered, this appeal. He was charged with the offence of defilement contrary to Section 8(1) as read with Section (8) (3) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence were that on the 1st day of July, 2021 at Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.A.O. a child aged 13 years.

2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on the 1st day of July, 2021 at Nairobi County, he intentionally and unlawfully committed an Indecent Act by touching genital organs namely vagina of N. O.A. a child aged 13 years with his genital organ namely penis.

3. Having been taken through full trial, he was found guilty, convicted for defilement and sentenced to serve twenty (20) years imprisonment.

4. Aggrieved he appeals on grounds that can be condensed thus: The charges were defective;

   Evidence adduced was incredible which made the conviction unsafe; and,

That the defence that was not displaced was rejected.

5. Briefly facts of the case were that the appellant is the complainant's step father. On the 1st July, 2021 the complainant N.A.O. was unwell. While sleeping on a seat in the house she was woken up by the appellant who undressed her, pulled down his trousers and lay on her. He inserted his penis into her vagina, then her sister E.A. (PW2) entered and interrupted him. She ran out to call neighbours. Among them, PW4 EOS rescued the victim and also the appellant who was being beaten by other neighbours. They took them to Korogocho Police Station.

6. The victim was escorted to Medecins Sans Frontiers (MSF) medical facility by PW6 NO. 107287 P.C. Catherine Rono where she was examined and found with tears at 3,6 and 9 O'clock positions. The hymen was missing and a PRC form was filled on the same day, 1st July, 2021.

7. It was the victim's testimony that it was not the first time the appellant was violating her sexually, as he had done it severally and would threaten to kill her if she divulged the information to anyone.

8. Upon being placed on his defence the appellant stated the he lived with the complainant, her siblings and their mother since 2014. That he enrolled them in school in 2015 but later disagreed with their mother because of a drinking problem and infidelity. This made him stop educating her children. That he stopped paying rent and even moved out of their house, hence she moved out of the house.

9. That their relationship was blessed with two (2) children hence he desired to see his 2 children. That on the 1st July, 2021 he went to Baba Dogo to the house where he lived with his new wife to pick up a jacket then went to Dandora Phase IV to buy a spare part for a customer. The motor-cycle he was using with his friend got a puncture. As they pushed it he saw his child that he had sired with the complainant's mother playing who asked him to buy for him chips which he did.

10. That the child invited him to go see where he lived with his mother and daddy and he followed him. On reaching the gate he encountered PW4 who was their neighbour. A lady emerged and identified him as the one. PW4 called his friend as they forced him into the complainant's mother's house where the complainant was lying on the seat. It was alleged that he had defiled the complainant hence they beat him up. They undressed him and pulled his private parts. One Stephen Otieno arrived and told them to take him to the Police Station which they did and he was subsequently charged.

11. The appeal was disposed through written submissions with the appellant filing submissions per the directions given. It was urged by the appellant that complainant stated that he inserted his penis into her vagina yet PW3 Stephen Kimwaki a Clinical Officer stated on cross examination that the survivor reported that she was a victim of ongoing sexual violence then and that the perpetuator had attempted to defile her that day of examination. That in his opinion it should have been a case of attempted defilement which means that the charge as framed was defective.

12. That Section 77 of the *Evidence Act* was not complied with when the medical certificate was produced by PW3; and, the defence put up was elaborated and cogent which should not have been disregarded.

13. I have considered evidence adduced at trial, arguments by the appellant and authorities relied on. This being a first appellate court, it is under the obligation to reconsider and re-evaluate evidence adduced at trial so as to reach its conclusion bearing in mind that it had no opportunity of seeing or hearing witnesses to such an extent as to observe their demeanor. This was well enunciated in Okeno vs. Republic (1972) EA 32 thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate

court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

14. Ingredients of defilement are provided for in Section 8(1) of the *Sexual Offences Act* that enact thus:

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

15. This was restated in GOA vs. Republic (2018) eKLR as follows:

> " The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence."

16. On the question of age, it was stated in Francis Omuroni vs. Uganda Criminal Appeal No. 2 of 2000 that:

> " 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..."

17. In Mwalengo Chichoro Mwajembe vs. Republic (2016) eklr the Court of Appeal delivered itself thus:

> " ....the question of proof of age has finally been settled by recent decisions 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

18. The appellant herein was the step father of the complainant who gave her age as thirteen (13) years. He acknowledged the fact of the victim being his step daughter but did not question the age as given by the prosecution. To reinforce the argument, a child immunization card issued to the victim was adduced which proved her date of birth as 10/7/2008 hence aged 13 years at the time of the occurrence.

19. The appellant's complaint refers to the act of penetration, whether indeed it was a question of defilement or an attempt. Section 2 of the *Sexual Offences Act* (SOA) defines penetration as follows:

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

20. The complainant was taken to MSF at the outset. The examination carried out established the presence of old scars at the 3, 6 and 9 O'clock positions, subsequently, a P3 form was filed on 2nd July 2021 by a clinician at MSF which was adduced in evidence.

21. Section 77 of the *Evidence Act* provides that:

    1. In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

    2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

    3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

22. A document made by a Medical Practitioner may be adduced in evidence if the court presumes it to be genuine. It is only when in doubt that the court would summon the maker with a view of being examined on it.

23. PW3 Stephen Kimwaki, a Clinical officer at MSF was not the maker of the PRC and P3. A basis was laid as to whether he could adduce the document in evidence.; he had worked with the author of documents for one year and was conversant with her handwriting and signature. Prior to the documents being produced, an application was made to that effect and the court recorded that:

    > " Nature of application explained to accused in Kiswahili"

    And the applicant responded thus:

    > " I have no objection."

    Clearly Section 77 of the *Evidence Act* was complied with.

24. That notwithstanding, it was held by the Court of Appeal in Ali Kassim vs. Republic (2006) eKLR that:

    > " …The fact of rape is not decisive as it can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

25. In contending that Section 77 of the *Evidence Act* was not complied with; this was ideally to challenge medical evidence adduced which is not the only way of proving the act of defilement.

26. Section 124 of the *Evidence Act* provides thus:

> “ Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

27. Evidence of the victim itself may be sufficient to prove the offence of defilement as long as the court finds it believable. The trial court stated thus:

> “ I had the opportunity of observing the demeanor of the complainant. She broke down while giving the accounts of what happened just like her sister PW2. Their bitterness towards the accused who turned into a sex pest and preyed on the complainant at will could not be overstated. Theirs was an unfortunate case which caused them to end up living in a children’s home.”

28. The court did believe the complainant/victim that indeed the appellant inserted his genitalia into hers. The act of insertion by itself proves defilement having occurred.

29. The appellant put up a defence which was disregarded by the trial court. The appellant alleged that his wife had gone to stay elsewhere with another man. That neighbours knew him and confirmed the issue of the appellant having been living in that house. However, coming up with an alibi defence that he was elsewhere, he argued that the defence should have been dislodged; he relied on the case of Victor Mwenda Mulinge vs. Republic (2014) eKLR where it was held that:

> “ It is trite law that the burden of proving falsity, if at all, of an accused‘s defence of alibi lies on the prosecution”

30. It has also been held in Republic vs. Sukha Singh S/O Wazir Singh & 7 Others [1939] 6 EACA 145; that:

> “ If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

31. Evidence of the appellant having been present at the scene (inside the house) is not countered. The question of having gone to pick up a jacket should have been raised at the outset so that the prosecution would have the opportunity to investigate it. The possibility of having entered a house he alleged he was not staying is a theory that does not appear valid/reasonable, therefore the trial court was right in disregarding it.

32. On the question of sentence, Section 8(3) of the SOA provides thus:

> 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 than twenty years.

33. The trial court considered factors and circumstances in which the offence was committed and the psychological effect the offence left on the complainant. Therefore, it settled for the minimum sentence provided by Statute considering that the appellant was a first offender.

34. From the foregoing, it is apparent that the court adhered to the law. In the premises, I find the appeal lacking merit. Therefore, it is dismissed in its entirety.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 28TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE