SCM v Republic (Criminal Appeal E031 of 2021)
[2023] KEHC 2710 (KLR) (Crim) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2710 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E031 OF 2021

PM MULWA, J

MARCH 31, 2023

BETWEEN

SCM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence in Makadara Criminal Case No. 237 of 2019 – Hon. J. Kibosia, PM)

JUDGMENT

1. The appellant, SCM was charged and convicted with the offence of sexual assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of the *Sexual Offences Act*. The particulars were that on diverse dates between 15th September 2019 and 17th September 2019 within Nairobi county, unlawfully used his fingers to penetrate the vagina of MN.

2. In the alternative, the appellant was charged with committing indecent acts with a child contrary to Section 11(1) of the same Act. The particulars were that on diverse dates between 15th September 2019 and 17th September 2019 within Nairobi county, intentionally touched the vagina of MN a child aged 6 years with his fingers.

3. He denied the charges and the case proceeded to full hearing. The prosecution's case, in summary as narrated by PW1, the victim, was that the appellant inserted his fingers in her private part and she felt pain.

4. PW2, the victim's mother and wife to the appellant testified that she saw a Facebook post by the appellant that he had been arrested for defiling PW1. When she asked PW1 about it she confirmed that it was true.

5. According to PW3, owner of the day care. She stated that she would watch over PW1 and her sibling and take them home at 9PM. She then noticed that there was a change with PW1 where she would refuse to go home, instead cling to her and start crying. She stated that she informed the appellant about it. On 15th September 2019 she testified that PW1 informed her that the appellant used to insert her fingers into her private parts and threatened to beat her if she told anyone. She further stated that she informed the school, then reported the incident to the police station after which she took PW1 to the hospital.

6. PW4, the Clinical Officer testified that she examined PW1 on 17th September 2019. On examination, she noted that there were no injuries on the body, however she found that the vagina was reddish in color, hymen was perforated/broken, anal region was normal, outer genitalia was normal.

7. PW5, medical/social worker testified that on 17th September 2019 she received a call about a sexual assault. She instructed that the victim be taken to Tumaini Clinic for treatment then a report to be made at the police station. It was her testimony that she made rescue arrangements for the victim and her sibling.

8. PW6, No.75152, CPL Ruth Wambui Waweru of Villa Police Post Embakasi testified that she was on duty when PW3 made a report of sexual assault. She booked the case and escorted PW3 and the victim to Mukuru for checkup and a P3 form was filed. She testified that they rescued the victim and her sibling and then arrested the appellant. She charged the appellant with the offence for which he was convicted.

9. Upon being placed on his defence, the appellant denied having committed the offence as alleged and claimed that the charge was a fabrication by PW3 who wanted an affair with him which he declined because she was married. In addition, he stated that the police demanded a bribe of kshs. 50,000 to release him but he refused.

10. In support of his defence, the appellant called his neighbor as DW2 who confirmed that the appellant usually took his children to daycare. That he could leave the door open for PW3 to pick the children.

11. In her judgement, the learned trial magistrate found that the prosecution had satisfied all the ingredients of the offence and thus had proved their case beyond reasonable doubt and convicted the appellant of the offence of sexual assault and sentenced him to 10 years' imprisonment.

12. Being aggrieved by the conviction and sentence he preferred this appeal.

13. As the first appellate court my duty is to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses. In *Kiilu & Another v Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate court as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

14. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court and the written submissions filed on behalf of the parties. I have also read the judgment of the trial court. Having done so, I find that the key issue for my determination is whether the prosecution established the charges brought against the appellant to the required standard of proof beyond any reasonable doubt.

15. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that;

    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;

        b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

    2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

16. The Court of Appeal in the case of *John Irungu v Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows;

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

17. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the appellant for that purpose. The evidence by the complainant was that the appellant inserted his fingers into her private parts. PW3 testified that the complainant informed her that the appellant inserted his fingers into her private parts. PW4 confirmed her hymen to be broken and that she had an infection. In my view, PW1's evidence is to that extent corroborated by PW4.

18. On my own analysis of the evidence there was no doubt penetration was confirmed by the findings of the clinical officer that there were bruises on the vagina. The appellant was the father of the complainant. There was no truth in the appellant's defence that PW3 had fabricated the case due to a grudge. The prosecution witnesses had no reason to lie against the appellant. The appellant was convicted on cogent and credible evidence. I am thus satisfied that the trial court properly convicted the appellant and that his alibi evidence did not shake the evidence by the prosecution which was quite overwhelming against him.

19. On sentence, the appellant stated that the learned trial magistrate did not take into account section 333(2) of the CPC.

20. Upon perusal of the lower court record, it is noteworthy that, before sentencing the appellant, the court stated as follows,

> " ...time spent in custody to be considered."

21. From the aforesaid, it is clear that the trial court addressed itself to the provisions of section 333 (2) of the *Criminal Procedure Code*. The court took into account all the relevant factors which it was obliged to consider in assessing sentence. In the result, the appeal ground on sentencing fails.

Final Orders

22 The appeal against both conviction and sentence be and is hereby dismissed.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MILIMANI

THIS 31ST DAY OF MARCH, 2023

.....

P.M. MULWA

JUDGE

In the presence of:

Ms. Karwitha – Court Assistant

For State: Ms. Akunja

Appellant: Present