JNM v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 11323 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11323 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E029 OF 2023

GL NZIOKA, J

SEPTEMBER 25, 2024

BETWEEN

JNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. J. Ndengeri Principal Magistrate (PM) delivered on; 27th April 2023, vide Chief Magistrate's Criminal Case S/O No. 48 of 2016 at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court charged vide Chief Magistrate's criminal case sexual offence No. 48 of 2016, with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offence *Act No. 3 of 2006* (herein "the Act")

2. The particulars of the charge sheet states that, on the 29th day of July 2016 in Gilgil Sub-County within Nakuru County, he unlawfully caused the penetration his male genital organ (penis) into the female genital organ (vagina) of PNN, a girl aged 4 years old.

3. The appellant was also charged in the alternative count with the offence of indecent act with a child contrary to section 11(1) of the Act.

4. The particulars of the alternative count states that on 29th day of July 2016 in Gilgil Sub-County within Nakuru County, he committed an indecent act with a child namely PNN a child aged 4 years by touching her private parts (vagina) with his private parts (penis).

5. The appellant was arraigned before the court on 5th August 2016 but the plea was deferred as the learned trial Magistrate observed that "he had signs of insanity".

6. On 19th August 2016, the trial court was informed that the appellant was still unfit to stand trial. Additionally, his mother produced documents showing the appellant was a mental patient. The trial

court directed that the appellant be escorted to Mathari Mental Hospital for treatment and/or further assessment.

7. On 13th December 2017, the learned state counsel informed the court that the appellant had recovered. The matter was set down for hearing 8th March 2018.

8. On the material date, the case proceeded to hearing whereby two (2) witnesses testified and it was adjourned to 28th March 2018 and then to 14th June, 2018. However, the case did not proceed and notably on 17th July, 2018 the trial court observed the appellant looked mentally disturbed.

9. Apparently the case was adjourned for quite a long time with the third witnessing testifying on 1st August 2019 and the last witness five years thereafter on 1st March, 2023, when the prosecution closed its case.

10. The appellant was placed on his defence but did not offer any defence.

11. At the conclusion of the trial, the learned trial Magistrate found that the prosecution had adduced adequate evidence to convict the appellant and convicted him on the main count. He was then sentenced to serve term of fifty (50) years imprisonment.

12. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced: -

    a. That, learned Magistrate erred in fact and law by not aappreciating that the appellant did not defile the minor all the evidence tendered by the prosecution witnesses was inconsistent.

    b. That the learned Magistrate erred in putting so much weight on the evidence of the minor notwithstanding that her testimony was unsworn.

    c. That the learned Magistrate erred in law and fact by relying on evidence produced by prosecution witnesses despite the same being inconsistent with the charges.

    d. That the learned Magistrate erred in law and fact by relying on the evidence of the complaintant's mother despite the same being hearsay.

    e. The learned Magistrate erred in law by not appreciating that the appellant is not a person of sound mind.

    f. The learned Magistrate erred in law and fact by making own conclusion that the appellant had recovered from a illness and was fit to stand trial.

    g. The learned Magistrate disregarded exculpatory evidence given by the prosecution witnesses.

    h. The learned Magistrate erred in fact and law by failing to appreciate that the charge sheet as presented was fatally defective.

    i. That the learned Magistrate erred in fact and law by allowing a P3 to be produced by the person who was not the maker.

    j. That the learned trial Magistrate erred in fact and law by not informing the appellant of his right under section 200 of the CPC.

    k. That the learned Magistrate erred in fact and law by failing to take into account the 8 years that the appellant has been in custody/ remand.

13. As the appellant prays for the following orders: -

a. An order setting aside the judgment and sentence of the Chief Magistrate Court made on 14th June 2023 in Cr. No. SO 48 of 2016 against the appellant;

b. Spent

c. Costs of this appeal be borne by the respondent

14. The appeal was disposed of by filing of submissions. The appellant in submissions filed on 6th May 2024, in which he abandoned grounds 10 and 11 of appeal.

15. The appellant submitted that the trial Magistrate erred by giving words used by the complainant new meanings that were incriminating. That, the complainant in her testimony stated that the appellant stated that tissue and stick were inserted in her anus but the trial Magistrate found it to mean a penis.

16. Further, the trial court created a narrative not borne by the trial court record which narrative is that the appellant threatened the minor and asked her not to tell anyone but no such evidence appears on the record.

17. Additionally, the trial Magistrate held that, the appellant penetrated and/or inserted an object in the complainant's private parts while on top of her yet the complainant testified that both her and the appellant were fully clothed.

18. The appellant cited the case of; Burunyi & Anothers vs Uganda Cr. Appeal No. 1968 EA 123 where it was stated that the court's duty is not to stage manage the prosecution case or make a case against the accused but to see justice is done according to the law on the evidence before it.

19. The appellant argued that, the trial court erred in relying on evidence produced by the prosecution's witnesses which was inconsistent. That, the complainant and PW2 gave varying evidence as to who the complainant reported the incident to first. Further, there was inconsistency on when the offence was committed with PW2, PW3 and PW4 stating it occurred on 29th July 2016 while PW4 stated it was reported on 20th July 2016.

20. The appellant further submitted that, the trial Magistrate erred in relying on the evidence of PW2 which was hearsay. That from evidence adduced, the complainant first reported the incident to her grandmother however, the grandmother was never called as a witness to corroborate the evidence of PW2.

21. Further, the trial Magistrate failed to appreciate that the appellant was not a person of sound mind prior to the date of the offence and throughout trial. That, on two occasions the appellant was referred to Mathari Mental Hospital for treatment but there was no evidence to indicate the state of mind of the appellant at the time of committing the offence, or any time during the trial and the trial court did not interrogate his mental state.

22. He cited section 12 of the Penal Code (cap 63) Laws of Kenya, and the case of Leonard Mwangemi Munyasia vs Republic (2015) eKLR where the Court of Appeal stated that: -

> " We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the

accused person. There is also medical history of the accused person to be considered as the backdrop."

23. Lastly, the appellant faulted the trial Magistrate for allowing PW3 Dr. David Kuria Samson to produce the P3 and PRC forms without laying a basis why the maker, Dr. Masinde, was not called to produce them. That while the medical documents produced are admissible by dint of section 77 of the *Evidence Act* as being genuine and authentic, a basis should be laid why the maker cannot be called in accordance with section 33 of the *Evidence Act*.

24. That under section 48 of the *Evidence Act* (cap 80) Laws of Kenya, expert evidence must be tendered by an expert, however the prosecution did not lay a basis for why PW3 Dr. Kuria who was competent to produce the evidence. Furthermore, no evidence was led to show that PW3 Dr. Kuria had worked with Dr. Masinde and knew his handwriting and signature.

25. However, the respondent in submissions dated 11th December 2023 argued that the elements of defilement were proved to the required standard. That, the age of the complainant was proved by an age assessment report produced in court that indicated she was 4 years old. That it was corroborated by the evidence of the complainant's mother and the P3 form which indicates the age of the complainant as 4 ½ years old.

26. Further, penetration was proved through the evidence of the complainant on how the appellant waylaid her and took her into her bush and penetrated her vagina with a stick before inserting tissue in her vagina and anus. Further, the medical evidence showed the complainant had bruises in her vaginal and anal areas that was consistent with defilement.

27. Furthermore, the appellant was properly defiled by the complainant who informed PW2 that she was defiled by their neighbour N. PW2 confirmed he knew N for over five (5) years. That, the prosecution evidence was unshaken by the appellant's defence which was mere denials and urged the court to uphold the sentence imposed by the trial court.

28. At the conclusion of the arguments by the parties and in considering the material placed before the court, I note that the role of the 1st appellate court as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that this court did not benefit from the demeanour of the witnesses.

29. In evaluating the evidence herein I find that, the appellant was convicted of the offence of defilement. The elements of the offence are settled in the case of; Agaya Roberts vs. Uganda, Criminal no. 18 of 2002, and Bassita Hussein vs. Uganda Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

30. In the instant matter, the evidence of age of the complainant was led by the mother who referred to what is recorded as; "age assessment –PMFI-2". The witness further stated "the victim is 5-6 years old. She was born in February 10th 2010"

31. PW4 No. 86xxx PC Paul Komen produced an age assessment reporting showing the complainant was 5-6 years old as at the date of examination being; 21st February 2018, while the alleged offences took place on 27th July 2016. Therefore, the age element was proved adequately.

32. As regards penetration, it was the evidence of PW3 Dr. David Kuria that upon examination of the complainant's by Dr Masinde, it was established the hymen was broken and missing as indicated in the P3 form. However, although PW3 states that the complainant had lacerations on her vaginal walls, it

is not indicated in the P3 form. But Dr Masinde indicated in closing remarks that "the complainant had signs of penetration forced in nature".

33. The afore medical evidence supports the evidence of PWI the complainant that, foreign material was inserted in her private parts. She stated that: "the appellant removed tissue from his pockets and stuck it in "the part used to go for long call". Further, "he penetrated her using a piece of stick".

34. Based on the afore evidence, it is the finding of this court that penetration was proved.

35. The third element is the identity of the perpetrator. PW1 referred to the appellant by his name as "N" and identified him in the dock as the person who committed the offence. She testified that he was known to her prior to that date.

36. PW2 PN, the complainant's mother, testified that the appellant was their neighbour and worked as a casual worker in their home and that she had known him since his childhood.

37. As such, based on the aforesaid, the appellant was well known to the complainant and the mother. He did not adduce any evidence to rebut the evidence of these witnesses.

38. The next question is whether the appellant committed the offence. First and foremost, the appellant did not defend himself against the charges levelled against him. But it suffices to note that the burden of proof lies on the prosecution to prove the case beyond reasonable doubt.

39. In this matter the appellant was convicted of the offence of defilement. The same is created under section 8 (1) of the Act which states that: -

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

40. In the same vein "penetration" is defined under the Act as follows:

    " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

41. The key words in the afore definition are, "genital organs".

42. The evidence of PW1 the complainant was that the appellant inserted a "tissue" and "stick" into the place used for a long call. She told the mother the same and the mother testified to that effect. These two items are not "genital organs" and therefore fails to support the charge of defilement

43. However, the action of the appellant was definitely sexual assault.

    Section 5(1) of the Act define sexual assault as:

    (1) Any person who unlawfully—

        (a) penetrates the genital organs of another person with—

            (i) any part of the body of another or that person; or

            (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

44. In the given circumstance the appellant penetrated the complainant's body by insertion of the "tissue" and "stick" which qualify as "objects". Consequently, the conviction of the appellant on defilement charge cannot stand and is set aside accordingly.

45. In further analysis of the evidence, though not raised as a ground of appeal, I note that appellant never took plea in this matter. The trial court's record indicates (as set out herein under paragraphs *5* to *10*) that the plea was deferred the first day the appellant was arraigned in court on ground of his mental instability but was never administered thereafter.

46. The question is: does the failure to administer the plea render the entire proceedings a nullity. In that regard section 207 of the Criminal Penal Code states that: -

> (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

47. Further, the Court of Appeal in the case of JAO v. Republic [2011] eKLR stated that: -

> " The requirement under section 207 of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held.

48. Similarly, section 382 of the Criminal Procedure Code provides that: -

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

49. In relation to the afore, the Court of Appeal in the case David Mutune Nzongo v Republic [2014] eKLR cited with approval the decision in David Irungu Murage & Another v. Republic, Criminal Appeal No. 184 of 2004 at Nakuru, (unreported) where it held that:

> " The issue that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of the opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code"

50. Pursuant to the afore, it is the finding of this court that the appellant fully and effectively participated in the trial and did not suffer any prejudice as he was given the opportunity to cross examine the witnesses and even defend himself. That said, the trial courts should be much more careful to follow the law and accord the suspects a fair trial as envisaged under article 50 of *the Constitution* of Kenya, 2010.

51. The other issue raised relates to the appellant's mental status at the time of alleged commission of the offence. The plea was not administered as he was said to be mentally unfit. The mother availed in court medical evidence of his historical mental instability. The trial court committed him to Mathari Mental and Referral Hospital for treatment.

52. The question is what was his state of mind at the time of commission of the offence?

53. It suffices to note that section 12 of the Penal Code provides that: -

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

54. Further, the Court of Appeal in the case of; Leonard Mwangemi Munyasia v Republic [2015] eKLR stated that:

> " Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.
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> Both section 12 aforesaid and the McNaughten Rules recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other."

55. It is however, noteworthy that the accused person bears the responsibility to prove insanity on a balance of probability. In that respect the Court of Appeal in the case of; *Hirbo v Republic (Criminal Appeal 27 of 2021)* [2023] KECA 249 (KLR) (3 March 2023) (Judgment) stated that:

> " With regard to the burden of proof, the law is that the burden of proof lies on the defence to show that the accused person suffered mental challenges at the time of committing the offence. This principle of law was stated by this Court in C N M vs. Republic [1985] eKLR thus:
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> > "...where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while this burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could not have formed the intent to kill the deceased."

56. Be that as it were, the trial court is also expected to consider the medical history of the accused and his conduct during the trial. In that regard the Court of Appeal stated in the case of; Leonard Mwangemi Munyasia v Republic (supra) that: -

> " We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.
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> ... Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. ... It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action."

57. In the instant matter, the medical records produced and the committal of the appellant to a mental hospital on several occasions was clear evidence of his mental insanity and the trial court should have inquired into his state of mind at the time the offence was committed. This was the finding too in the case of *Republic v EVK (Criminal Case 12 of 2016)* [2023] KEHC 1538 (KLR) (22 February 2023) (Judgment) where the Court of Appeal observed that: -

> " 36. The medical reports provided though admittedly not well detailed, indicates clearly that the accused was treated for mental illness. The record also shows that the accused was taken for treatment at Mathari Hospital a renowned medical facility attending patients with mental illness and/or disorders. It is not very clear from the medical records how long the accused had been treated there, but when the accused was presented for plea, the court was informed that he was unfit to plead. Later, another report was presented showing that the accused was then mentally fit to plead. The mental state of the accused at the time of commission of the offence is not captured but the actions made by the accused on the material day as narrated by PW1 is indicative of a person with a mental disorder. PW1 stated that he slit two chickens by the neck and threw them at her and took PW5 (his uncle) with the help of other villagers to subdue him. That in my view, shows that the accused at the time, was suffering from a disease of the mind and was not in control of his action at that time".

58. In the circumstances of this case, it is likely and I hold so that the appellant was mentally unstable at the time of the commission of the offence. If he wanted to defile the complainant and was in normal mental state, he would likely use his genital organ.

59. The upshot of the afore is that, the conviction herein on defilement is set aside and substituted with conviction on sexual assault and the appellant is thus guilty but insane as provided for under section 167 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

60. As regards sentence, the period of fifty (50) years is set aside and substituted with an order of guilty but insane. The appellant shall be detained at President's pleasure.

61. The appellant, who has been in custody since his arrest on 5th August 2016 and shall forthwith be taken for medical attention and a report availed to court to ascertain where he should be detained and/ or be taken to a mental hospital for medical treatment where he was to remain until such time as a psychiatrist in charge of the hospital certified that he was no longer a danger to society or to himself.

62. The Hon. Deputy Registrar of the court shall forthwith serve this order to the relevant authorities stipulated under section 166 of the Criminal Procedure Code for necessary action.

63. That then is the order of the court

DATED, DELIVERED AND SIGNED ON THIS 25TH DAY OF SEPTEMBER, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mbere for the appellant

The appellant present virtually

Mr. Ndiema for the respondent

Mr. Komen: Court Assistant