Mwakichwa v Republic (Criminal Appeal E001 of 2024) [2024] KEHC 12988 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12988 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E001 OF 2024

GMA DULU, J

SEPTEMBER 26, 2024

BETWEEN

DONALD MWALA MWAKICHWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction in Sexual Offence Case No. E016 of 2022 at Wundanyi Law Courts delivered on 18th January 2024)

JUDGMENT

1. The appellant was convicted by the Magistrate's court at Wundanyi for defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 18th September 2022 at around 1600hours within Taita Taveta County, intentionally caused his penis to penetrate the vagina of JMM a child aged 15 years.
2. On conviction, he was sentenced to serve twenty (20) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
   a. That the learned trial magistrate erred in law by failing to appreciate that the evidence of PW1 was a frame up, incredible and devoid of belief.
   b. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that the prosecution did not prove there was no penetration of PW1's genitalia beyond reasonable doubt as required in law.
   c. That, the learned trial magistrate erred in law by failing to appreciate that there were crucial witnesses who were summoned but never called by prosecution.

d. That, the learned trial magistrate erred both in law by failing to consider the appellant's defence yet the same was cogent and believable.

e. That, the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.

4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director Public Prosecutions.

5. This being a first appeal, I have to remind myself of my legal duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see Okeno – vs – Republic [1972] EA 32.

6. The ingredients of the offence of defilement for which the appellant was convicted are firstly, the age of the victim or complainant who should be below 18 years. The second element is sexual penetration even if partial. The third element is the positive identity of the culprit or perpetrator.

7. The burden was on the prosecution to prove all the elements of the offence. Such burden is codified under Section 107 of the *Evidence Act* (Cap.80).

8. In their effort to prove their case against the appellant, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.

9. With regard to the age of the alleged victim, PW1 described a JMM throughout but recorded by the court assistant in the list of witnesses as JM, testified under oath that she was 15 years old when she testified in court on 1st November 2022. She relied on a birth certificate in which the date of birth was entered as 5th February 2007.

10. The said evidence of PW1 on her age, was corroborated by the evidence of PW2 RM her mother, and the birth certificate of JM produced in court as an exhibit by PW5 PC Patrick Lumumba, the investigating officer.

11. In my view, the prosecution proved beyond any reasonable doubt that PW1 was 15 years old when the alleged incident occurred.

12. I now turn to sexual penetration. This element of the offence was testified to by PW1 who stated in court that she left church that day and met someone after 4p.m, who accosted her and pulled her into the bush and had sexual intercourse with her. Thereafter, she ran home and informed her sister about the incident, who informed her father.

13. PW2 the mother of PW1, also testified in court that her husband PW3 LM informed her at 6pm that her daughter (PW1) was not at home, having been so informed by his older daughter.

14. It is in evidence also that when PW2 arrived home, she met the complainant PW1 and interrogated her, and PW1 stated that she had been defiled, and a report thus made to the police.

15. In addition to the above evidence, the medical evidence of PW4 Lilian Sigei a Clinical Officer at Mwatate Sub County hospital, was to the effect that she medically examined the complainant PW1, and found white discharge and epithelial cells in the vagina. The hymen was also broken, but at a much earlier date. The Clinical Officer PW4 thus concluded that there was evidence of sexual penetration on the victim PW1, due to presence of epithelial cells.

16. In my view, from the totality of the evidence on record, the prosecution proved beyond any reasonable doubt that there was recent sexual penetration on PW1.

17. I now turn to the identity of the culprit. The evidence on the identity of the culprit is that of the complainant PW1 alone, who stated in court that the appellant was the culprit. Under the provisal to Section 124 of the *Evidence Act* (Cap.80), such evidence of a single witness victim of a sexual offence, may sustain a conviction, if believable.

18. In this regard, I note that the complainant PW1 mentioned some people like a friend called Z who was with her when she left ACK church that day and met the appellant. That other girl Z was however not called by the prosecution to testify in court and no explanation was given to the trial court on that failure by the prosecution to call this crucial witness.

19. In my view, taking into account the natures of sexual offences and the severity of sentence, the prosecution should have attempted to call this crucial witness in order to remove any doubt as to the truth on the identity of the culprit, or to confirm whether indeed the victim herein at least met the appellant that day as alleged.

20. As the evidence on record stands, there remains a reasonable doubt in my mind as to whether PW1 was truthful and whether the appellant was the culprit. The benefit of that doubt has to be given to the appellant, which I hereby do. I thus find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit. For that reason alone, I will allow the appeal and release the appellant.

21. I note also that the prosecution produced in court the original birth certificate of the complainant PW1, which should have been released by the trial court to the complainant, as it is a personal identity document. The court should only have retained a certified copy. I will thus order the release of the original birth certificate of the complainant PW1.

22. Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence.

23. I order that the appellant be set at liberty unless otherwise lawfully held.

24. I also order that the original birth certificate of the complainant PW1, be released to the Director Public Prosecutions by the Deputy Registrar of this court, to hand over to the complainant, and a certified photocopy of same be retained in the court file.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for State