SMM v Republic (Criminal Appeal E005 of 2023)
[2023] KEHC 22936 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22936 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E005 OF 2023

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

SMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. P.M. Mugure (PM) in the Chief Magistrate's Court at Wang'uru Sexual Offence No. 26 of 2019 delivered on 25th November 2022)

JUDGMENT

1. The appellant has brought an appeal through a petition seeking that the appeal be allowed in totality on the grounds that the trial magistrate erred in law and fact by:
    a. Disregarding the fact that the evidence adduced was full of inconsistencies and contradictions;
    b. Disregarding the fact that the defilement and age of the complainant were not proved;
    c. Overlooking the fact that the medical evidence adduced was inconclusive as the appellant was not subjected to medical examination; and
    d. Disregarding the appellant's defence.
2. The appellant was faced with the charge of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that, on November 13, 2019 in Mwea East sub-county within Kirinyaga county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MNM a child aged 14 years.
3. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars for this charge were that on November 13, 2019 in

Mwea East sub-county within Kirinyaga county, the appellant intentionally and unlawfully did cause his penis to come into contact with the vagina of MNM a child aged 14 years.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 5 witnesses in support of its case.

5. PW1 who is the victim, gave sworn testimony and stated that the accused was well known to her as he was the husband of her mother's sister and their homes were about 80 meters apart. That on November 13, 2019 she was getting firewood near Nyamindi River in the company of the accused who asked her to give him half of the firewood but she refused. That he told her to pay him and that he would like to be paid in kind. That he said he wanted to have sex with her. That when she refused, he tried to throw her into the river and she clutched on some trees near the river. When she tried to run away, she fell down and it is then that the accused person took off his clothes and told her to take off her biker and panty before he defiled her.

6. That she did not scream as she was threatened with death by the accused person. That when she returned home, she told her mother and aunty what had transpired. That when confronted about the issue, the accused denied everything. That PW1's mother took her to Wang'uru Police Station and then to Kimbimbi Hospital for treatment. On cross examination, PW1 stated that she was in the company of the accused for about one and a half hours and she wrestled with him and sustained bruises on her hands and legs before the accused defiled her. That it was not unusual for the accused to escort PW1 to get firewood because he was her uncle. That she had never had sex before the incident.

7. PW2, Omondi Francis Owino, was the clinician who examined PW1 at Kimbimbi Hospital. He observed that PW1 had bruises on knees and palms and had a tender lower abdomen and genital pain after the sexual assault. That the genitalia examination showed that she was actively bleeding in the vagina, bruised labia with old torn hymen and presence of spermatozoa. He produced the P3 form and treatment notes as exhibits. On cross examination, he confirmed that he examined the minor on November 13, 2014 although the P3 form was filled the following day. That the report shows an old broken hymen but forced penetration evidenced by fresh bleeding wounds on the vaginal and cervical walls. He stated that hymen can be broken through a fall, riding bicycle, trauma or sexual penetration. That infection was ruled out and so the white discharge could be spermatozoa.

8. PW3, RWM, mother of PW1 stated that her daughter was 14 years old at the time of the incident and produced her birth certificate which was verified by the court. That on the day of the incident, she did not find PW1 at home but she (PW 1) later went back carrying firewood and narrated what had transpired. That PW3 took her to the police station to report and they were directed to Kimbimbi Hospital for examination and treatment. That P3 and PRC forms were filled and defilement was confirmed. On cross-examination, she stated that the medical report confirmed what PW1 had said happened.

9. PW4 JWK, wife of the accused and sister to PW3 stated that on the day of the incident, she had returned from work at around 6.30pm when she was called to her sister's house. That PW1 narrated her ordeal and when she (PW4) confronted the accused about it, he denied everything. That she went along with the accused to the hospital where PW1 had been taken for examination and treatment and the report confirmed that PW1 had been defiled. That the accused was arrested on November 14, 2019. On cross examination, she stated that the accused was at home alone on the day of the incident as she had gone to work. That the accused was not examined at the hospital to ascertain that the sperms found in the minor were his.

10. PW5, PC Rose Sambu of Wang'uru Police Station stated that on the day of the incident at around 8pm, PW1 and PW3 reported the incident at the station. That she gave them P3 form and sent them to

the hospital. That the accused was arrested by the in-charge Kiumbu. That she got the birth certificate of the victim and confirmed that she was a minor at the time of the incident and proceeded to charge the accused. On cross-examination, she stated that she visited the scene of the crime. That no DNA was conducted and the accused was also not tested. That the crime scene was not far from a road that was rarely used and in a deserted place

11. After the close of the prosecution's case, the accused person was put to his defence.

12. In his defence, he stated that on the day of the incident, he had passed by the road near the river on his way to Kiumbu village. That he saw PW1 collecting firewood but he went his way. That he returned and took his goats to the river to drink water before heading home. That when he got home, his wife asked him if he had defiled PW1 but he denied. That he went with PW1, PW3 and PW4 to the hospital and to the police station that night. That he was shocked when he got arrested the next day on claims that he had defiled PW1. That he had a disagreement with his wife the night of November 12, 2019 and they had slept together and he was not happy when she went to work on November 13, 2019. On cross-examination, he stated that his statement was not taken when he visited the police station on the day of the incident. He stated that he had no grudge with the mother of the victim and that he knows that PW3 and PW4 had plotted to remove him from his home..

13. In this appeal, both parties filed their submissions.

14. The appellant submitted that the sentence meted against him was very harsh and implored the court to review it downwards. He relied on the case of *Yawa Nyale v Republic* (2018) eKLR. He also relied on the case of *Okeno v Republic* (1972) eKLR in reminding this appellate court of its duty to deeply scrutinize the evidence at trial and make its own conclusions. He also submitted that while in prison he continues to be of good behavior and has demonstrated usefulness.

15. The respondent in its submissions briefly stated that all the elements of the offence of defilement were proved beyond reasonable doubt by the 5 prosecution witnesses. That the verdict and sentence should be upheld.

16. In view of the foregoing, the issues for determination herein are:

    a. Whether the offence was proved beyond reasonable doubt;

    b. Whether there were inconsistencies in the evidence adduced; and

    c. Whether the mandatory minimum sentence is justified.

17. On the first issue, under section 8(1) and (2) of the *Sexual Offences Act*, the elements making up the offence of defilement are as follows:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration happened; and

    c. The perpetrator was positively identified.

18. The age of the victim was ascertained through her birth certificate produced by PW3 and a certified copy of the same was retained by the court. This is not in issue.

19. On the second element of penetration, PW1 stated that the accused forced her to the ground, removed his trouser, then ordered her to remove her biker and panty and then proceeded to defile her. The accused person threatened to kill her if she told anyone about the incident. PW1 also stated that the accused attempted to throw her into the river and she clutched on a thorny tree thereby injuring

her hands. That PW1 tried to escape but he pursued her and she fell on some thorns and sustained more bodily injuries. She narrated that he restrained her from further escape and he defiled her. I am persuaded, and so was the trial court, that the testimony of PW1 is credible under section 124 of the *Evidence Act* which provides:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." Emphasis added.

20. Even if the court had found any reason to doubt the evidence by PW1 and thereby demanding corroboration, I am satisfied that the evidence by PW2 is sufficient corroboration for PW1's testimony. The P3 form clearly indicates the bodily injuries sustained by PW1. It also confirms that the victim was defiled and PW2 states as much through cross-examination. PW2 stated that the hymen was broken but not recently and he gave circumstances under which hymen can be broken besides penial penetration. His response does not discredit the fact that the victim was defiled. In other words, that the victim did not have a recently torn hymen does not mean that she was not defiled. I am not ignorant of the position taken by previous courts on this same issue where it was held that an old torn hymen is not conclusive proof of defilement (See *Michael Odhiambo v Republic* (2005) eKLR). However, evidence of forceful penetration without lubrication, causing the vaginal and cervical walls to tear, is proof of penetration as indicated by PW2.

21. On identification of the assailant, as mentioned earlier, I rely on the testimony of PW1 on the strength of section 124 of the *Evidence Act* and I am satisfied that the appellant was positively identified by the victim. The trial court in its judgment observed at page 40 lines 9-12 of the petition of appeal as follows:

> " ...The accused was positively identified by PW1 he was the husband of PW4 who is an aunt to PW1. They were neighbors. PW1 stated that the ordeal lasted for one and a half hours. Even if they were strangers, this was long enough to be able to recognize the assailant later..."

22. I agree with these sentiments by the trial court and in my view, the assailant was positively identified. The testimony by the accused did not do much by way of distancing himself from the scene of the crime either. In the case of *Wamunge v Republic*, (1980) KLR 424 it was held;

> " It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction"

23. If there were inconsistencies in the evidence adduced before court, and which inconsistencies I cannot find, I fail to see how those inconsistencies, if any would water down the evidence and change the outcome of the case. In the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR the Court of

Appeal cited with authority the Ugandan case of *Twehangane Alfred v Uganda*, Crim App No 139 of 2001, [2003] UGCA, 6 where it was held:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

24. On the issue of the sentence meted to the appellant, the same is defined by section 8(3) of the *Sexual Offences Act* as a mandatory minimum of 20 years imprisonment. The trial court followed the letter of the law in sentencing the appellant following a guilty verdict. However, I am guided by the Supreme Court's decision in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) where the unconstitutionality of mandatory minimum sentences was discussed at length. The decision was used to guide another court in determining an appeal similar to the instant one, where he court applied it cautiously. In the case of *Athanus Lijodi v Republic* (2021)eKLR the court held thus:

> "On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases *Muruatetu's case* (supra) notwithstanding. This court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. This court expressed the proposition as follows in *David Wafula Kilwake & Another v Republic* [2018] eKLR.
>
> We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it."

25. In light of the foregoing and considering the record of the trial court and the submissions in this appeal, I hereby uphold the trial court's finding on conviction. However, on sentence I do order as follows:

    i. I hereby set aside the mandatory minimum sentence of 20 years and substitute the same with 15 years imprisonment to run from the date when the trial court imposed its sentence.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent