Mutevu v Republic (Criminal Appeal E089 of 2021) [2023] KEHC 209 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E089 OF 2021

GMA DULU, J

JANUARY 24, 2023

BETWEEN

JUSTUS MUTHAMA MUTEVU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original judgment of Hon C A Mayamba in Kilungu Principal Magistrate's Court (S O) Case no 16 of 2020 pronounced on December 10, 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) (4) of the *Sexual Offences Act* no 3 of 2006. The particulars of the offence were that on June 20, 2018 at [particulars withheld] Sub Location, [particulars withheld] Location in Mukaa Sub-County intentionally caused his penis to penetrate the vagina of INM a child age 17 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of offence being that on the same date and at the same place, intentionally touched the vagina of INM a child aged 17 years with his penis.
3. He denied both charges. After a full trial, he was convicted of the main charge of defilement and sentenced to 13 years imprisonment.
4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
    1. That the trial magistrate erred in convicting him without considering that there was no evidence to prove penetration and more so the offence of defilement to the required standard in law of beyond reasonable doubt in criminal cases.

2. The learned magistrate erred in failing to consider that there was no evidence to prove the alternative count of committing an indecent act with a child either, hence erred by convicting him on the main count based on extraneous evidence which was motivated by his own opinion without relying on evidence on record.

3. The trial magistrate erred by failing to observe that the prosecution case was full of contradictions and inconsistencies, especially from the evidence of prosecution witnesses which coupled with poor police investigations rendered the prosecution case unbelievable, implausible and hence unreliable to attain a conviction.

4. The learned trial magistrate erred by convicting him without properly applying section 124 of the *Evidence Act* (cap 80) and using the same to establish the offence of defilement when the same was not proven beyond reasonable doubt.

5. That the magistrate erred when he dismissed his sworn defence without giving cogent reasons and failing to reconcile the numerous discrepancies in evidence on record and comply with section 169 of the *Criminal Procedure Code*.

5. The appeal was canvassed through written submissions. In this regard I have perused and considered the submissions filed by the appellant and the submissions filed by the Director of Public Prosecutions.

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Shantilal M Ruwala vs R* (1957) EA 570 and *Okeno – vs- R* (1972) E A 32.

7. 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.

8. The elements of the offence of defilement are first the age of the victim (complainant) who should be below 18 years, secondly, penetration of a sexual nature even if partial. Thirdly, the identity of the culprit. This being a criminal case, each of these elements of the offence had to be proved by the prosecution beyond any reasonable doubt – see section 107 of the *Evidence Act* (cap 80) and *Woolmington vs DPP* (1936) AC 462.

9. With regard to the age of the complainant Pw1 INM, she stated that she was born on January 28, 2001. She relied on a birth certificate.

10. Her mother Pw3 EM also gave the date of birth as January 28, 2001. The birth certificate was produced in evidence as an exhibit.

11. I find and hold that the complainant was 17 years old at the date of the alleged offence herein.

12. With regard to penetration, the complainant Pw1 stated that she was penetrated sexually on that day. She gave a narrative of how someone coursed her to go into a house, and then had forceful sexual intercourse with her.

13. The medical evidence adduced by Pw4 Jadeson Nzivo a Clinical Officer at Sultan Hamud however, did not show any evidence of sexual trauma. It was stated by the witness that the medical notes from Kiu dispensary where the complainant was initially treated, somewhat were not placed before the medical personnel at Sultan Hamud hospital to prepare the P3 form.

14. Thus the evidence on sexual penetration is only that of the complainant Pw1. Is this evidence saved by the provisal to section 124 of the *Evidence Act*?

15. In my view, the evidence of Pw1 the complainant is not believable and thus cannot be saved by the provisal to section 124 of the *Evidence Act*. The reason is that the medical notes from Kiu dispensary were not availed to assist in preparation of the P3 form entries. In my view, these notes would have shown if there were any signs of forceful sexual penetration as alleged by Pw1.

16. Though the complainant Pw1 produced alleged treatment notes at the hearing, as the same were not produced by medical personnel nor identified by medical personnel, their authenticity is in doubt, and the benefit of doubt has to be given to the appellant and I so do.

17. Thus there being no evidence of forceful sexual penetration as alleged by Pw1, I find that the prosecution did not prove beyond any reasonable doubt that there was sexual penetration as alleged.

18. With regard to the identity of the culprit, I also find that the appellant was not proved to be the culprit. In this regard, I note that Pw2 CNP testified that she saw the appellant pass with a girl. However, she did not identify the girl as Pw1. Secondly; it is clear from the evidence on record that the complainant Pw1 had another sexual partner JPM, against whom a similar sexual offence case was filed.

19. In those circumstances, even if it was true that sexual penetration did occur, it might as well be that same was done by someone other than the appellant.

20. Lastly, I note that the appellant raised an alibi defence. He has complained on appeal, that the trial magistrate dismissed his defence without cogent reasons.

21. In my view, the trial court considered the defence of the appellant and came to the correct conclusion with regard to the alibi defence that it was raised too late in the day, as the appellant had ample opportunity to indicate such defence much earlier in the prosecution case through cross-examination, as he was represented by counsel. He did not do so, and I agree with the trial court that the alibi defence was an afterthought.

22. To conclude based on the reasons above; I find merits in the appeal herein. I thus allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JANUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE