Mwanda v Republic (Criminal Appeal 7 of 2019) [2023] KEHC 1147 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 1147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL 7 OF 2019

DO CHEPKWONY, J

JANUARY 26, 2023

BETWEEN

STEPHEN MUSAGHA MWANDA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Wundanyi Law Court on 26th day of March, 2019 in Criminal Case No.27 of 2018 – Wundanyi)

JUDGMENT

1. The Appellant, Stephen Musagha Mwanda was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No.3 of 2016.

   The facts are that;

   > "On 18th day of December, at around 12.00 noon in Mwachaba Location of Mwatate Sub-County, intentionally and unlawfully causes his penis to penetrate into the vagina of BM, a girl aged Eight (8) years".

2. The Appellant was also charged with an Alternative Count of Committing an Indecent Act with a Child contrary to section 11(1) as read with section 2(1) of *Sexual Offences Act*, No.3 of 2006.

   The particulars of the offence being that;

   > "On the 18th December, 2018 at around 12.00 noon in Mwachaba Location of Mwatate Sub-County, within Taita-Taveta County, the Appellant intentionally and unlawfully committed an Indecent Act with BM, a girl aged Eight (8) years by touching her private parts using his penis"

3. The Appellant pleaded "not guilty". The case was heard and the Appellant was convicted for the offence of Defilement contrary to section 8(2) of the *Sexual Offences Act*, whereby he was sentenced to serve an imprisonment for life.

4. Being aggrieved by the said conviction and sentence, the Appellant filed an appeal citing the following grounds:-

   a. That the learned trial Magistrate erred in law and fact by not considering my defence.

   b. That the learned Magistrate erred in law and fact by not requesting the prosecution to produce the exhibit.

   c. That the learned trial Magistrate erred in law and fact by not considerate on fractuational confusing in consistent statement of the prosecution witness unreliable and baseless or untrue.

5. His prayer is for the appeal to be allowed, the conviction quashed and sentence set aside.

6. On 23rd October, 2020, the parties were directed to canvass the appeal by way of written submissions. The Appellant filed his submissions on 7th May, 2021 while the Respondent's submissions were filed on 14th June, 2021.

Determination

7. As a first Appellate Court, this court is expected to subject the entire evidence that was adduced before the trial court to a fresh evaluation and analysis while bearing in mind that it neither saw nor heard any of the witnesses testify and give due allowance to that. These principles were ably set out in the well-known case of *Okeno v Republic* [1072] EA 32, where it was stated:-

   > "The first Appellant court must itself weigh conflicting evidence and draw its own conclusions, (*Shantilal M. Rumula v R.* [1957]EA 157). It is not the function of a first Appeal Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the Registrar Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witness".

8. I have read through the entire proceedings of the trial court and alongside the submissions by each counsel in support of their respective cases in consideration of the grounds set in the Memorandum of Appeal. I find that although the Appellant had raised three grounds in his Memorandum of Appeal filed on 9th July, 2019, his submissions, as pointed out by the Respondent's counsel have addressed the following grounds:-

   a. That the trial court failed to conduct the viore dire examination in accordance with section 19(1) of the *Oaths and Statutory Declarations Act*;

   b. That the Appellant was not positively identified;

   c. That there are material contradictions in the evidence of the prosecution's witnesses.

9. With regard to the issue of whether the *voire dire* examination of the Complainant (PW1) was properly conducted, it is the Appellant's contention that the same was not conducted in accordance with section 19(1) of the *Oaths and Statutory Declarations Act* as neither did the trial court record the questions posed to the complainant nor indicate if the Complainant understood the meaning of taking an oath,

hence failed to satisfy itself on the truthfulness or nature of evidence the Complainant was to give. On the other hand, counsel for the Respondent submitted that the voire dire examination was conducted in accordance with provisions of section 19(1) of the *Oaths and Declarations Act* as the record clearly shows that the trial Magistrate recorded it as a narrations. His argument is that the particular Section does not prescribe the manner in which a voire dire examination should be conducted or a particular form to be applied in the course of such administration.

10. The record clearly shows the trial Magistrate's proceedings on the voire dire examination as follows:-

> " Voire dire for the Complainant;
>
> I am BM. I am 7 years old. I study at [Particulars Withheld] Primary and am in class two. I go to church pastored by Mr. Mwanda. I understand the meaning of saying the truth and lying. Lying is not good but the truth is good"
>
> Court:
>
> I elect the minor complainant to give an unsworn evidence"

11. Section 19(1) of the *Oaths and Declarations Act* provides as follows:-

19(1)

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap 75), shall be deemed to be a deposition within the meaning of that Section".

12. From this provision, as noted by Justice Gikonyo in the case of *Julius Kiunga M'birithia v Republic*[2011],

> " Where a child of tender age is called as a witness in a proceedings, there are two things the trial court must be severally satisfied about, namely;
>
> 1. Whether the child understands the nature of an oath; or,
>
> 2. If the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. The inquiry should graduate to the second level if the child does not understand the nature of the oath; then the trial court should determine if he possesses sufficient intelligence to justify the reception of the evidence, and he understands the duty of talking the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. But in both instances, the child is triable to cross-examination".

13. A scrutiny of the voire dire examination recorded by the trial Magistrate clearly shows that the information recorded from the child (PW1) are answers elicited from questions asked except it is not indicated whether the trial Magistrate was satisfied with the truthfulness of the child. However, the trial Magistrate, in electing the child to give unsworn evidence clearly shows that she made a specific finding before receiving the Complainant's evidence, hence complied with the requirements of section 19(1) of the *Oaths and Statutory Declaration Act*. In the circumstances, the argument by defence counsel that the trial Magistrate did not comply with section 19 of the *Oaths and Statutory Declarations Act* fails.

14. On the issue of the Appellant not having been positively identified, both the Appellant and Respondent concede that the Appellant was not positively identified. Upon reading the proceedings before the trial court, I find that PW1 told court that she did not know the Appellant's name but knew him by face. It is worth-noting that she gave unsworn evidence. PW2, mother to the Complainant, although referred to the Appellant as the person who had defiled PW1, did not tell court how she came to know it was him. In cross-examination, she said that the Appellant was confirmed as PW1's assailant by her children. PW4 testified that he interrogated the Complainant and she told him that the person who had defiled her had a sickle and a sack and gave his name as Jeremiah. He said he brought two suspects, (not indicated why he did this when he had already been given a name) being the Appellant and the said Jeremiah, and the Complainant picked on the accused person.

15. The inconsistency in the evidence of the prosecution witnesses in regard to the Appellant's identify clearly casts a doubt on whether or not the Appellant was positively identified by the victims whose benefit goes to the Appellant.

16. Furthermore, there are more contradictions in the evidence of PW2 who told court that the Complainant was with her siblings when the incident happened to her and PW6, the Investigating Officer told court that PW1 told her on interrogation that she was alone and had gone to look for her sister.

17. Having analyzed the entire evidence and Judgment of the trial court, I find that although it is not in dispute that the Complainant was a child of tender years and she was found to have been penetrated, hence defiled, the prosecution failed to prove beyond reasonable doubt that the Appellant was the person who defiled her.

18. In the circumstances, as conceded by both the Appellant and Respondent the appeal has merit and is hereby allowed. Subsequently, the conviction is quashed and sentence meted against the Appellant set aside.

    It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person

Mr. Sirma counsel for the State

Court Assistant - Gitonga