Mafusa v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 11524 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E047 OF 2023

GMA DULU, J

SEPTEMBER 25, 2024

BETWEEN

SHADRACK MWAMBURI MAFUSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction in Sexual Offence Case No. 13 of 2020 at Taveta Law Courts delivered on 3rd February 2023 by Hon. D. M. Ndungi PM)

JUDGMENT

1. The appellant herein was convicted by the Magistrate's court of 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 unknown dates in the month of June 2020 at unknown time in Taveta Sub County within Taita Taveta County, intentionally caused his penis to penetrate the vagina of RMM a child aged 13 years.
2. On conviction, he was sentenced to serve nineteen and a half (19 ½) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following amended grounds of appeal:-
    a. That the learned trial magistrate erred in both law and fact by convicting him yet the charge of defilement was not proved.
    b. That, the learned trial magistrate erred in both law and fact by convicting and sentencing him in reliance on the medical evidence of PW4 which is scanty and insufficient to sustain conviction.
    c. That, the learned trial magistrate erred both in law and fact by convicting him for the offence of defilement yet the prosecution herein did not prove their case beyond doubt.

d. That, the learned trial magistrate erred both in law and fact by failing to adequately consider his defence.

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 start by reminding myself of my duty to independently evaluate the evidence on record afresh and come to my own independent conclusions and inferences, though at the same time bear in mind that I did not have the opportunity to see and hear witnesses testify to determine their demeanour – see *Okeno v Republic* [1972] EA 32.

6. In determining this appeal also, I have to bear in mind that the burden was squarely on the prosecution to prove all the ingredients of the offence alleged against the appellant. This legal burden, is codified under section 107, 108, and 109 of the *Evidence Act* (Cap. 80).

7. This being a criminal case, the standard of proof is beyond reasonable doubt.

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

9. The major elements of the offence of defilement are firstly, the age of the victim who should be below 18 years. Secondly, penetration of a sexual nature, even if partial. Thirdly, the positive identity of the culprit or perpetrator.

10. With regard to the age of the victim, I note that the alleged victim PW1 RM stated more than once in her sworn evidence, that she did not know her date of birth nor her age. She merely said that she was a standard 3 primary school pupil, but was not referred to any document.

11. PW2 JM, who claimed to be her grandmother, however testified that PW1 was 13 years old and relied on a Child Health Clinic card, in the name of RK.

12. On her part, PW5 PC Ann Kimani the investigating officer, produced as exhibit in court a Child Clinic card in the name of RKM.

13. The above evidence on the age of PW1 in my view, is both hazy and contradictory, as the names differ and PW1 did not know her age. From the evidence on record therefore, I find that the prosecution did not prove beyond reasonable doubt that the alleged victim PW1, was 13 years old at the time of the incident.

14. In regard to the age of PW1 also, I will add that PW2 JM the grandmother of PW1, who testified that she lived with PW1 for only two (2) months, did not disclose how and where she came to possess the alleged child clinic card of PW1. In addition, PW5 PC Ann Kimani, the succeeding investigating, also did not describe how she came to be in possession of the child clinic card which she produced in court as an exhibit. Of major concern also is the fact that the names in the clinic card testified to by PW2 and the names testified to by PW5 were materially different, and also different from the names of the victim in the charge sheet. That in my view is created material doubt which discredited the document relied upon on the age of PW1. Thus the age of PW1 was not proved.

15. I now turn to sexual penetration. The evidence of PW1 the alleged victim on record, was that she was sexually penetrated in broad day light. She testified that infact such sexual penetration occurred on two separate decisions.

16. PW3 BWM, a neighbour and shopkeeper at [Particulars withheld] who knew both the appellant and the alleged victim, testified that she witnessed a man in broad day light on 7th July 2020 enter a house, and shortly after, the victim PW1 entered the same house. That this was not the first time such had occurred, and that in the evening, she revealed the incident to PW2, the grandmother of the victim PW1.

17. In addition, the evidence of PW4 Patterson Mwapulu a Clinical Officer at Taveta Sub County hospital was that he examined PW1 and filled the medical report (P3 form) on 15th July 2020, and that though no visible laceration were found, the hymen of PW1 was missing.

18. From the evidence of eye witnesses, and medical evidence on record, I find that the prosecution proved sexual penetration on PW1 beyond any reasonable doubt.

19. As for the identity of the culprit, I find no possibility of mistaken identity in this case where PW1 and PW3 knew the appellant well, and the incident occurred in their neighbourhood in broad day light. I thus find that the prosecution proved beyond any reasonable doubt that it was the appellant who had sexual intercourse with the victim herein PW1.

20. Since however, I have found that the age of the PW1 was not proved beyond any reasonable doubt, I will have to allow the appeal quash the conviction and set aside the sentence.

21. Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Sirima for State

Appellant