DMM v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 11614 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E031 OF 2023

FR OLEL, J

SEPTEMBER 30, 2024

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and sentence of the Hon PM Mayova, Principal Magistrate in Mutomo Sexual offense case No 2 of 2020 delivered on 6.07.2023)

JUDGMENT

A. Introduction

1. The Appellant, Daniel Musyoka Mulu was charged with the offence of defilement contrary to section 8 (1) as read together with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on diverse dated between 22nd and 28th January 2020 in Mutomo Sub-county within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of JM, a child aged 8 years.

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on diverse dated between 22nd and 28th January 2020 in Mutomo Sub-county within Kitui County, he intentionally and unlawfully touched the vagina of JM, a child aged 8 years with his penis.

B. Facts at Trial

3. PW1 the complainant, underwent voire dire examination and gave unsworn evidence. She testified that between 22nd to 28 January 2020 she had visited and stayed with her grandmother, K. During this period, her uncle/ the appellant, who was known as "Kasee" took advantage of her being left alone at home and did bad things to her. On one occasion, the appellant came and told her that he had been

pricked by a needle and asked her to remove the said needle. He subsequently sat on the bed, directed her to remove her clothes, and proceeded to sleep on her. PW1 stated that she felt pain and cried, but the appellant continued to defile her and told her to shut up or he would beat her up. When done he left and went out to the construction site, which was the residence of one Loise.

4. That evening, her grandmother came back but did not inquire from her, if she was ok. The following evening, the appellant again forced her to sleep with him and when she told her grandmother about the incident, she warned her not to tell anyone. Undeterred, she reported this incident to MR who took her to hospital, where she was examined and treated. The appellant was thereafter arrested. PW1 identified the medical treatment notes, P3 and age assessment report. Upon cross-examination, PW1 reiterated that the appellant did "tabia mbaya" to her and confirmed that she had not been coached to lie against the appellant nor was she told to falsely testify against him. She confirmed in re-examination that it was the appellant who defiled her.

5. PW2, AMM testified that he was an uncle to the appellant and was also chair of Nyumba Kumi of the said area. On 22.01.2020 he got information from PW1's grandmother, that the appellant herein had blocked his niece, the complainant from going to school and had also been defiling the minor. He went to their home and found the appellant building a house and the victim was assisting him in carrying bricks and water. He asked the appellant why the PW1 had not gone to school, to which he stated that the child had woken up late. He instructed PW1 to prepare for school but the appellant told him that the child would not leave the compound. He reported the matter to the area chief, who in turn called the OCS and informed him of the obtaining circumstance. The following day around 9.00 pm, the police came and he led them to the appellant's home. They found him sleeping and asked his mother to open the door. She did so and they found the appellant sleeping naked on the floor, and next to him was the complainant, who was also sleeping.

6. PW2 further testified that the appellant's mother was blind and she had got to know that the appellant was sleeping with the minor when they opened the door of the appellant's house, they found PW1 asleep but she had her clothes on, while the appellant was stack naked. The police took photos of him while asleep and proceeded to arrest him. PW1 was taken to the general hospital where she was examined/treated and the doctor confirmed that she had been defiled. PW2 confirmed that he knew the appellant well as he was his uncle. The appellant was 25 years old, and he held no grudge against him, while the minor was 8 years old.

7. PW3 Ruth Mutinda, a clinical officer from Mutomo Level Four Hospital confirmed that she examined and treated PW1 at Mutomo Hospital and subsequently filled in the P3 form which she produced into evidence. PW1 had given a history of having been defiled several times in January 202o, by her uncle Daniel, who had subsequently threatened to kill her if she told anyone. Upon examination, she found that PW1's thighs had a wound, she had a foul smell on her vagina, which had lacerations, and red bruises with a broken hymen. Further, high vaginal swab showed 10-15 pus cells, 3-5 yeast cells and no spermatozoa, syphilis and pregnancy was negative, while urine tests showed 3-5 pus cells. The physical examination and laboratory results confirmed that PW1 had definitely been defiled and she was placed on antibiotics to treat the infection.PW3 also confirmed that there was no evidence of anal penetration.

8. PW4, Kasya Mulu stated that the appellant was arrested on 28.01.2020, and he had a history of having a mental breakdown. Previously, he had broken the door to her house, torn his clothes uprooted crops within the compound, and eaten raw food. She had informed the area chief of her son's condition and sought help to treat him. The appellant had no house and occasionally slept on her bed or in the kitchen. Concerning the defilement incidences, PW1 had not informed her and thus was not aware of the same.

9. PW5, PC Ruth Nafula, the investigating officer stated that on 29.01.2020 she reported on duty and was instructed by the OCS to investigate this case. By this time, the accused had been arrested and was in custody. PW1 informed her that on diverse dates in January 2020 and February 2020, the accused stopped her from attending school and started going with her to the grazing field. Pw4 tried to intervene but all that was in vain. During this period the appellant started sleeping with her and defiled her several times. The area chief was informed he organized for the arrest of the appellant at their home. During the arrest, the appellant was found sleeping with the child. PW5 escorted PW1 to the hospital where she was treated and eventually, she caused the appellant to be charged. PW5 also produced the age assessment report, as an Exhibit before the court.

C. Defence Case

10. The trial magistrate placed the appellant on his defence and explained to him the import of section 211(1) of the CPC. The appellant opted to give sworn evidence and stated that previously before arrest he was earning a living in Narok and had been arrested at night. The issue before the court was material damage to property and not defilement of the minor. He had been unwell and to his knowledge, he had never defiled PW1. Upon cross-examination, the appellant confirmed that PW1 was his niece and he had disciplined her for refusing to go to school. He had not done any wrong and had been framed by his uncle PW2.

11. The Trial Court considered the evidence adduced and found the appellant guilty of the offence of defilement of a minor contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The court considered the appellant's mitigation and proceeded to sentence him to life imprisonment as provided for in law.

D. The Appeal

12. Being wholly dissatisfied by the said judgment and sentence, the Appellant filed his petition of Appeal and raised the following grounds of Appeal;

    a. The learned Trial Magistrate erred in both law and fact when he did not view that the minor had other difficulties with him which is why he was linked to the offence.

    b. The learned Trial Magistrate erred in both law and fact when he did not evaluate the nexus of evidence adduced based on contradictions.

    c. The identity at the scene of the crime was not established, whereby the learned trial magistrate faulted in law by delivering judgement on the said issue.

13. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanour. This court relies on the finding of the Court of Appeal in *Kiilu & Another v Republic*, [2005] 1 KLR 174, where they stated 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 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.
>
> 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; 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."

14. In the case of *Republic v Edward Kirui* [2014] eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another v State by Prosecutor, Tamil Nadu & Another* [2008] INSC 1688 where the case of *Bhagwan Singh v State of M. P.* [2002]4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining whether all or any of the accused has committed any offence or not."

15. I have considered the entire record of Appeal, the trial bundle record and the submissions on record filed by the parties and I find that the issues for determination are;

    a. Whether the offence of defilement was proven

    b. Whether the sentence should be quashed and/or set aside

16. The Appellant was found guilty of defilement contrary to section 8 (1) as read together with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The said sections provide that;

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

17. Three elements to be proven in such a case are;

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant

18. On this question of age, I rely on the case of Fappyton Mutuku Ngui v Republic [2012] eKLR where it was held that:

> " conclusive" proof of age in cases under the *Sexual Offences Act* does not necessarily mean a certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases"

19. The victim testified and stated that she was 8 years old. PW5 corroborated this information by producing the age assessment report dated 25th February 2020, which confirmed the victim's age. No contrary evidence was adduced and as such the court finds that this element was proven beyond reasonable doubt.

20. On the issue of proof of penetration, Section 2(1) of the *Sexual Offences Act* defines penentration as follows;

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

21. PW1 narrated how the appellant took advantage of her grandmother being away from home and proceeded to defile her on her grandmother's bed. Further, the appellant prevented her from going to school and he insisted she helps him undertake construction work which he was engaged in. On one of the subsequent evenings, the appellant again took advantage of her at night and forced her to sleep with him. PW3 the clinical officer confirmed that on physical examination, she had found that PW1's thighs had a wound, she had a foul smell on her vagina, and there were lacerations and red bruises with a broken hymen but there was no evidence of anal penetration. Further, the high vaginal swab showed 10-15 pus cells, 3-5 yeast cells and there were no spermatozoa. Both syphilis and pregnancy tests were negative, while urine tests also showed 3-5 pus cells. From her analysis of the examination and laboratory test results, PW3 produced into evidence the medical reports and stated that she could confidently conclude that there had been penetration, which had occurred several times.

22. The third element is that of identification. PW1 stated that the Appellant is her uncle. PW4 and the appellant too, confirmed and corroborated this fact. This was therefore a case of recognition as the victim knew the appellant well given that he was a family member. Considering the totality of the evidence adduced, I do find that the prosecution did ably discharge the burden and indeed proved that the appellant did defile the complainant. The offence of defilement was therefore proved. The appeal against conviction therefore lacks merit and is hereby dismissed.

23. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

24. The principles guiding interference with sentencing by the appellate court were also properly set out in *S v Malgas* (1) SACR 469(SCA) at para 12, where it was held that;

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court.....however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial

court is marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.

25. Section 8(1) as read with section 8(2) of the *Sexual Offences Act* provides a punishment of life imprisonment for an offender who defiles a minor below the age of 11 years. But be that as it may, the current jurisprudential leaning is for courts to give a definitive sentence. This court is guided by the finding in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR)(7 July 2023)(Judgment)Neutral Citation:[2023]KECA827(KLR)Court of Appeal at Malindi P Nyamweya, JW Lessit and GV Odunga, JJ which was a second appeal by an accused that was convicted of the charge of defiling a girl aged 4½ years. The appellant was sentenced to life imprisonment at the trial court. The appellant’s first appeal at the High Court was dismissed. The appellant further aggrieved filed the instant appeal on grounds that he committed the offence when he was only 18 years old and was a first offender. The Court of Appeal held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. The Court of Appeal partly allowed the appeal, the life sentence was substituted with a sentence of 40 years’ imprisonment. The 40 years were to serve as a deterrent.

26. On account of the new jurisprudential leaning, the appellant has a right to have his life sentence reviewed. Further, I do note that one constant theme that also strongly came out in evidence was that the appellant seems to be of unsound mind and before the plea was taken, he had to be sent for mental assessment. PW4 in her evidence in chief also alluded to the fact that the appellant was unwell and had needed to undergo treatment. The appellant in his defence also stated that he was unwell. I have looked at the mental assessment report dated 3rd March 2020 and the subsequent mental assessment report also dated 9th September 2020. They confirm that the appellant had auditory and visual hallucinations causing him significant mental disturbance as well as insomnia and this had been caused by family discord leading him to have drug-induced psychosis.

27. Though the appellant committed a heinous crime and deserves to be punished, it was important for the trial court to consider the appellant's social background and his family background. Unfortunately, the trial court failed to call for a pre-sentence report and conduct a sentencing hearing as mandatorily required in law and as clearly set out under paragraphs 22.12, 22.13 and 23.1 of the sentence policy guidelines.

28. By virtue of provisions of Article 27(1) of the *Constitution* of Kenya 2010, the appellant has a legitimate expectation to be treated equally before the law and have equal protection and benefit from the law. Sentencing constitutes part of the trial process and indeed where a pertinent process is not undertaken which could favour the appellant, it would constitute an affront to provisions of Article 50(2), (p) of the *Constitution* of Kenya 2010.

E. Disposition

29. Having considered the entire appeal I do find and hold that;

    a. The Appeal against conviction lacks merit and the same is dismissed

    b. The appeal against the sentence is upheld and the same is set aside.

    c. The trial file be returned to Mutomo Principal Magistrate court, for fresh sentencing.

    d. I do direct that the probation office- in charge of Mutomo sub-county, file a new pre-sentence report in Principal Magistrate’s court (SOA) case No 2 of 2020 within the next 30 days of

delivery of this judgement and the Senior Principal Magistrate – Mutomo court to consider the same and resentence the appellant afresh.

30. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 30TH DAY OF SEPTEMBER 2024.

In the presence of:-

Appellant from Kamiti Maximum prison

Mr. Mongare for O.D.P.P

Sam Court Assistant