Mutunga v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 10480 (KLR) (27 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E038 OF 2023

LM NJUGUNA, J

AUGUST 27, 2024

BETWEEN

STEPHEN KAZINA MUTUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. Njoki Kahara S.R.M in the Magistrate's Court at Siakago Sexual Offence No. E035 of 2022 delivered on 23rd November 2023)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars are that on 19th August 2022 at [Particulars Withheld] Subcounty in Embu County, the appellant intentionally caused his penis to penetrate the vagina and anus of PM a child aged 9 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006, whose particulars are that on 19th August 2022 at 1400HRS at [Particulars Withheld] Subcounty in Embu County, the appellant intentionally touched the anus and vagina of PM, a child aged 9 years with his penis.

2. At the trial, the appellant pleaded 'not guilty' to the charge. The case proceeded to full trial and subsequently he was convicted and sentenced to life imprisonment.

3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 13th December 2023, seeking orders that the appeal be allowed, conviction quashed and the sentence of life imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:

    a. The learned trial magistrate erred in both law and fact by convicting the appellant without considering that the adduced prosecution evidence was inadequate to sustain conviction;

b. The learned trial magistrate erred in both law and fact by convicting the appellant without considering the fact that the prosecution's evidence was uncorroborated and was full of inconsistencies hence sections 163(1) of the *Evidence Act* was not complied with;

c. The learned trial magistrate erred in both law and fact by disregarding the appellant's defense without giving cogent reasons; and

d. The learned trial magistrate erred in both law and fact by considering the prosecution's evidence which was insufficient and unsatisfactory in law.

Further grounds of appeal as stated in the supplementary documents filed together with written submissions were as follows:

e. That the trial magistrate erred in law and facts by convicting and sentencing the appellant based on the evidence of PW1 and PW2 which evidence was riddled with doubts, thus contravening sections 163(1) and 165 of the *Evidence Act*;

f. That the charge sheet was defective contrary to section 214 of the *Criminal procedure Code*;

g. That the case was not proved beyond reasonable doubt as the DNA was not conclusive.

4. A summary of the evidence adduced at the trial is as follows: PW1 was the complainant, a minor, who gave sworn testimony after voire dire. She identified the appellant as her assailant and she stated that on the day of the incident, the appellant was doing some painting at [Particulars Withheld] workshop. That the said MV called her and sent her to buy paraffin worth Kshs.100/= but when she brought it, it seemed too little. That MV asked the appellant to accompany PW1 back to the petrol station to enquire why the paraffin seemed less than what should cost Kshs.100/=. That while on the way back, the appellant knocked her ankles and she fell to the ground then he removed her undergarments, put them in his pocket, covered her mouth with a cloth and defiled her by inserting his penis into her vagina and her anus.

5. That she felt pain and lied to him that she wanted to urinate but she used the chance to run away, leaving her shoes and undergarments behind. That she went and reported the incident to MV who accompanied her back to the scene where they found the appellant sitting on the ground and he said he did not know where the undergarments, were but MV found them in his pocket. She stated that MV called her mother who went to the scene and took her to Embu Level 5 Hospital and the matter was also reported to the police. On cross-examination, she stated that she had told the appellant twice that her mother had forbidden her from walking with men along isolated roads.

6. PW2 was KM, the victim's mother, who stated that her daughter was 10 years old at the time of the testimony and she produced an age assessment report as evidence. She stated that she knew the appellant since he lives in her neighborhood. She stated that on the day of the incident, all her 4 children were at home since they had been sent home from school for lack of school fees. That she received a phone call from MV informing her that PW1 had been defiled and she caught up with them at the sub-chief's office. That after being prevailed upon by MV, the appellant removed PW1's panty and biker from his pocket and he also showed them where he had hidden the victim's shoes. That the appellant's father was also present and the matter was reported at Gachoka Police Station. She stated that she examined her daughter and saw some injuries and fluid coming out of her private parts.

7. PW3 was LM, also known as MV. She stated that on the day of the incident, she had engaged the appellant to paint some assembled doors when he informed her that he had run out of paraffin. That she called PW1 who was playing outside her workshop and sent her to the petrol station to purchaser

paraffin worth Kshs.100/=. That PW1 returned with half of the expected quantity and she decided to go back to the petrol station with her and the appellant to enquire why the paraffin was less.

8. That as they were leaving, a customer walked in and she remained behind as the appellant went with PW1. That after a few minutes, PW1 ran back while crying and told her that the appellant had defiled her. That she resolved to go to the scene but the appellant had also returned to the workshop and he denied all the allegations made against him. That they went to the sub-chief's office in the company of the appellant's father and they also called PW2. That the appellant removed PW1's panty and biker from his pocket and accompanied them to the scene where PW1's shoes were found. The matter was reported at Gachoka Police Station.

9. PW4 was PKM who stated that on the day of the incident, he received a phone call from PW3's husband asking him to go to his workshop where he found the appellant and he was informed of the incident. That he took the appellant, PW1 and PW3 to the sub-chief's office and while on the way, they met the appellant's father. That the appellant admitted that he had committed the act and he blamed it on the devil. That the appellant led them to the scene and also produced PW1's undergarments from his pocket. That the matter was reported at Gachoka Police Station.

10. PW5, Dr. Godfrey Njuki Njiru of Embu Level 5 Hospital produced P3 and PRC forms on behalf of Dr. Phylis, his colleague, whose handwriting and signature he was familiar with. He stated that PW1 had a cut wound on her upper lip and had bruises on her vaginal and anal areas. The hymen was absent. The conclusion was that she had been physically and sexually assaulted.

11. PW6 Christine Matindi, an analyst at the government chemist in Nairobi. She stated that her office received samples for analysis, being pubic hair, blood sample and oral swab from the appellant and Outer genital swab, anal swab and blood sample from the victim. She observed that there were no blood stains on the appellant's pubic hair, the anal swab had no blood or sexual stains and the outer genital swab tested positive for semen. That the semen stains on the outer genital swab from the victim generated a mixed profile that matched the blood sample of the victim and male friction could not be resolved.

12. PW7 was Inspector Teresia Waitherero Maina of Gachoka Police Station who stated that the incident was reported at the police station and the minor's undergarments were found in the appellant's trouser pocket. That she escorted the minor to the hospital for examination, treatment and age assessment since the minor did not have a birth certificate.

13. At the close of the prosecution's case, the trial court put the appellant to his defense. He gave an unsworn statement as DW1 stating that he did not defile the complainant.

14. The trial court analysed the evidence adduced and found that the elements of the offence of defilement had been proved beyond reasonable doubt and the appellant was convicted. He was sentenced to life imprisonment, being the sentence prescribed under section 8(2) of the *Sexual Offences Act*.

15. In the appeal herein, the court directed the parties to file their written submissions but only the appellant complied.

16. It was the appellant's submission that the trial court convicted him without considering that the evidence adduced was not sufficient. He contended that the alleged incident couldn't have happened since it was along an open road used by members of the public and in broad daylight. That the testimonies of PW1, PW2 and PW3 were coached to frame the appellant for an offence he did not commit. That the charge sheet was defective since he was presented in court 6 days after his arrest against the stipulated 24 hours yet the trial court did not consider that flaw under section 72(3)(b) of the *Criminal Procedure Code*.

17. That the time he was held in custody before being presented in court for plea-taking was sufficient for them to create the story and frame him for the incident. He referred to the inconclusive DNA analysis which showed that the foreign DNA from the semen stains could not be resolved. That PW2, PW3 and PW6 colluded to frame him for the offence to avoid paying him his money. That the trial court did not give its reasons for rejecting the appellant's defense but simply stated that the appellant was on a fishing expedition.

18. The issues for determination are as follows:

    a. Whether the charge sheet is defective;

    b. Whether the offence was proved beyond reasonable doubt; and

    c. Whether the sentence meted out to the appellant is harsh and excessive.

19. The appellant has argued that the charge sheet was defective in light of section 214 of the *Criminal Procedure Code* and that he was held in police custody for a period of 6 days before being arraigned. Section 214 of the Criminal Procedure Code provides for circumstances when the charge and the evidence adduced are at variance or in cases when a charge sheet is amended, the accused person should take plea in light of the changes. Section 134 of the *Criminal Procedure Code* states:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

20. From examining the charge sheet herein, the same is compliant with the provisions cited hereinabove since it correctly captures the details of the accused person and the specific offence and particulars thereof. The facts of the case were read out to the appellant and he took plea based on the information contained in the said charge sheet. In other words, the appellant did not fail to understand the charges brought against him on account of the charge sheet. In my view, the charge sheet was not defective. My position is guided by the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) where the court stated thus:

> " The Court of Appeal in *Benard Ombuna v Republic* (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-
>
> > "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

21. Further,a charge sheet cannot be said to be defective, for the reason that the appellant was detained at the police station for a longer period than what is allowed in law, before he was arraigned in Court.

22. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (2) of the *sexual Offences Act* provides the elements of the offence as follows:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;

c. The perpetrator was positively identified.

23. The age assessment report dated 16th November 2022 from Embu Level 5 Hospital shows that the complainant was 9 years old at the time. This is sufficient proof of the complainant's age. The element of penetration was proved through the testimony of PW5 who stated that there were bruises on the vaginal and anal areas of the complainant and the hymen was absent. The conclusion was that the complainant had been sexually assaulted. PW6 also observed that there were semen stains on the outer genital swab of the complainant.

24. On the identity of the assailant, the appellant decried the fact that the testimony of PW1 was not corroborated. When it comes to identification of an assailant in sexual offences, section 124 of the *Sexual Offences Act* guides as follows:

> "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."

25. This provision basically states that owing to the nature of sexual offences (which are often committed in the absence of witnesses besides the victim), the testimony of the victim on identification of the assailant does not need to be corroborated. PW1 narrated that the appellant is the one who defiled her after unsuccessfully trying to get her to use a shortcut. Besides, PW3 testified that the appellant went on the errand with the appellant since she remained behind to attend to a customer. In my view, this is sufficient evidence to identify the appellant as the assailant. The appellant led PW2 and PW3 to the scene and he was found in possession of the complainant's biker and pants which were recovered from his own pockets. In his defence, he gave a very general denial and he did not give an explanation as to how the complainant's biker and pant were found in his pockets.

26. The appellant argues in this appeal that he was not properly identified given that DNA evidence identifying him was inconclusive. According to the government analyst's report, the male fraction of the mixed profile generated from the semen stain on the outer genital swab of the victim could not be resolved. While this may have been true, it does not remove the appellant from the scene of crime nor does it change the evidence proving the 3 elements of the offence. I am not persuaded by the evidence of PW6 and hereby dismiss it. The evidence being wholesomely considered, it is my view that the offence was proved beyond reasonable doubt.

27. The final issue is whether the life imprisonment sentence meted out to the appellant is excessive in the circumstances. The sentence is prescribed under section 8(2) of the *Sexual Offences Act*. The supreme court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain undisturbed/constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> "(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters

> of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

Bearing this in mind, I find that the sentence imposed by the trial court is not to be disturbed by this court

28. For the foregoing reasons, the appeal herein lacks merit and the same is hereby dismissed.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent