Mtune v Republic (Criminal Appeal E059 of 2021)
[2023] KEHC 17792 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E059 OF 2021

GMA DULU, J

MAY 25, 2023

BETWEEN

PETER KALOTHIA MTUNE ALIAS KAKALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 16 of 2020 at Voi Law Court on 25th May, 2021 by Hon. C. K. Kithinji - PM)

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Taveta with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of offence were that on 21st July, 2020 at around 1500hours at [Particulars withheld] village within [Particulars withheld] Sub-County in Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of JM (name withheld) a girl child aged 16 years.

3. 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 which being that on the same date, time and place unlawfully and intentionally touched the vagina of JM a girl child aged 16 years with his penis.

4. He was also charged with a second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of offence were that on the same day, time and place unlawfully assaulted JM thereby occasioning her actual bodily harm.

5. He denied all the charges. After a full trial, he was convicted of defilement and assault causing actual bodily harm. He was sentenced to fifteen (15) years in jail for defilement and three (3) years in jail for assault causing actual bodily harm. The sentences were ordered to run concurrently, thus a total of fifteen (15) years imprisonment.

6. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-

    1. The trial Magistrate erred in law by convicting and sentencing him yet failed to find that his constitutional rights for fair trial under Article 50(g) and (h) were violated.

    2. The learned trial Magistrate erred in law and fact by failing to find that PW1 having been declared a hostile witness her evidence was thus of little evidential value.

    3. The learned trial Magistrate erred in law and fact by failing to appreciate that the prosecution did not prove its case beyond reasonable doubt.

    4. The sentence imposed was harsh and excessive since it was applied in mandatory terms as provided by the statute without considering the appellant's mitigation or the unique facts and circumstances of the case.

7. The appeal was canvassed through written submissions. In this regard, I have considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

8. This being a first appeal, I have to be guided by the principle that I am expected and required to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour – see *Okeno v Republic* [1972] EA 32.

9. The appellant has raised both technical and substantive grounds of appeal. The technical ground is one, that his rights to fair trial under Article 50 (g) (h) of the *Constitution* were violated, in that he was not informed of his right to legal representation.

10. In my view, this ground of appeal fails because the appellant as an accused person was presumed to know the law, and it is clearly provided under our Constitution Article 50, that the choice is for the accused person to elect whether to be represented by counsel or to act in person. Hiring an advocate costs money and if an accused person elects to act in person, so be it, as there is no law that binds the State to provide free legal representation to all persons charged with criminal offences.

11. On the substantive grounds of appeal, they relate to the adequacy of the evidence on record, and the severity of the sentence imposed.

12. From the record of the trial court, the prosecution called four (4) witnesses in support of their case. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses. I note that PW1 the alleged victim, was treated as a hostile witness.

13. The appellant was convicted of defilement and assault causing actual bodily harm. Each of the two offences has different elements.

14. The prosecution had the burden to prove each element of the two offences beyond any reasonable doubt see *Sawe v Republic* (2003) eKLR.

15. The key witness in this case herein who was PW1, turned out to be a hostile witness. Section 161 of the *Evidence Act* (Cap.80) provides as follows with regard to such hostile witnesses:-

    '161 The court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.'

16. In my view, a conviction cannot be founded solely on the evidence of such a hostile witness unless there is other evidence to support the allegation against an accused person. This is because such a hostile witness has first of all changed his story and is therefore not reliable, and secondly because he or she will be asked leading questions during his testimony.

17. In the present case, with regard to the charge of defilement, the key witness PW1 the alleged victim, was a hostile witness. She initially said in court that the appellant only hit her with a cane because she did not feed a young child, but later changed her story and said that she was also defiled by the appellant.

18. The alleged victim's mother PW2 Anne Kaveke Kilonzo also initially denied the defilement allegation, but later testified to both the defilement and assault. Thus both PW1 and PW2 tendered seriously contradictory evidence in their testimonies. As such both the testimonies of PW1 and PW2 had to be supported by other independent evidence, if they were to be believed.

19. From the totality of the evidence on record, in my view, the age of PW1 Josephine Mueni Nyerere was proved beyond reasonable doubt to be 17 years as her date of birth was entered in the birth certificate relied upon, issued in 2017, as 13th October, 2003. This being independent evidence, I thus find that the age of the victim was proved to the prosecution beyond reasonable doubt.

20. The second element of the offence of defilement was penetration. In view of the glaring contradictions in the evidence of PW1 who was treated as a hostile thus unreliable witness, and the fact that the medical evidence did not confirm recent penetration, in my view penetration was not proved as alleged.

21. Was the appellant the culprit? I find that the appellant was not proved to be the culprit, first of all because of the unreliability of the evidence of PW1 who was declared a hostile witness, and thus not saved by the provisal to Section 124 of the *Evidence Act* (Cap.80).

22. Secondly, the evidence of PW2 the mother of the alleged victim PW1, was to the effect that PW1 was a naughty girl who was failing to go to school and appeared to be reacting herein to attempts to discipline her by the appellant who was a step father. Thus the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

23. I thus find that the allegations against the appellant regarding defilement, were a fabrication by PW1 as a way of avoiding to be disciplined, as the appellant who was trying to discipline her, was her step father but not her biological father. I will thus quash the conviction for defilement and set aside the sentence for that offence.

24. Coming now to the offence of assault causing actual bodily harm, though PW1 was treated as a hostile witness, the medical evidence was to the effect that there were visible superficial injuries to the arm of PW1. That is my view, is additional independent evidence, which was sufficient to prove the offence of assault causing actual bodily harm. It is in evidence that the appellant caned PW1. I will thus uphold the conviction for this offence of assault causing actual bodily harm.

25. With regard to the sentence for assault causing actual bodily harm, I note that this is a domestic matter relating to an attempt to discipline PW1, but which went beyond what is allowed by law. In my view, therefore the prison sentence already served by the appellant for this offence is adequate punishment.

26. Consequently, and for the above reasons, I order as follows:-

    i. I quash the conviction for defilement and set aside the 15 years imprisonment imposed by the trial court.

    ii. I uphold the conviction for the offence of assault causing actual bodily harm.

iii. I set aside the sentence of 3 years imprisonment imposed by the trial court for assault causing actual bodily harm, and order that the appellant will instead serve the prison sentence he has served to date.

iv. The appellant will thus be set at liberty forthwith unless otherwise lawfully held.

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

GEORGE DULU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

The appellant – virtually

Mr. Sirima for State

Mr. Otolo – court assistant