MMK v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 8009 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8009 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E019 OF 2023

J WAKIAGA, J

JUNE 26, 2024

BETWEEN

MMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement of the Principal Magistrate's Court at Kandara SO NO 63 of 2016 delivered on 5th November 2019 by Hon. M. Kinyanjui PM)

JUDGMENT

1. The Appellant was charged tried and convicted of the offence of defilement Contrary to Section 8(1)(4) of the *Sexual offences Act* No 3 of 2006. The particulars of which were that on the 14th day of December 2016 at Korangi Sub County of Muranga County, he defiled EN a child aged 13 years. He was convicted and sentenced to serve twenty (20) years in prison.

2. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds:

    a. The trial Court erred in points of law and fact by failing to find that the elements of defilement were not proved beyond reasonable doubt.

    b. The charge sheet was defective in nature.

    c. The prosecution case was not proved beyond reasonable doubt.

    d. The prosecution case was full of material contradictions.

    e. The trial Court failed to find and hold that there existed a grudge between the Appellant and the victim's family.

3. The Appellant sought that the conviction be quashed and the sentence set aside.

4. Directions were given on the hearing of the appeal by way of written submissions and on behalf of the Appellant it was contended that penetration was not proved as the P3 form produced by PW4 Dr. Gachanja and filed on 16th December 2016, two days after the alleged date of the offence stated that the approximate age of injuries was 11 days showing that the injuries had occurred much earlier only for the Appellant to be implicated of the offence by PW1 and that the motive was confirmed by PW2 in his evidence under cross examination that the Appellant did not marry his sister and that he later demanded payment of Kshs.10,000 from the Appellant.

5. It was the Appellant's contention that vital prosecution witnesses, including PW1's siblings who were sleeping together with her, the rider who allegedly ferried PW1 from the Appellant's house, and the watchman who called the chief, were never called to testify and thereby creating lacunas in the prosecutions' case on the positive identification of the Appellant. It was contended further that vital exhibits including the complainant's pants that had discharge were never produced and that there was contradiction on the evidence of PW1 and PW2.

6. It was submitted that the Appellants state of mind was an issue during the trial but no investigation was conducted to ascertain his mental status during the time of the alleged offence and that the same raised the defence of insanity in his defence so the burden of disapproving the same was on the prosecution as was stated in the cases of *R v Philemon Chemas* [2014] eKLR and *PIM v Republic* [1982] eKLR.

7. It was submitted that in view of the provisions of Section 12 of the *Penal Code* the sentence of 20 years was unlawful and inhumane, in support of the submissions reference was made to the case of *R v. Lewis* [2021] KEHC 272 where it stated that the Court was under a duty to inquire into the question and to have the accused subjected to a medical examination to establish whether he suffered from the deceased of mind and that on the authority of *Hassan Hussien Yufus v R* [2016] eKLR where the Court held that a sick person's place is at the hospital and not prison, the sentence was inhumane and unfair.

8. On behalf of the Respondent, it was submitted that the age of the victim was proved through her testimony and her mothers' evidence which was corroborated by the production of her baptismal certificate by PW6. Penetration was proved by the complainant's evidence and p3 form produced by PW4 and that the date of injuries was corroborated by the complainant's evidenced that it was the fourth time she was having sex with the Appellant who was positively identified by the minor who used to visit their home as per the evidence of pw2.

9. On the Appellant's defence it was submitted, that the Appellant participated fully in the trial and only raised the insanity defence at the tail end of the trial and that there was no proof that the said deceased affected his understanding of what he was doing and therefore Section 166 of *CPC* did not apply and that the special finding by the magistrate of guilty but insane should not have applied to the case.

10. It was contended that the contradictions on the prosecution case were not material and that the witnesses it called did not have any probative value to the prosecution case.

11. This being a first appeal, the Court is under a duty to re-evaluate the evidence tendered before the trial Court and to come to its decision thereon, while giving allowance to the fact that it did not have the.....

12. PW1 stated that her mother had gone to pick tea on the material day when the Appellant came to their home and gave her sweet and Ngumu. He then gave her brothers money to go buy sweets, he then told her that he would come for her at 9.00pm. She went and found the Appellant who put her on bed and defiled her by putting his penis into her vagina and that the Appellant had defiled her before that date

and had warned to kill her if she told her parents. He changed her clothes after that and gave her new ones and money for a motor bike.

13. The Appellant then told her to wait for him at the market since he intended to take her to his grandmother in Meru where the watchman saw her and took her to the chief who called her mother and was taken to the police station.

14. When she was recalled, she stated that on the material night they had sex three times and that in the morning the Appellant locked her in the house and later came back with changing clothes in preparation to taking her to Meru.

15. PW2 confirmed that the complainant was 13 years and was in class 4 and produced her baptismal certificate. It was her evidenced that on the material night the complainant left the house without her knowledge. They searched for her to no avail and later a village Elder called Baba M came to her with a phone and asked her to speak to the Assistant Chief who asked her what clothes the complainant was wearing which confirmed that it was her daughter and that at the Chief's camp, she told them that she had slept at their house of the Appellant, whom she knew.

16. It was her further evidence that she took PW1 to the hospital where it was confirmed that she has been defiled. She further confirmed that the Appellant had previously defiled her whenever the mother was not at home. In cross examination she confirmed that she had asked the Appellant to assist in looking for PW1 and that when he met the Assistant Chief, he followed him to his house. When recalled, she stated that the Appellant had given the complainant different clothes, rubber shoes and T-shirt, which were not her school uniform.

17. PW4 DR Gachanja Kamau produced P3 form which confirmed that the complainant's hymen was torn and her vulva swollen, confirming defilement. In cross examination he confirmed that PW1 told him that she had been defiled four times.

18. PW5 PC Jeremiah Mugambi escorted the complainant and the Appellant to hospital where they were examined. PW1 on interrogation stated that the Appellant used to go to her place and defile her said that on the material night she sneaked from their house and went to the Appellant's house where she stayed until 5am when the Appellant put her on a motor bike to Gatura Market where she was found by the watchman, who reported her to the Chief. In cross examination he stated that he did not know of any grudge between the Appellant and the family of the complainant.

19. PW6 PW(w) MK produced the baptismal certificate of the complainant confirming that she was born on 27th December 2003 and that her birth certificate was burned.

20. When put on his defence, the Appellant stated that he used to live at Karangi and that when he was arrested he was told that he had defiled a child and that he was sick and did not know if he did it or not as he only came to know where he was at Mathari Hospital and that if he committed the offence he should be forgiven. In cross examination he stated that he used to be on mental illness medicine since 2004 and that he knew the complainant as he used to work in their home sometimes and could not recall whether he cross examined her.

21. PW2 EK stated that he was a brother of the Appellant and that in December 2016, he was called to Ndakaini Police where the complainant's mother said that she knew the Appellant well and didn't want him jailed and that if she was paid Kshs.10,000 medical cost she would forgive him and that he managed to get Kshs.8,600 which she refused to accept and that he later learned that the Appellant was at Mathari Hospital several times.

Determination

22. From the proceedings herein, I have identified the following issues for determination:

    a. Whether the case of defilement was proved by the prosecution.

    b. Whether the defence of insanity was available to the Appellant.

    c. Once the Court found the Appellant guilty but insane, what was the available sentence.

23. From the record of the proceedings herein and for the purposes of this judgement, it is clear that there was no medical report produced in Court on the mental status of the Appellant and that on 14th February 2017, the Court was notified that the Appellant had been taken to hospital at Githumu and that on 2nd July 2017, the Appellant informed the Court that he had a condition where he faints. On 16th March 2017, the Court was informed that the Appellant had been taken to hospital again.

24. On 2nd May 2017 the prosecution informed the Court that the Appellant was unwell and needed to be committed to Mathari according to the prison report and the trial Court made the order to that effect, which order was confirmed on 16th May 2017. On 30th May 2017, 27th July 2017, 30th October 2017 up to 24th October 2018, it was confirmed that the Appellant was at Mathari hospital.

25. On the 27th November 2018 the Appellant confirmed to Court that he was now well and applied for the recall of PW1 and PW2, which was allowed and on 31st December 2018, the Appellant informed the Court that he was again unwell and requested to be taken back to hospital and to be released on free bond but was subsequently given cash bail of Kshs.30,000.

26. It is clear that the question of the Appellant mental status was raised before the Court and therefore the Court was expected to follow the procedure provided for under Section 162 of the *Criminal Procedure Code* which provides that the Court has to make an inquiry as to the soundness of the mind of an accused person. The trial of the Appellant would only have resumed on compliance with Section 163 and 164 of the *Penal Code*. It is the duty of the trial Court to inquire specifically into the question of insanity, not only in situation where such defence is raised but also where it becomes apparent as was stated in the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR

27. From the record of the proceedings herein the Court did not comply with this statutory provisions and having failed to do so, I find that the Appellant's rights to fair hearing were violated and therefore the trial herein amounted to mis-trial as it is possible that the Appellant did not understand the nature of the trial and the process and therefore agree with the Appellant's submissions herein that having been under medication during the entire period of trial, which information was available to the Court, the strength upon which it rendered a finding of guilty but insane, the said sentence in view of the provisions of Section 12 of the *Penal Code* was unlawful.

27. On the merit of the appeal, it is clear from the evidence that the Appellant was identified through recognition. He was known to the complainant and her mother. The complainant through her evidence in chief confirmed that the Appellant had been defiling her before the said dated and in what seems to be a grooming by the Appellant, he had promised to take her to his rural home on the material day and he would have done so had the complainant not been found by the watchman. I therefore find and hold that his identification was not mistaken.

28. The age of the complainant and the fact of penetration were proved beyond any reasonable doubt through the production of the baptismal card, P3 form and oral evidence and would find no fault with the trial Courts' finding thereon.

29. Whereas the evidence tendered before the Court, supports the conviction, having found that the Appellant was insane, the Court should have returned a verdict of not guilty for reason of insanity as was stated by the Court of Appealin *Wakesho v Republic* [2021] KECA 223 (KLR) having found that there was a mistrial and noting that the Appellant has been in custody since 19th December 2016, this is not a matter where the Court ought to order a retrial.

30. I therefore allow the appeal herein, quash the conviction and set aside the sentence of twenty years. As stated in Wakesho (*supra*) I substitute the same with a special finding that the Appellant did the act charged but was insane. The Appellant shall be taken to a mental hospital for confirmation of his current status and shall be set free thereafter on condition that he continue with his treatment and it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 26th DAY OF JUNE 2024

J. WAKIAGA

JUDGE

In the presence of ;

Accused – Present virtually in Nyeri

Jackline – Court Assistant