Mutuma v Republic (Criminal Appeal E204 of 2022)
[2023] KEHC 21178 (KLR) (27 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E204 OF 2022

LW GITARI, J

JULY 27, 2023

BETWEEN

FELIX MUTUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against both the conviction and sentence arising from Sexual Offence Criminal Case No.41 of 2020 in the Principal Magistrate's Court at Nkubu Law Courts, Hon. E. Ayuka (S.R.M) , and Judgment delivered on 20th day of December 2022)

JUDGMENT

1. The Appellant herein was charged in Nkubu SRM's Court Criminal Case No. 41 of 2020 with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge were that on 25th August, 2020 in Imenti South Sub-County within Meru County, the Appellant did an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of DM, a child aged 16 years.

3. The Appellant faced the alternative charge of committing an indecent act with a child.

4. The Appellant denied the charge and the matter proceeded to trial with the prosecution calling a total of five (5) witnesses and the Appellant testified as the sole witness in his defence. After a full trial, the Appellant was convicted and sentenced to serve imprisonment for a period of ten (10) years.

5. Being dissatisfied with the said decision, the Appellant filed this appeal which was canvassed by way of written submissions. In his submissions, the Appellant relies on the following amended grounds of appeal:

a. That the learned trial erred in law and fact by failing to note that the voir dire examination was not properly conducted since there was no finding that the complainant PW1 understood the importance of giving evidence on oath.

b. That the learned trial erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by law.

c. That the learned trial erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form a basis for a conviction.

d. That the learned trial erred in law and fact by failing to find that the clinical report does not support the allegation of defilement.

e. That the learned trial erred in law and fact by convicting the appellant to serve 10 years' imprisonment without supportive evidence.

f. That the learned trial erred in law and facts by failing to note that the period spent in custody (pre-trial) under Section 333(2) of the Criminal Procedure Code (CPC) was not considered.

g. That the learned trial erred in law and fact by dismissing the Appellant's defence without giving cogent reasons of dismissing it.

6. Based on the above grounds, the Appellant prayed that his appeal be allowed, his conviction quashed and his sentence set aside, and that he be set at liberty.

The Appellant's Submissions

7. The Appellant filed his submissions on 20th April, 2023. It was his submission that voir dire examination was not properly conducted since there was no finding that the complainant understood the importance of giving evidence on oath. That as such, the complainant's evidence was not properly received and hence the Appellant's conviction was not safe. The appellant has heavily relied on the case of Macharia –v- Republic, (1976) KLR 209 on the meaning of 'voir dire'

8. On the issue of whether the prosecution proved its case beyond any reasonable doubt, it was the Appellant's submission that prosecution failed to prove the elements of penetration and the identification of the Appellant as the perpetrator of the crime. That the evidence of PW3, the clinical officer, did not indicate that the complainant was pregnant which would mean, according to the Appellant, that the complainant continued with her behavior which caused her to get pregnant. The Appellant maintained that there was need for the DNA test to be conducted in order to proved beyond reasonable doubt that he was guilty of the offence. Further, that doctor's evidence that the complainant had a broken hymen was not conclusive proof of sexual penetration.

9. The Appellant averred that the case against him was based on suspicion and that the trial court erred by failing to objectively analyze the whole of the evidence tendered before it, including the Appellant's defence, in order to determine the Appellant's criminal culpability.

10. Finally, it was the Appellant's submission that when imposing the sentence against the Appellant, the learned trial magistrate erred by failing to take into account the period that the Appellant had spent in custody while undergoing trial as provided under Section 333(2) of the Criminal Procedure Code.

The Respondent's Submissions

11. The Respondent submitted that the prosecution witnesses who were called proved the case against the Appellant beyond reasonable doubt. That the assertion that the trial magistrate rejected the Appellant's defence without giving cogent reasons was false as the trial court did consider the defence by the Appellant tans found it to be an afterthought and a mere denial.

12. On the issue of the trial court not considering the period that the Appellant had spent in custody, the Respondent conceded that the same was not taken into account and ought to have considered.

13. Finally, it was the Respondent's submission that the sentence of 10 years meted against the Appellant was lawful and proper considering the circumstances of this case. That the Appellant took advantage of a vulnerable person and the trauma that comes with such overt acts is huge.

Issues for determination

14. I have considered the grounds of appeal as well as the submissions of the parties. The following issues arise for determination by this Court:

    a. Whether the trial court properly conducted the voir dire examination of the complainant;

    b. Whether the prosecution proved its case beyond any reasonable doubt;

    c. Whether the sentence meted against the Appellant was appropriate in the circumstances of this case.

Analysis

15. The duty of this Court as a first appellate court is now well settled in law which is to re-evaluate the evidence adduced before the trial court, analyse it, and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to access their demeanour. [See Okeno vs. Republic [1972] EA 32].

16. Guided by the above authorities, I shall now re-analyse the respective cases of the parties.

The Prosecution's Case

17. The complainant testified as PW1. It was her evidence that on 25th August, 2020 at about 11 a.m., he saw the Appellant near a shop. He was with PW1's brother called V. That PW1 went to where they were, she boarded a motor cycle with the Appellant and they went to a lodging Mituguu. PW1 stated that they had agreed to go to the lodging to have sexual intercourse. That the Appellant paid for their accommodation at the lodging and that they indeed had sexual intercourse there. Later, police officers went and arrested them.

18. PW2 was VK, the complainant's younger brother. It was his testimony that on the material day, he was at the shops nears their home when the Appellant sent him to call the complainant. That PW2 went and called the complainant who then left with the Appellant on a motorcycle.

19. PW3 was Seberina Kaimatheri, a clinical officer at Kanyakine S/C Hospital. She produced in evidence the complainant's P3 Form, PRC Form, Lab request Form and treatment notes as P. Exhibits 1, 2, 3(a) and 3(b) respectively. According to her, the complainant did not have any bodily injury. The complainant's hymen was missing but no lacerations, bruises or discharge was noted. The laboratory tests including pregnancy test all came out negative. PW3 testified that the absence of hymen was indicative of sexual penetration.

20. PW4 was FK, the complainant's father. He testified that on the material day at about 10 a.m., he was heading to work when he met the Appellant on a motor cycle. That later at about 12 p.m., he was called and told that his daughter, the complainant herein, had been arrested together with the Appellant at a lodging. It was his testimony that the complainant was sixteen (16) years old. She was a student and had left home for school and he could not tell how she was found in a lodging. He further told the court that the appellant had gone knocking his gate and when he told him to detest he became rude. That it was not the first time for appellant to defile the complainant.

21. PW5 was P.C. Lenah Achieng, the investigating officer in this case. It was her testimony that on the material day at around 2.00p.m. – 2.30 p.m., he was heading back to the police station from court. That on reaching Glorious Bar and Restaurant, he found the Appellant and PW1 having been loaded on a police motor vehicle. At the station, PW5 was informed by one IP Magai that he had received a tip off that the Appellant had sneaked a school girl into the lodging. PW5 was allocated the case and her investigations revealed that the Appellant had picked PW1 on the material day and took her to a lodging where they had sexual intercourse.

The Defence Case

22. When placed on his defence, the Appellant stated that he is a boda boda rider. That on the material day, he was ferrying a man on his motor cycle to Kithakanaro. That they then met the complainant and the man the Appellant was ferrying asked the Appellant to ferry him and PW1 to Mitunguu. That at 2 p.m., the said customer called the Appellant and asked him to go pick him up. That the Appellant met them at Mitunguu and carried them. According to the Appellant, a police motor vehicle stopped ahead of him while at pillars. That the customer fled and the Appellant was arrested and eventually charged in court. The Appellant thus maintained that he was not the perpetrator of the subject offence.

23. From the above facts, I shall now move to analyzing the issues arising for determination by this Court.

    a. Whether the voir dire examination was properly conducted

24. Subjecting a witness of tender age to voire dire examination is founded under Section 125 (1) of the *Evidence Act*, which states;-

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

25. Also, Section 19 (1) of the *Oaths And Statutory Declarations Act* (Chapter 15 of the Laws of Kenya) provides that:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

The court further stated that the definition of a child of tender years in the *Children Act* is not of general application but that it is meant to determine criminal responsibility.

In Kibageny Arap Kipkor –v- Republic (1959) E.A

26. The definition of a child of tender years was considered by the Court of Appeal in the case of Patrick Kathurima v Republic [2015] eKLR as cited with approval in the case of Samuel Warui Karimi v Republic [2016] eKLR where the Court held as follows:

> "We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."
>
> The court has further stated that the definition of a child of tender years in the *Children Act* is not of general application but that is meant to determine criminal responsibility.
>
> In Kibageny Arap Kipkorir –v- Republic (1959) E.A which the Court of Appeal has faithfully upheld, it was stated that a child of tender years meant a child under the age of fourteen (14) years and 14 years remains the correct threshold for voir dire examination of children of tender years

27. I have perused the record and note that voir dire examination was not conducted before the complainant testified. The complainant aged sixteen (16) years old at the material time when the subject offence is alleged to have been committed as she was born on 14th January, 2004. She was seventeen (17) years old when she testified on 18th January, 2021. Guided by the holding of the Court of Appeal in the case of Samuel Warui Karimi (supra) the complainant in this case cannot be said to have been a child of tender years for purpose of undertaking voire dire examination during the trial. In the circumstances, I find that the evidence by the complainant was properly received and the same was safe to sustain the Appellant's conviction.

b. Whether the Prosecution proved its case beyond any reasonable doubt

28. The critical ingredients that constitute the offence of defilement are: the age of the complainant, proof of penetration, and positive identification of the assailant. [See: Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013]

29. On the issue of the complainant's age, it is not in dispute from the copy of PW1's birth certificate on record (P.Exhibit 4) that she was sixteen (16) years old at the material time as she was born on 14th January, 2004. The ingredient of the age of the complainant was therefore sufficiently proved by the prosecution.

30. On proof of penetration, it was PW1's testimony that on the material day, the Appellant took her to a lodging where they had sexual intercourse. According to the clinical officer (PW3), an examination of the complainant revealed that her hymen was missing and that the same was indicative of sexual penetration.

31. The term penetration as defined under Section 2 of the Sexual Offence Act requires proof two scenarios. First partial vagina penetration or complete insertion of the male penis to that genitals.

The Section defines penetration as follows:-

> " means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

In this case the evidence aduced by the complainant is that she had sexual intercourse with the appellant in a lodging at Mitunguu. The medical evidence tendered by PW3 the Clinical Officer who produced the P3 form exhibit 1, Post Rape Care Form exhibit 2 and lab request as well as treatment notes exhibits 3 a&b, was that the hymen was missing which was evidence of sexual penetration and highly indicative of sexual activeness. It was the complainant's evidence that she was in an intimate relationship with the appellant. I find no reason to doubt the complainant for two reasons:-

Fistly, her evidence was not challenged in cross-examination. The record shows that the apapellant was given an opportunity to cross-examine the complainant and he categorically stated that he had no questions for the witness. Article 50(k) stipulates that the every accused person has the right to adduce and challenge evidence. The means given to an accused person to challenge evidence is through cross-examination. The appellant was given the opportunity to challenge the evidence of the complainant but he had no reasons to challenge it as he had no questions. The upshot is that the testimony of the complainat was not challenged and the court had no reason not to believe the complainant.

Secondly, the tetimony of PW2 & PW3 that appellant carried the complainant from her home on a motor bike. PW3 testified that he had warned the appellant against going to his gate but he became too rude.

Finally, the medical evidence adduced by PW3 corroborated the testimony of the complainant on the fact of penetration. I find that the prosecution proved beyond any reasonable doubts that the appelalnt penetrated the complainant.

32. The complainant testified that he was in a love affair which started when she was in class seven and they had been in a relationship all along.

I therefore have to address the issue of consent. According to the P3 form the appellant was a male adult when he committed this offence. Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* provides:-

> " (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

The section makes it an offence for a person to engage in a sexual inter course with a girl aged sixteen years. The law is trite that a child under the age of eighteen years is no capable of giving consent to have sexual inter course. The *Sexual Offences Act* defines child thus-

> " has the meaning assigned to thereto in the *Children Act*.
>
> "The *Children Act* defines a child to mean-means an individual who has not attained the age of eighteen years."

The age of the complainant was proved to be sixteen years. Under the *Sexual Offences Act*, a child below the age of eighteen (18) years cannot consent to sex. It was therefore immoral and unlawful for the appellant to have intimate relationship with the complainant.

By so doing he went contrary to the provision of Section (4) of the *Sexual Offences Act*.

The complainant had no capacity to consent to the sexual inter-course with the appellant.

33. The appellant was identified as the perpetrator by the complainant. I will not belabour the point as the appellant was identified by the complainant whose testimony as I have stated was not challenged.

34. The trial magistrate who had opportunity to see the complainant observed that she was truthful and consistent. It follows that the court had no reason to doubt her testimony.

35. Finally the appellant submits that the prosecution failed to prove the case against him and the evidence on record is based on suspicion. I find that the prosecution adduced cogent evidence to proof all the ingredients of the charge and it is far fetched for the appellant to submit that the charge was based on suspicion.

On the issue of D.N.A, I find that it was far fetched. The medical evidence before this court is that pregnancy test done on the complainant was negative. If the complainant got pregnant thereafter and delivered a child is not a matter that is relevant to this case.

On the failure by learned trial magistrate to take into account the period the appellant he spent in remand awaiting trial was not taken into account, I find that this is case and the round must succeed. Section 333(2) of Criminal Procedure Code provides:-

"

"(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

This section is couched in mandatory terms. The period the appellant spent in custody must be taken into account to reduce the sentence imposed on him. The learned trial magistrate erred by failing to the period the appellant spent in custody into account when passing the sentence. He was remanded in custody on 26/8/2020 and released on bond on 26/10/2020, a period of two months. He was remanded again on 6/12/2021 upto 20/12/2022 a period of only one year.

Conclusion:

For the reasons I have given in this Judgment, I find that the charge was proved beyond any reasonable doubts. The appeal is without merits save for the failure by the trial magistrate to take into account the period the appellant spent in remand before he was finally convicted and sentenced. I order as follows:-

1. The appeal is dismissed.

2. The sentence shall be reduced by one (1) year two (2) months and fourteen (14) days the period the appellant spent in remand while awaiting trial.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JULY, 2023.

L.W. GITARI

JUDGE