Mokua v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 16394 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16394 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E007 OF 2024

JN ONYIEGO, J

DECEMBER 19, 2024

BETWEEN

ERICK SHEM MOKUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Cornel O. Omondi in Sexual Offences Case No. E027 of 2022 in the PM's Court at Mandera delivered on 15.05.2024.)

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*. Particulars of the offence were that on 08.09.2022 within Mandera County at about 2030hrs he intentionally caused his penis to penetrate the vagina of KIA a child aged 14 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. Particulars were that on 08.09.2022 within Mandera County at about 2030hrs he intentionally touched the vagina of KIA a child aged 14 years.
3. He pleaded not guilty to both the main charge and its alternative count. Consequently, prosecution presented evidence from six witnesses in support of its case.
4. Upon conclusion of the trial, the hon. court found the appellant guilty of the charge of defilement contrary to section 8 (1) as read with section 8(3) and sentenced him to 20 years' imprisonment.
5. Being dissatisfied with the finding of the trial court, he filed a petition of appeal dated 24.05.2024 citing the following grounds:
    i. That the trial magistrate erred in law and fact by convicting the appellant yet the prosecution failed to prove its case beyond reasonable doubt.

ii. That the trial magistrate erred in law and fact by convicting the appellant when the prosecution's case was marred with contradictions.

iii. That the trial magistrate erred in law and fact by convicting and thereafter meting out a harsh sentence.

iv. That the trial magistrate erred in law and fact by failing to consider his defence without giving any reason.

6. The court directed that parties file their written submissions wherein the appellant via submissions dated 07.10.2024 urged that the prosecution failed to prove its case to the required standard. That in as much as age could be ascertained by other means including the testimony of a guardian, in this case, the mother of the complainant did not testify to corroborate the testimony of the complainant. That having shown that the complainant was an incredible witness, the aspect of age was not proven to the required standard.

7. It was contended that, the prosecution relied on the photocopies of PW1's birth certificate to allegedly prove her age in as much as the same is regarded as secondary evidence yet documents can only be proved under primary evidence except in exceptional cases. Learned counsel submitted that the prosecution did not produce an original copy of the birth certificate and as such, the same was prejudicial to the appellant's case as the said document was erroneously admitted as evidence. To that end, counsel relied on the Court of Appeal decision in the case of Dickson Ngigi Ngugi vs Morrison Njenga Waweru [1979] eKLR where the court held that...we are of the opinion that copies of documents which are filed in court being secondary evidence and which could be certified should be certified as required in the *Evidence Act*.

8. That the element of penetration was equally not proved in view of the testimony of PW6 who could not determine whether indeed there was penetration. To buttress that position, reliance was placed on the holding in the cases of DOO vs R [2019] eKLR and Titus Karani vs Republic [2021] eKLR in which convictions were quashed relying on the Court of Appeal decision in the case of PKW vs R [2012] eKLR where the court stated that...the evidence of missing hymen is not automatic proof of penetration through a sexual act. That in the instant case, the trial magistrate erred by over relying on the opinion of PW6 to reach a conclusion that was flawed.

9. The trial magistrate was also faulted for failing to consider the appellant's defence which was allegedly cogent. That the charges herein were meant to settle scores. That a perusal of the judgment by the trial court reveals that nothing was mentioned of the defence by the appellant. That this fatal omission greatly prejudiced the appellant. The court was referred to the holding in the case of HMK vs R Criminal Appeal no. E027 of 2021 where Mativo J. (as he then was) stated that when evaluating or assessing evidence, it is imperative to evaluate all the evidence and not to be selective in determining what evidence to consider.

10. It was contended that, the trial court failed to consider the integral contradictions by the prosecution witnesses. That PW3 at page 21 line 28 stated that he was the one telling the truth as Khadija's statement was false; At page 21 line 30, PW3 also stated that Safia recorded a false statement. That equally, it was admitted that it was PW3's principal who instructed him to record his statement against the appellant knowing well that the appellant and the head teacher did not see eye to eye. Counsel opined that the trial court failed to warn itself on the dangers of convicting the appellant on an uncorroborated evidence of the minors.

11. On sentence, the appellant decried that the same was not only harsh but also excessive in the given circumstances. That the appellant did not only maintain his innocence but also was a 1st time offender

and therefore, the court ought to be lenient. To that end, it was urged that the appeal herein be allowed, conviction quashed and sentence set aside.

12. The prosecution submitted that it proved its case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, the conviction of the appellant was regular. The learned prosecution counsel contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss the appeal.

13. The duty of the first appellate court is to re-analyse and re-consider the evidence presented before the trial court with a view to arriving at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. [See Kiilu & Another vs Republic [2005]1 KLR 174].

14. Briefly, PW1, KIA, a minor stated that she was born on 06.08.2008 and was a student at [Particulars Withheld] Secondary School. That the appellant, her former science teacher defiled her on 08.09.2022 while in the bush. She testified that the appellant called her through Safia's mother's cellphone and together with Safia, they went to meet the appellant. Upon meeting, they went near a road where the appellant pulled her, removed her pants and while standing, penetrated her vagina with his penis. That while on the act, some children came along and took her away to some homestead from where her mother picked her. She was taken to the Kiliweri police station and subsequently, to the hospital for treatment.

15. PW2, SIA, a minor stated that on the material day, she was with PW1 when they met the appellant. That upon meeting, they exchanged pleasantries and then the appellant left with PW1. Noting that she was not far away from them, she could easily see them with the aid of the moonlight. It was her evidence that she saw them undress and thereafter the appellant penetrated PW1. That while there, some boys came along and took PW1 to some house where they locked her before informing her (PW1's) mother.

16. According to her, it was not the first time the appellant had called the complainant as they used to communicate using her mother's phone. On cross examination, she stated that she knew her mother's phone number but did not know the appellant's phone number in as much as it was not the first time that the appellant was calling the complainant using her mother's phone. That he had done so for a period running to one year.

17. PW3, AOM, a minor stated that on 08.09.2022 at around 8.p.m., he was at Kiliwaheri with Abdifatah Hassanow and Adan Hassanow as they were from the mosque when they saw girls conversing over the phone. That they overheard the subject of their conversation and so, they closely followed them to a plot in a deserted bush. They hid nearby the place when they saw the appellant approach the girls. According to him, identifying the appellant was not difficult as there was sufficient light emanating from the moon.

18. He stated that, when the appellant approached the girls, he left with PW1 as PW2 remained. The appellant then started undressing the complainant and upon completion, told her to bend and thereupon penetrated her. Upon seeing the same, they rushed to the scene and took away the complainant and locked her up and thereafter informed her mother of what had happened. It was his case that the appellant was a person well known to him as he was his deputy head teacher at Kiliwaheri Primary school. On cross examination, he stated that he was the one who was speaking the truth as PW1 and PW2 spoke lies.

19. PW4, AHN, a minor stated that on the material day, in company of his classmate, they were from the mosque on their way home when they encountered PW1 and PW2. That the two girls were conversing over the phone and so, they hid about 20-30 metres away when they saw the appellant approach

the girls. According to him, PW2 was standing by the side when the appellant arrived and started undressing PW1. He also undressed and then told PW1 to bend upon which he inserted his penis into her vagina. That when PW2 and the appellant saw them, they ran away with PW1 leaving her clothes behind. He stated that they took those clothes to their home before informing her mother of what had happened. Later, PW1's mother in company of PW2's mother went for PW1.

20. PW5, No. 106782 PC Anthony Mwangi Maina, the investigating officer stated that he was minuted this case by the OCS. That he called Mr. IA, PW1's father who had previously reported that his daughter had been defiled. He stated that he also called the complainant and recorded her statement wherein she alleged that on the night in question, she was in the process of preparing dinner when the appellant called and informed her that he wanted to assist her in preparing for the exams.

21. That upon arrival, the appellant instead defiled her. He stated that he escorted the complainant to Banisa Sub County Referral Hospital for filling of the P3 form and upon completion of the investigations, charged the appellant. On cross examination, he stated that the minor was presented to the station five days late as she awaited the return of her father who was away herding. On further cross examination, he stated that the incident took place in a deserted house inside the bush. That he visited the scene.

22. PW6, Dr.MJ testified that he examined the complainant six days after the injury. That the hymen was not intact, there was no tear, no presence of discharge, external genitalia was normal and the cervix was also normal. On cross examination, he stated that the vaginal opening was intact, there was no fresh tear, no spermatozoa seen. He went further to state that according to him signified penetration and that the complainant had previously been repetitively penetrated.

23. At the close of the prosecution's case, the trial court found that he had a case to answer thus placed him on his defence.

24. The appellant in his sworn defence denied committing the offence as he claimed that the same was a frame up. That there existed grudges between him and the curriculum support officer and the head teacher. To him, the head teacher was not happy when he got promoted for the position of the deputy head teacher. He further challenged the evidence of PW1, PW3 and PW6 as materially contradictive. He urged the court to set him free as he was not culpable for the offence herein.

25. I have considered the grounds of appeal, the record herein and the submissions by the respective parties. The main issues for my determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the sentence meted out was commensurate with the offence.

26. The appellant herein was charged with defilement under Section 8 of the *Sexual Offences Act* which stipulates as follows: -

> Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. ...
>
> 3. 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.

27. The elements of the offence of defilement can therefore be discerned as; proof of age; proof of penetration and; positive identification of the perpetrator. Proof of these elements was further espoused in the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013].

28. On the age of the complainant, the *Sexual Offences Act* defines the word "Child" within the meaning of the Children's 2022 as "...any human being under the age of eighteen years."

    Also see the case of Martin Okello Alogo vs Republic [2018] eKLR].

29. In the same breadth, the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows in respect to proving the age of a victim in cases of defilement:

> " ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added)"

30. Similarly, in the case of *Richard Wahome Chege vs R Criminal Appeal No. 61 of 2014* the court held that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate, but also by the parent or the doctor who examined the complainant." (See also Francis Omuroni v Uganda CR Appeal No. 2 of 2000).

31. In the instant case, the complainant stated that she was born on 06.08.2008 A photo copy of the birth certificate though contested was produced in compliance with the law. With this evidence, I have no doubt, the complainant was 14 years old as at the time the offence was committed hence a child. I do not find any substance in the appellant's counsel's submission that a photocopy was not sufficient proof of age. Even without the birth certificate, the court upon conducting a voire dire examination was through observation and common sense able to ascertain that the complainant was a minor capable of understanding the nature of an oath and importance of telling the truth.

32. On the ingredient of penetration, the same is defined under Section 2 of the Act as follows: -The partial or complete insertion of the genital organ of a person into the genital organs of another person.

33. The Court of Appeal, in the case of Sahali Omar vs Republic [2017] eKLR, noted that:

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

34. In the instant case, pw1 said that on the material day at 8.30 pm, she was in the bush with Safia when the appellant called her through her mother's phone. That the appellant went to the bush where the two were. That safia moved near the road as the appellant had sex with her while standing. Pw2, a girl aged 15 years reiterated the testimony pw1. However, pw3 and pw4 said they saw the appellant have sex with pw1 while pw1 was pending. This was contrary with what pw1 said that they had sex while standing.

35. On the other hand, pw5 the investigating said on cross examination that the incident took place in a deserted house in the bush. He stated that he even visited the scene. How could pw2, pw3 and pw4 have

seen what was happening in a deserted house. How come pw1-pw4 never mentioned of the incident taking place in the house. This a critical contradiction from an independent witness.

36. One would be curious to ask the question, how come only students from the same school witnessed the incident yet they were not either from school or going to school. How come it was the school principal who was instrumental in having pw3 and pw4 record statements. Was it a coincidence that this incident arose when the appellant was in bad relationship with the same principal.

37. Even if we were to assume that the appellant met with the pw1, there is no clear proof that they had sex. Even the medical evidence by pw6 did not reveal that pw1 engaged in any sexual activity that day. The absence of the hymen perse is no proof of recent engagement in sexual activity.

38. Pw6 said that upon examination of pw1, everything was normal. There was no basis upon which the trial magistrate found that the absence of the hymen which was not freshly torn was connected with the instant offence. The doctor however contradicted himself by saying that the absence of hymen implied there was penetration. It is trite that mere absence of hymen in the vagina of a girl does not automatically prove a charge of defilement. There has to be a nexus. See PKW vs Republic (supra) where the court held that it is an erroneous assumption to assume that absence of hymen means there might have been sexual activity.

39. It was not clear why the offence was reported five days after the incident. Although pw5 associated the delay with the absence of the father, pw1 said in her examination chief that her mother was at home and that she went home after the incident.

40. In the absence of any medical proof that pw1 was carnally known and taking into account the inconsistencies of the key witnesses, I am persuaded to believe that there was no proof that there was any sexual contact between the appellant and the victim. Although proof of a sexual offence may not necessarily depend medical evidence to prove penetration, the same is not useless. The evidence on record therefore does not support the element of penetration owing to the contradictory evidence.

41. As regards the identity of the perpetrator, there is no doubt that the appellant was well known by the witnesses being their teacher. From the evidence on record, I am convinced that the appellant did meet with the pw1 and pw2 on the road at odd hours in the pretext of assisting pw1 pass her exams as per the testimony of pw1 and pw2. This meeting did not translate to any sexual activity although against the code of conduct and professional ethics.

42. Having held that the appellant did not commit the offence as alleged, I will not endevour to consider the issue of sentence. Therefore, it is my finding that the offence was not proved to the required degree hence the appeal succeeds. Accordingly, the conviction herein is quashed and the sentence set aside. The appellant is hereby set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE