DMM v Republic (Criminal Appeal E032 of 2020)
[2023] KEHC 18169 (KLR) (Crim) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E032 OF 2020

K KIMONDO, J

MAY 25, 2023

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment in S. O. Case No. 1 of 2020 in the Chief Magistrates Court at Milimani by R. Oganyo, Senior Resident Magistrate, dated 26th October 2020)

JUDGMENT

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (hereafter the Act). He was sentenced to life imprisonment.

2. The particulars were that on diverse dates between November 21, 2019 and December 29, 2019 at [particulars withheld] within Nairobi county he caused his penis to penetrate the vagina of MW [particulars withheld] a child aged 6 years.

3. The appellant filed an appeal on November 11, 2020 raising nine grounds which can be condensed into three: Firstly, that he was denied a fair trial in contravention of Article 50 of the *Constitution*. Secondly, that the entire trial offended the tenets of procedural and substantive law prescribed by the *Constitution* and the *Criminal Procedure Code*. Thirdly, that on the totality of the evidence, the prosecution failed to prove the charge to the required standard.

4. The appellant relied on submissions and a list of precedents filed on December 19, 2022.

5. The appeal is contested by the respondent through written submissions dated January 20, 2023.

6. On April 26, 2023, I heard further arguments from both learned counsel for the appellant and the respondent.

7. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kiilu & another v Republic* [2005] 1 KLR 174.

8. The complainant was a child of tender years. The trial court conducted a voire-dire examination. The questions posed to the minor are not on the record. Ideally, they should be. However, there are clear answers. The learned trial magistrate was satisfied that the child was intelligent and understood the duty of telling the truth. However, she did not comprehend the nature of an oath and thus gave unsworn evidence.

9. I am satisfied that the trial court employed the correct procedure in taking her evidence. See generally, *Republic v Peter Kiriga Kiune* Criminal Appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

10. I am equally satisfied that the age of the child was established. According to the birth certificate (exhibit 1), she was born on April 9, 2013. At the time of the incident, she was six years old.

11. The next key question was identification. The appellant and the complainant's mother (PW2) had a romantic relationship or brief marriage. It was however fraught with problems and had broken down at the time of the incident. But they used to cohabit. The complainant thus knew the appellant and referred to him as "uncle". The appellant was thus positively identified. In fact, this was evidence of recognition. *Wamunga v Republic* [1989] KLR 424.

12. It is a truism that the legal and evidential burden rested squarely on the Republic. *Woolmington v DPP* [1935] AC 462, Bhatt v Republic [1957] E.A. 332. Did the prosecution prove beyond a reasonable doubt that the appellant penetrated the complainant? To answer it, I will now re-evaluate the complainant's testimony, that of her guardian (PW2) and the medical evidence from PW3.

13. The complainant testified that the appellant "*alinifanyia tambia mbaya.... alinilalia....aliingiza chuchu yake kwa yangu*". She pointed to her private parts in the vaginal area explaining that "*chuchu yake*" meant "*kitu yake ya kukojoa*" and "*chuchu yangu*" was her "*kitu yangu ya kukojoa*". She said she felt a lot of pain but the appellant threatened to beat her up.

14. PW1 disclosed the matter to her mother, (PW2). PW2 confirmed that she, the appellant and her two children were living in a single room. On a day in October 2019, she said she was bathing one of the children outside their house. She abruptly went back into the room and found the appellant touching the private parts of the complainant. Both the appellant and child were startled.

15. When she spoke to the child three days later, she said "*alikuwa akinigusa kwa susu yangu*". Surprisingly, the mother only instructed the minor to avoid being with the appellant alone. In cross-examination, she said:

> "I pretended not to see anything. I wanted to find out what [his] aim was".

16. On December 29, 2019, PW2 noted that the complainant had a white discharge from the vagina but detected no physical injuries to the outer genitalia. In yet another incident on an unspecified date, the complainant told her that the appellant had locked the door, placed her on the bed "and kept touching her private part with it at the top" and that she felt a lot of pain. PW2 then lodged a complaint with the police on January 7, 2020.

17. Granted the time span between the incidents and the evidence of the complainant and her mother, the medical evidence is very important. According to the clinical officer, John Kibunga (PW3)-

> The external genitalia was [sic] normal and no injuries were seen. Vagina there was "kufinyiliwa' noted '*ilikuwa inakaa kama kufinyiliwa*'. The hymen was not visualized. It was not there. The hymen had not been interfered with.

18. But that was not his entire evidence. On cross examination, PW3 stated that the "private parts had injuries on the hymen and injuries on the birth canal". According to the P3 Form (exhibit 3) there were fresh linear tears along labia majora and fresh abrasions at posterior fourchette. This is also consistent with the report by Medicins San Frontiers (exhibit 2) and Post Rape Care Form (exhibit 4) that there were "fresh abrasions at posterior fourchette". The vagina was "moist, reddened with tenderness... hymen has old tears at 3, 6 and 9 o'clock positions".

19. When I juxtapose the evidence of the complainant against the medical evidence, I am satisfied that penetration was proved. I have no reason to doubt the complainant. Learned counsel for the appellant, Mr. Njengo, submitted that the trial court erred by convicting on "uncorroborated evidence". But I am alive that under the proviso to section 124 of the *Evidence Act*, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful.

20. Furthermore, the evidence of PW1 was corroborated by the medical evidence from PW3, the P3 Form (exhibit 3) the report by Medicins San Frontiers (exhibit 2) and the Post Rape Care Form (exhibit 4). In addition, the appellant had the opportunity to commit the offence. I stated that there was no doubt about identification. He was living with the complainant in a single-roomed dwelling. This amounts to further corroboration. *Opo v Republic* [1976-80] 1 KLR 1669.

21. I partly agree with the learned counsel for the appellant that there were some inconsistencies between the oral evidence of PW3 and the documents he presented. But they were immaterial. The complainant was not also clear on whether she was defiled twice or on a number of occasions. What was critical was whether on any one occasion, she was penetrated by the appellant. Furthermore, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.

22. I have then studied the defence. The appellant denied defiling the complainant on any of the occasions. He was arrested on January 11, 2020 at the locus in quo. He went into great detail about the history of his relationship with PW2 and how they ended up cohabiting as a couple. He had another family and children. At the time they met, PW2 also had two children including the complainant.

23. The appellant moved into her one-roomed house because he had financial difficulties. He referred to an incident on November 17, 2019 when he over-heard PW2 speaking to another man (who turned out to be her former husband). He suspected she was unfaithful but they resolved the matter. On November 20, 2019, she came home drunk and never made food for the children. He said he forgave her.

24. The thread running through his defence was that despite his strained relationship with his wife, he had a cordial relationship with the two children and was a victim of a trumped-up charge. Learned counsel for the appellant submitted before me that the defence was not considered. That is not entirely true. The learned trial magistrate summarized all the evidence including the defence. However, she reached the conclusion that the complainant's evidence was reliable and backed up by medical evidence; and, that it is the appellant who penetrated her. I concur in that finding for the reasons I gave earlier.

25. True, the mother of the child (PW2) acted strangely. I said earlier that it was surprising for a mother to shut her eyes to the serious matter of the appellant touching the complainant inappropriately; or,

why she took so long to report the matter to the police. It is also clear that her relationship with the appellant had deteriorated. There is then a sense in which the appellant strongly feels he was set-up for a fall. But the truth is that the testimony of the complainant was graphic and was clearly corroborated by medical evidence.

26. I will now turn to the question of whether the appellant was given a fair trial. Article 50 (2) (c) (g) (h) (j) and (p) of the *Constitution* provides that a every accused person has the right to have adequate time and facilities to prepare a defence; to choose, and be represented by, an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access that evidence; and, to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

27. The appellant laments that he was not availed legal counsel at his trial. I find that the nature of the charge did not entitle him to pro bono counsel from the State. He was granted bail and remained at liberty to instruct counsel. True, the record does not indicate that the right to counsel was explained to him but I find that that alone did not cause substantial injustice.

28. Like I stated, the appellant was arrested on January 11, 2020. He took plea two days later and was admitted to bond with the option of a cash bail. He was however unable to post bail. On January 17, 2020 the court ordered that the appellant be supplied with witness statements. On January 27, 2020, the appellant informed the court that he had not been supplied with witness statements. On February 19, 2020, the trial was fixed for hearing on February 21, 2020 with an order that "the investigating officer to supply the appellant with statements and any other documents to prepare for hearing before then". On February 21, 2020, the record shows the accused told the court he was ready and the trial opened. The assumption can only be that he had the witness statements. His submission that he was not supplied with the statements in advance is thus not borne out fully by the record.

29. Flowing from the above, it is also clear that the trial started and concluded within a year. It involved a vulnerable child of 6 years. The appellant was present at all the hearings and cross-examined all four witnesses at length. I find no evidence on the record to show that the trial court was biased or that the burden of proof was shifted to him. The trial magistrate explained to the appellant his rights under section 211 of the Criminal Procedure Code and he gave sworn testimony. I found earlier that it is not true that his defence was disregarded. I also find, in all the circumstances of this case, that the defence was bogus.

30. In the end I am unable to say that that there was violation of Article 50 of the *Constitution*. In view of my earlier re-evaluation of the evidence, I find that the conviction was safe. The appeal against conviction is accordingly dismissed.

31. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. Under the *Sexual Offences Act*, the minimum sentence for defiling a child under the age of 11 years is life imprisonment. The trial court considered the pre-sentencing report, the appellant's mitigation and records and found that a deterrent sentence was just.

32. The Court of Appeal has however given fresh guidance on minimum sentences under the *Sexual Offences Act*. In *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.
>
> The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (*supra*), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court. [Emphasis added]

33. I accordingly set aside the life sentence. I have considered the pre-sentencing report dated October 7, 2020, that the appellant is a first offender, the gravity of the offence and the life-long trauma to the young complainant. The appellant shall now serve a term of 10 (ten) years in jail. The sentence shall run from January 11, 2020, the date when he was arrested and placed in remand custody.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Mr. J. Njengo for the appellant instructed by J. M. Njengo & Company Advocates.

Ms. Oduor for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.