Mwanzi v Republic (Criminal Appeal 87 of 2019)
[2023] KEHC 2972 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 87 OF 2019

PJO OTIENO, J

MARCH 27, 2023

BETWEEN

PHILIP WASWANI MWANZI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. F. M. Nyakundi SRM in Mumias S.O. Case No. 15 of 2018)

JUDGMENT

1. The Appellant was arraigned before the Senior Resident Magistrate at Mumias in Sexual Offences Case No. 15 of 2018 charged with the offence of attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 5th day of July, 2018 at [Particulars Withheld] Village in Mumias West Sub- County within Kakamega County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LA a child aged 15 years.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were given to be that on the 5th day of July, 2018 at [Particulars Withheld] in Mumias West Sub- County within Kakamega County, the appellant intentionally caused his penis to come into contact with the vagina of LA a child aged 15 years.

3. Because the Appellant pleaded not guilty to the charge, the case proceeded to full trial with the prosecution calling five witnesses, while the appellant when put on its defence, elected to give sworn statement.

4. Being a child, voire dire examination was conducted on PW1, a class four student, and a sister to the complainant and upon the court being satisfied on her ability to speak truthfully, she testified on oath

and said that on 5/7/2018 she was called by her sister and when she went outside, she saw the accused on top of her sister, the complainant, and that the accused inserted his 'dudu' on the victim's vagina. She screamed and people gathered. At the time she saw the accused wearing blue jeans, slippers and a cap.

5. Voire dire examination was conducted on PW2, a sister to the complainant and upon the court being satisfied on her ability to speak truthfully, she testified that on 5/7/2018 she saw the appellant take the complainant to the maize plantation and that he lay on top her after which she called PW1. She stated she saw the appellant do 'bad manners' to the complainant.

6. PW3, mother to the complainant testified that on 5/7/2018 she had gone to collect firewood and on coming back she found a crowd had gathered and the complainant was there. She was told that her daughter had been defiled by the appellant. She noted that blood was coming from her vagina and that she went to report at the police station and later took her to hospital.

7. PW4, a village elder of Banyaseta 'B' gave evidence that he received information that the appellant had been found defiling a minor and that he ran away. He went to the scene where he recovered one side of a slipper and that the other side he found with the appellant when he went to see him. On cross examination he stated that he did not know the owner of the slipper though he met the appellant with the other slipper.

8. PW5, No. 20081099450 PC Caleb Wafula testified that on 5/7/2018 at about 9:30 PM he received information that the complainant had been defiled and that the complainant was taken to Butere Hospital and the appellant arrested the next day.

9. The court ruled that a prima facie case had been established and the accused person was put on Defence.

10. The Defence called one witness, the appellant herein, who testified that he was arrested on 6/7/2018 at his place of work on allegations that he had defiled the complainant. He claimed not to have committed the act and argued that he was not taken to a doctor and that a birth certificate was not produced.

11. Judgment was subsequently delivered and the accused person sentenced to fifteen years' imprisonment.

12. Aggrieved with the decision of the trial court, the appellant has lodged this appeal which is premised on the following grounds: -

> " a) I pleaded not guilty to the charge.
>
> b) That the learned trial magistrate erred in law and facts by convicting me without proper evaluation of my defense of alibi.
>
> c) That the learned trial magistrate misdirected himself in law and facts by convicting me on evidence that did not corroborate.
>
> d) That the learned trial magistrate misdirected himself in law and facts by convicting me on evidence that did not adhere to the provisions of section 35 and 36 (2) of the *sexual offences act* No. 3 of 2006.
>
> e) That the learned trial magistrate erred in law and facts by convicting me based on fabricated, far-fetched and hearsay evidence.
>
> f) That the learned trial magistrate grossly misdirected himself in law and fact by convicting me without proper inquiry of the fact that I was placed to stay in station cell more than the time requires by law before being taken to court.

g) That the learned trial magistrate grossly misdirected himself in law and fact by convicting me based on evidence that was supported by that of an expert personnel (doctor).

h) That the learned trial magistrate grossly misdirected himself in law and fact by convicting me a harsh and excessive sentence in the circumstance without bearing in mind that I was the sole breadwinner of the family."

13. None of the parties has submitted on the appeal.

Issues For Determination

14. Looking at the petition of appeal, this court discerns the following issues for determination:-

a) Whether the prosecution failed to call key witnesses specifically the doctor and its effect on the appellant's conviction

b) Whether the sentence meted on the appellant was harsh and excessive

Analysis

15. Before I address the two issues I have identified for my determination I will address the other grounds that have raised in the appeal. The appellant contends that he pleaded not guilty, that is true and this prompted the matter to proceed to full trial.

16. To rely on the defence of alibi, an accused person must raise it at the earliest opportunity. I have perused at the proceedings of the lower court and at no point does the appellant raise the defense of alibi.

17. On the issue of corroboration, the prosecution called a total of five witnesses and out of those, two were eye witnesses who confirmed the testimony of the other being that the appellant attempted to defile the victim and that is the most important element of corroboration as stated by the Court of Appeal in *Mukungu v Republic* [2002] 2 EA 482 where it was held that:-

> "An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61."

18. The appellant has faulted the trial court for not adhering to the provisions of section 36(2) of the sexual offence act No. 3 of 2006 which provides as follows: -

"(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

19. The wording of this section is not drafted in mandatory terms as it uses the word 'may'. Nonetheless, there is no legal requirement of DNA to prove a sexual offence as noted by the Court of Appeal in *AML v Republic* [2012] eKLR where it was held as follows;

> " The fact of rape or defilement is not proved by D.N.A. test but by way of evidence."

20. On whether the testimony by the prosecution witnesses was fabricated, none of the parties mentioned the existence of animosity between the victim's family and the appellant in order to allude to fabrication.

21. The appellant claims that he was placed at the station cells for more than the time required by law. According to the charge sheet, the appellant was arrested on 6/7/2018 and presented to court on 12/7/2018. 6/7/2018 being a Friday, the law demanded that the appellant be taken to court on 9/7/2018. The delay was in contravention to article 49(1)(f) of the *Constitution* of Kenya, 2010 which provides as follows: -

> " (f) to be brought before a court as soon as reasonably possible, but not later than —
>
> (i) twenty-four hours after being arrested; or
>
> (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

22. The prosecution has not explained the delay. Regardless, the delay cannot overturn a conviction.

Whether the prosecution failed to call key witnesses specifically the doctor and its effect on the appellant's conviction

23. A doctor is indeed a crucial witness in a sexual offence case. However, in the event a crucial witness fails to testify, the mandate of the court is to examine whether the other prosecution witnesses are sufficient to establish a charge. This was the decision of the Court of Appeal in *Sahali Omar v Republic* [2017] eKLR where it was held as follows: -

> " The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. *Keter v Republic* [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."

24. I therefore find that the evidence of PW1 and PW2 being eye witnesses, was sufficient to sustain a conviction against the appellant.

Whether the sentence meted on the appellant was harsh and excessive

25. The circumstances in which a court may interfere with a sentence were addressed in the case of *Wanjema v Republic* Criminal Appeal No. 204 of 1970 [1971] EA 493, 494 where it was held as follows: -

> " An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

26. The penalty section for the offence of attempted defilement is found in section 9 (2) of the *Sexual Offences Act* which provides as follows: -

> " A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

27. The section charged prescribes a minimum of a ten-year sentence whereas the trial magistrate sentenced the appellant to fifteen years' imprisonment. The trial Magistrate had the right to exercise his discretion in sentencing. Nothing has been demonstrated as an error in that exercise of discretion to merit interference by this court. It of note that the trial court disproved the conduct of the prosecution in preferring a charge of attempted defilement yet the fact in the evidence revealed a complete offence of defilement upon a vulnerable Kenyan. The conduct of the appellant must be disproved and shunned. He deserved and deserve today a deterrent sentence to act as a warning to others who may wish to take advantage of the vulnerable.

28. I find no merit in the appeal and the same is entirely dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

The Appellant in person

Ms. Chala for the Respondent/State

Court Assistant: Polycap