MN v Republic (Criminal Appeal E009 of 2022)
[2023] KEHC 3488 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3488 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E009 OF 2022

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

MN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. E Malesi, Principal Magistrate, PM, in Kakamega CMCSO No. E065 of 2021, of 30th July 2021)

JUDGMENT

1. The appellant, Mathias Ngoka, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 2nd January 2021, at [particulars withheld] Village, Shinoyi Sub-Location, Butsotso West Location, in Navakholo Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MA, a child aged 13 years. The appellant denied the charges, on 22nd March 2021, and a trial ensued, where 7 witnesses testified.

2. PW1, Moureen Anyango, was the complainant. She described how the appellant, a man who was living with her mother, after her father died, defiled her on 2 occasions. PW2, PA, was the mother of PW1. She described the appellant as her husband, and how she found him in the act of defiling PW1. PW3, JO, was the grandfather of PW1. He described how another grandchild called him, and took him to the house where PW1, PW2 and the appellant were. PW2 explained to him how she found the appellant and PW1 having sexual intercourse. PW3 asked the appellant to leave his home. PW4, Joel Kuyo, was the clinician who attended to PW1, shortly after the incident. PW5, JOO, was an uncle of PW1. He heard screams from the home of PW2, and he rushed there. He found PW1 and PW2, and it was reported to him that PW2 had found the appellant on top of PW1, and that the appellant had escaped.

They then decided to report the matter to the police. PW6, EA, was a sister of PW1. She was the one that PW2 sent to call PW3, after she found PW1 and the appellant inside the house. PW7, No. 11820 Police Constable Josphat Bett, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 5th July 2021. He made a sworn statement. He denied the charges. He said the charges were trumped up by PW2, after he failed to build a house for her. He called 2 witnesses, DW2, his cousin, CM, and DW3, his sister, CKA. She said that he did not do it. They both alluded to the charges being trumped up.

4. In its judgment, the trial court found the appellant guilty on the main charge. It found the main charge had been proved beyond reasonable doubt.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that Article 50(2)(c)(g)(h)(j) of the *Constitution* had been violated; the evidence was contradictory; the medical evidence was flimsy; and his defence was not considered. He later filed supplementary grounds, simultaneously with his written submissions, which are around the case not being proved beyond reasonable doubt; the evidence being contradictory; and the defence not being considered.

6. The appellant filed detailed written submissions. I have gone through the same and noted the arguments made. The submissions are on the age of PW1, penetration not being proved, identification, evidence being contradictory, and defence not considered.

7. I shall determine the appeal on the basis of the grounds argued on appeal, and I shall presume that grounds not submitted on have been abandoned.

8. On the age of PW1, the trial court noted that the certificate of birth placed on record indicated 5th February 2010 as the date of birth, but PW1 said she was born in 2008, and PW2 said she was born in 2007. PW2, the mother of PW1, explained that the certificate was not obtained by her, and, therefore, the date of birth was not correct. PW2, as the mother of PW1, would be the best person to tell when she gave birth to her own child. However, the court chose to go with the age given by PW1, as it tallied with what was stated in the charge. I consider that, by deciding to work with the age of 13, rather than the 12 years stated by PW2, the trial court was giving an advantage to the appellant. PW1 was a minor, whose age was in the 11 to 13 years bracket. The trial court did not err in picking on the age of 13 years. It did not disadvantage the appellant.

9. On penetration, PW1 was the victim of the offence. She said that the appellant tore her inner wear, and inserted his penis into her vagina. I would agree that PW4, the clinician gave evidence in a very vague manner. This was a case of criminal investigation with respect to the offence of defilement. PW4 should have given a coherent testimony as to his findings. Did he find anything suggesting that PW1 was defiled? He only talked of a missing hymen, but he did not explain whether the hymen broke recently or a long time ago. The medical records he produced are his notes, they explain nothing about defilement. He was not helpful at all. However, the evidence by PW1 was fairly straightforward, and the appellant did not shake her on cross-examination. The incident happened in mid-morning, and there were persons around, who provided corroboration. PW2 found the appellant on top of PW1. She might have not been able to tell whether or not there was penetration; the fact of being on top of a female, pants down, and the female says she was penetrated, would suffice for corroboration purposes. PW2 then sent PW6 to call PW3. PW5 was also within the vicinity. He heard the commotion, and went to the scene to enquire, and was updated on the goings-on.

10. On identification, the evidence is clear, that the appellant became the lover of PW2, after her husband died. It was a case of recognition. The issue of doubt, with respect to identification does not arise. PW1 and PW6 treated or regarded him as a father, on account of how he was relating with their mother,

PW2. PW3 and PW5, the father-in-law and brother-in-law, respectively, of PW2, confirmed the same. PW2 herself explained that he was a lover she got after her husband died. All these witnesses placed him at the scene. They said that they saw him.

11. On contradictions, I note that the only inconsistency that the appellant points out is as to the timing of the incident. One witness put it at 9.00 AM, and another at 10.00 AM. I noted that from the record. However, this was not fatal to the prosecution. The time frame or range within which it happened was mid-morning, somewhere between 9.00 AM and 10.00 AM.

12. On the defence not being considered. His defence was that there was a frame-up. However, he was placed at the scene by 4 witnesses, who said they saw him there. 1 said that he defiled her. The other said she found her on top of the other victim. The other said that she saw him enter the house, where PW1, and was sent to call PW3. PW3 said he sent the appellant away. The appellant did not lead evidence to show that he was not at the scene at that time. His defence, therefore, was very weak, when considered against the testimonies of all these eyewitnesses who placed him at the scene.

13. I find no merit in the appeal, I accordingly dismiss it. I hereby affirm the conviction, and confirm the sentence. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mathias Ngoka, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.