Mzee v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 14920 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14920 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E017 OF 2023

JN KAMAU, J

NOVEMBER 28, 2024

BETWEEN

TIMOTHY ANGODE MZEE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Sexual Offence Case No 57 of 2020 on 21st June 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon M. Ochieng (SPM), on the charge of defilement and sentenced to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgment, on 12th July 2023, he lodged the Appeal herein. His Petition of Appeal was dated 23rd June 2023. He set out nine (9) grounds of appeal. He incorporated three (3) Supplementary Grounds of Appeal in his Written Submission that were dated 13th May 2024 and filed on 15th May 2024.

4. The Respondent's Written Submissions were dated 14th November 2024. However, they did not bear a court stamp. In view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry having omitted to stamp the same.

5. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

8. Having looked at the Appellant's Grounds of Appeal and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the provisions of Section 214 of the Criminal Procedure Code were adhered to by the Trial Court with regard to amendment of the Charge Sheet;

    b. Whether or not the Appellant's right to fair trial was infringed upon;

    c. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court dealt with the said issues under the following distinct and separate heads.

I. Right To Recall Witnesses

10. Supplementary Ground of Appeal No (2) was dealt with under this head.

11. The Appellant submitted that the Charge Sheet was amended on 24th August 2022 when all the Prosecution witnesses had testified except No 105934 PC Mary Macharia (hereinafter referred to as "PW 4") who was stood down at the cross-examination. He argued that although he was allowed to plead again to the Charge, he was not given an opportunity to recall any witnesses who had testified for purposes of cross-examination. He pointed out that that was contrary to Section 214 of the Criminal Procedure Code hence accorded an unfair trial.

12. In this regard, he placed reliance on the cases of *Jason Akamu vs Republic Criminal Appeal No 1 of 1983* and Republic vs Francis Waweru Njuki [2006] eKLR amongst others without highlighting the holding that he was relying upon.

13. On its part, the Respondent placed reliance on the case of Domenic Kariuki vs Republic [2018] eKLR where it was held that the spirit of Section 214 of the Criminal Procedure Code was to afford an accused person an opportunity to recall and cross examine witnesses where amendments would introduce fresh element or ingredient into the offence with which he or she had been charged.

14. It argued that in this case, there was no extreme variance between the charge and the evidence tendered to have required the recall of witnesses for cross-examination. It added that under Section 214 (1)(i) of the Criminal Procedure Code, the court was only mandated to call upon an accused person to plead to an amended charge which the Trial Court did in this matter.

15. Notably, the said Section 214 (1)(i) of Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates that:-

> " Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge"

16. A perusal of the proceedings showed that the Prosecution amended the charge sheet twice during trial. On 4th October 2021, the Prosecution stood down the Complainant, GM (hereinafter referred to as "PW 1") and applied to amend the Charge. Its application was allowed by the Trial Court. The Charge Sheet was amended and the charge was read to the Appellant. He pleaded "Not Guilty". A plea of "Not Guilty" was entered against him on both the main and alternative counts and the Trial Court proceeded to take the evidence of PW 1. On 4th October 2021, the Trial Court took the evidence of PW 1 afresh.

17. It took the evidence of the Clinical Officer, Brian Demisi (hereinafter referred to as "PW 2"), that of PW 1's aunt, Jane Illagosi (hereinafter referred to as "PW 3") and No 105934 PC Mary Macharia (hereinafter referred to as "PW 4") on subsequent diverse dates.

18. On 23rd August 2022, the Prosecution stood down PW 4 and applied to amend the Charge Sheet again. The said application was allowed. On 24th August 2022, the charge was read over to the Appellant and once again, he denied the Charge. A plea of "Not Guilty" was entered against him on both the main and alternative counts.

19. A perusal of the Amended charge sheets indicated that the amendment was in respect of the names of the Appellant herein, in that, the first amendment added the name, "Agala" and the second amendment added the name "alias Mzee Sagala". There was therefore no variance caused between the charge and the evidence tendered by the Prosecution evidence as alluded to by the Appellant which would have required the recalling of witnesses for cross-examination.

20. Indeed, no fresh element or ingredient was introduced in the Amended Charge to have warrant a recall of the witnesses. It would have been a total waste of judicial time to recall witnesses merely because the Prosecution had amended his name. The purpose of recalling witnesses was not to give an accused person a second bite at the cherry but it was to ensure that his line of cross-examination was aligned to the facts that had been introduced in the amended charge. Indeed, all the evidence that was adduced during cross-examination of witnesses was to help him or her prepare for his or her defence in the event he or she was found to have had a case to answer.

1. As a charge sheet could be amended at any time before the close of the prosecution's case and the charge read to the accused person to plead again pursuant to Section 214(1)(i) of the Criminal Procedure Code, this court was not persuaded that the Trial Court's duty under Section 214 of the Criminal Procedure Code had been misapplied.

22. In the premises foregoing, this court found and held that Supplementary Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

II. Right To Fair Trial

23. Ground of Appeal No (2) of the Petition of Appeal was dealt with under this head.

24. The Appellant did not submit on this issue. It was therefore difficult to decipher what he intended to appeal against.

25. Be that as it may, the Respondent invoked Article 50(2) of *the Constitution* of Kenya, 2010 and submitted that the Appellant was given adequate time to prepare for his defence. It pointed out that the charges were read to him on 24th November 2020 and the nature of the evidence that the Prosecution intended to rely on was disclosed. It asserted that the Appellant was present throughout the trial which was conducted in a language that he understood and to which he was able to cross-examine the witnesses. It was its case that the Appellant had been accorded a fair trial.

26. Article 50(2)(c) of *the Constitution* of Kenya, 2010 provides that:-

> " Every accused person has the right to have adequate time and facilities to prepare a defence."

27. A perusal of the proceedings of 25th January 2023 showed that the Trial Court delivered its Ruling on a case to answer and the Appellant indicated that he would be giving sworn evidence in his defence and with one (1) witness. The case was fixed for defence hearing on 28th April 2023. When the same came up for hearing on the said date, he indicated to the court that he was ready to proceed with his defence case. He had three (3) months and three (3) days to prepare for his defence case.

28. There was nothing in the proceedings of the lower court to suggest that he was not ready for his defence. If he had not been furnished with documents that the Prosecution relied on in order to prepare for his defence, he ought to have informed the Trial Court before the trial commenced. He did not do so. This court was thus satisfied that he had been given adequate time to prepare for the trial.

29. In the absence of proof of his assertions that his right to fair trial had been infringed upon and/or violated, this court was therefore not persuaded that it should find that the trial was rendered a nullity necessitating a retrial, if at all.

30. In the premises foregoing, Ground of Appeal No (2) was not merited and the same be and is hereby dismissed

III. Proof Of Prosecution's Case

31. Grounds of Appeal Nos (1), (4), (5), (6), (7) and (8) of the Petition of Appeal and Supplementary Ground of Appeal No (1) were dealt with under this head as they were all related.

32. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

33. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

34. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

35. The Appellant did not submit on this issue. On its part, the Respondent cited Rule 4 of the Sexual Offences Rules, 2014 and submitted that the Charge Sheet indicated that PW 1 was a minor aged sixteen (16) years old at the time of the offence. It contended that PW 3 testified that PW 1 was born on 29th July 2003 and that she produced her Birth Certificate showing that PW 1 was sixteen (16) years old. It argued that that the Appellant did not challenge the same and hence, the ingredient of age was proven beyond reasonable doubt.

36. The aforementioned Birth Certificate showed that PW 1 was born on 29th July 2003. The offence herein was committed between 23rd October 2019 and 28th January 2020. The Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about sixteen and a half (16 ½) years old and was therefore a child at the material time.

B. Identification

37. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that the Appellant was positively identified as the perpetrator as he was well known to PW 1 and she could not have been mistaken as to his identity. It pointed out the evidence of recognition was held to have been more reliable and weightier than that of identification of a stranger as held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR.

38. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

39. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "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 (emphasis)."

40. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

41. The incident took place at day time. PW 1 and the Appellant knew each other as they were neighbours. PW 1 referred to him as Mzee Agala and pointed out that he was also known as Sagala in Church. PW 1 testified that the Appellant defiled her twice after he took her to his bedroom. PW 2 told the Trial Court that the Appellant was their neighbour whom they got milk from. Both PW 1 and PW 3 positively identified him by pointing at him in the dock during trial.

42. There could not therefore have been any possibility of a mistaken identity because they were not strangers. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

43. The Appellant submitted that PW 2 did not provide any proof that he penetrated PW 1 on the said diverse dates. He invoked Section 2 of the *Sexual Offences Act* No 3 of 2006 and pointed out that on vaginal examination, there were no bruises nor marks and other parts of the body were normal. He was categorical that presence of pregnancy or spermatozoa in a woman's vagina was not a conclusive proof of penetration as was held in the case of Mwangi vs Republic (1984) KLR 595.

44. He pointed out that PW 1's evidence was full of contradiction, inconsistencies and discrepancies. He argued that although Section 124 of the *Evidence Act* did not require corroboration on sexual offences but it was vital and decisive requirement that the same witness must be reliable to invite the court to believe that she was a truthful witness and not discredited pursuant to Section 163 (1)(c) and 165 of the *Evidence Act*. He added that in order to arrive to a truthful witness, the court needed to consider her demeanor and compare her evidence with other prosecution evidence. In this regard, he relied on the case of Kaluza vs Braeuer 1962 AD 243-267 where it was held that a crafty witness may simulate an honest demeanor and the judge had often but little before him to enable him to penetrate the armor of a witness who told a plausible story.

45. He further submitted that the failure of the Prosecution to call crucial witnesses such as Mercy and Kadenge was fatal to the case. He blamed the Prosecution for not carrying out a DNA examination on the child of PW 1 to prove that he was born as a result of the offence committed herein. In this regard, he relied on the case of Eliud Ouma Agwara Criminal Appeal No 16 of 2016 (eKLR) citation not given) where it was held that the trial court fell into error when it held that DNA results could never be a defence in an offence of defilement. He blamed the Trial Court for disregarding his defence of alibi and that of his witness.

46. On the other hand, the Respondent invoked Section 2 of the *Sexual Offences Act* and contended that the evidence of PW 1 and that of the Clinical Officer, Brian Demisi (hereinafter referred to as "PW 2") proved the ingredient of penetration. It pointed out that under normal circumstances the victim of sexual assault was usually the only witness. In this regard, it relied on the case of Kenneth Mutegi Kilonzo vs Republic [2021]eKLR where it was held that the fact of penetration was proved by the evidence of the complainant and that a court would rely on the evidence of the complainant to convict if it had reasons to believe her.

47. It was its case that the Prosecution evidence was credible with no contradictions and/or inconsistencies on the part of PW 1. It added that the Trial Court addressed its mind to the issues raised and found PW 1's evidence to have been credible and consistent and relied on Section 124 of the Criminal Procedure Code (sic) which gave exception to corroboration in sexual offences cases of a minor.

48. It further contended that the Trial Court adequately considered the Appellant's defence but found the same to have been unconvincing and hence, the Prosecution had proven its case beyond reasonable doubt. It added that failure to conduct a corresponding medical examination of the Appellant was not fatal to its case as the evidence of PW 1 coupled with other corroborating evidence was sufficient to establish the commission of the offence.

49. According to PW 1, on the material date of 23rd October 2019, she was with one Kadenge walking when the Appellant called them to his house. She stated that the Appellant took her to his bedroom,

switched off the lights, tied her mouth with a piece of cloth, removed her uniform and under-garment, laid on her, oiled his penis, put saliva on her vagina and defiled her. She stated that when he finished, he gave Fifty (Kshs 50/=) Shillings.

50. She stated that on another date her slippers were torn and the Appellant asked to go and fix it in his house. When they were in the house, he defiled her a second time. On another day she got home late and PW 3 asked what he had gone to do at the Appellant's house and she informed her that the Appellant had defiled her.

51. PW 3 stated that on 28th January 2020, at around 5.20pm she was at home when her niece came home late and she asked her why she had come late, she told her that she had a sexual relationship with the Appellant. She then took her to hospital for medical examination. She stated that she did not involve the Village elders because it was already a police case.

52. PW 2 confirmed that PW 1 was pregnant when he examined her. He pointed out that she had no other injuries or ailment. He observed that she had a history of defilement with a known person. He produced the Post Rape Care (PRC) Form, P3 Form and Treatment notes as exhibits in support of the Prosecution's case. PW 4 reiterated the evidence of all the witnesses.

53. Notably, the Appellant raised the issue of the age of PW 1's baby in his Written Submissions. A perusal of the proceedings of the lower court showed that when he cross-examined her regarding her baby on 4th October 2021, she stated that she had given birth and that the baby was one (1) month old. As PW 2 had noted that she was pregnant when he examined her on 29th January 2020, it therefore meant that she would have given birth in October 2020. As at 4th October 2021, the baby would have been about one (1) year as the Appellant had submitted.

54. This court perused the handwritten proceedings and noted that the Trial Magistrate indicated that the baby was one (1) month as at the time PW 1 testified. Whereas she found the Appellant's alibi not to have been watertight, she did not appear to have addressed the issue of the baby's age. She could have perhaps noted the disparity so that if it was a typographical error, it could have been re-clarified before she wrote her decision.

55. Having said so, if indeed that was what PW 1 said, the Prosecution's counsel was under a duty to have sought a clarification during re-examination. The counsel did not do so. The lack of clarity of the age of PW 1's baby went to the root of the Prosecution's case. In the absence of such clarity, this court was persuaded to find that the proof of penetration was not proven to the required standard and the benefit of doubt had to be given to the Appellant. The burden of proof did not shift to him but rather it remained with the Prosecution which ought to have ensured that it sealed all the gaps in its case.

56. Notably, the court had power to order DNA testing under Section 36 of the *Sexual Offences Act*. However, the exercise of that power was not couched in mandatory terms. Rather, that power was discretionary.

57. This position has been settled by many cases amongst them the case of Evans Wamalwa Simiyu vs Republic [2016] eKLR wherein the court cited the case of AML vs Republic [2012] eKLR where it was held that the fact of rape or defilement was not proved by a DNA test but by way of evidence.

58. As was held in the case of Mohammed Omar Mohammed vs Republic [2020] eKLR, the key evidence relied on by the court in rape cases and defilement in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report.

59. In view of the fact that four (4) years had since lapsed since the incident herein occurred and it might be difficulty and/or take time to trace PW 1 for a DNA test without delaying the determination of the

Appeal herein and more particularly because it would be unfair to give the Prosecution a second bite of the cherry to amend its omission in ensuring PW 1's evidence was cogent, this court found that it would be best to determine the case on the evidence that it had on record.

60. Accordingly, having analysed both the Prosecution and the Appellant's Written Submissions, this court came to the firm conclusion that the Prosecution did not prove its case to the required standard, which in criminal cases, is proof beyond reasonable doubt as envisaged in Section 108 and Section 109 of the *Evidence Act* Cap 80 (Laws of Kenya).

61. In the premises foregoing, Grounds of Appeal Nos (1), (4), (5), (6), (7) and (8) of the Petition of Appeal and Supplementary Ground of Appeal No (1) of the Petition of Appeal were merited and the same be and are hereby allowed.

IV. Sentencing

62. In view of the fact that the court had already found that the Prosecution did not prove its case, it would not have been necessary to analyse the submissions to determine if there was merit for this court to interfere with the sentence that was meted upon the Appellant herein.

63. However, as this court could be found to have been wrong by the Court of Appeal, it found it prudent to pronounce itself on the sentence that was meted upon the Appellant if it had found him to have been guilty of the offence that he had been charged with. It therefore dealt with Ground of Appeal No (3) of the Petition of Appeal and Supplementary Ground of Appeal No (3) as they were both related.

64. The Appellant placed reliance on the case of Maingi & 5 Others vs DPP & Another [2022] KEHC 1318 [KLR] that was cited with approval by the Court of Appeal in Joshua Gichuki Mwangi vs Republic [2022] eKLR without highlighting the holding he relied therein. He had urged this court to consider imposing on him a least prescribed sentence than the one he was serving and also to direct that his sentence run from the date of his arrest on 22nd November 2020.

65. On its part, the Respondent had submitted that the Appellant's sentence was lawful, befitting of the offence and was imposed after due consideration of the facts of the case. It urged the court to uphold the same.

66. Notably, the Appellant herein was sentenced under Section 8(4) of the *Sexual Offences Act*. The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

67. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful. Bearing in mind that on 12th July 2024 the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra), it would have left the sentence that was meted upon him undisturbed.

68. Recognising that that this court was mandated to consider the period the Appellant spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya), it would have directed that the period between 22nd November 2020 and 7th November 2021 be taken into account while computing his sentence.

Disposition

69. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 23rd June 2023 and lodged on 12th July 2023 was merited and the same be and is hereby allowed. His conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

70. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

71. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE