Stella v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 22890 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E027 OF 2022

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

HENRY MAMARIA STELLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. D.N. Sure RM) in the Senior Principal Magistrate's Court at Wang'uru Sexual Offence No. 017 of 2018 delivered on 30th November 2018)

JUDGMENT

1. The appellant filed a memorandum of appeal seeking that the appeal be allowed, conviction be quashed and the appellant be set at liberty. The appeal is premised on the grounds inter alia that the trial magistrate erred in law and fact by:

    a. Failing to consider the evidence by the complainant who said that it is not the appellant who defiled him; and

    b. Convicting the appellant based on evidence that is contradictory and inadequate.

2. The appellant was charged with defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 25th June 2018 in Mwea East Sub County within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of AMM a boy child aged 08 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 25th June 2018 in Mwea East Sub County within Kirinyaga County, the appellant intentionally and unlawfully touched the buttocks of AMM a child aged 08 years with his penis.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 6 witnesses in support of its case.

5. PW1 was the complainant who after voire dire, gave an unsworn statement. He stated that on 25th June 2018 he had been sent home from school because he had school fees arrears. That because nobody was at home, he went to his aunt's place where he spent the day. That the appellant took him by the right hand and forced him into a nearby maize plantation. That he resisted and made some noises but the appellant insisted. That the appellant removed PW1's uniform and inserted his penis into PW1's anus. That he felt pain and screamed and a man (PW 2) came and rescued him. That the appellant ran away with PW1's clothes. He identified the assailant as the appellant and he said that at the time of the incident, PW1 saw the appellant clearly as there was moonlight on that night. On cross-examination he stated that the appellant found him at the gate to his aunt's house and took him to the maize plantation where he defiled him.

6. PW2, Martin Waweru stated that he was near the scene of the incident where he had gone to collect cow-feed near the lake. That he heard screams from a nearby maize plantation and he went to check. That he found the appellant lying on top of the complainant who was naked with only his shirt on. That he shouted and told the appellant that he was going to kill the boy. That the appellant pulled up his trousers and ran off. That PW2 took the complainant to his house and gave him some clothes then escorted him to his aunt's place. That they went to Wang'uru Police Station and reported the matter. He stated that he saw the appellant as visibility was clear at the time and he had also seen him before. On cross-examination, he recounted the testimony and added that he was not framing the appellant for the crime.

7. PW3, JM, who is the father of the complainant, produced the child's birth certificate to confirm that he was a minor at the time of the incident. He stated that he was out in town buying some food when he received a call to go to the complainant's aunt's house. That he found the complainant wearing unfamiliar clothes and had mud on his legs. That he was informed that a man was found lying on top of his son in a farm. That he reported the matter at Wang'uru Police Station and recorded his statement and then took the child for treatment at Kimbimbi Hospital. On cross-examination he stated that he had no reason to frame the appellant for the offence.

8. PW4, PMM, mother of the complainant stated that on the day of the incident, she received a phone call from her sister asking her to go to the place where the complainant was and that something had happened to him. That she called PW3 and alerted him of the same because it would take her sometime to reach the place. That she interrogated the child and he said he had been defiled by the appellant. That the matter was reported to the police and the child taken for treatment where it was established that he had been defiled. That the appellant took himself to the chief's office where he got arrested. On cross-examination, she stated that the child had identified the appellant as the assailant and some 2 women had led PW4 to the house of the appellant where he was working as a herds boy.

9. PW5, Steven Kilonzo was the clinical officer at Kianyaga sub county hospital who examined the complainant. He noted that the minor had laceration on anal orifice and reddening of the anal region which was soiled. He concluded that the child had been sodomized. On cross-examination, he recounted his evidence and findings.

10. PW6, P.C. Andrew Mwaniki who was the investigating officer stated that on 26th June 2018 he was assigned the case and he called PW3 together with the complainant to the station. That they narrated the ordeal to him stating that complainant had been in the company of the appellant from around 5:30PM on the previous day. That the appellant lured the complainant into a maize plantation and defiled him. That PW2 rescued the child after he screamed. That he verified the age of the child using

the birth certificate provided. On cross-examination, he stated that the appellant was arrested by PW2 and PW3 and he ran to Tebere AP camp where he was detained.

11. Upon close of the prosecution's case, the appellant was placed on his defence after the court found that the prosecution had established a prima facie case.

12. The appellant, in his defense, stated that on the date of the alleged incident, he was at his place of work where he was employed to take care of animals in a zero-grazing unit. That he went about his duties all day and that there is no way he could have met the complainant. That he was attacked at his house and so he ran to the chief's camp where he did not get a chance to explain himself. That the complainant's mother threatened to have him jailed.

13. The defense case was closed and the court gave its judgment finding the appellant guilty of the offence and thereby convicting him. He was sentenced to life imprisonment.

14. In this appeal, the court directed that the parties file their written submissions and both parties complied.

15. In his written submissions, the appellant stated that the witness testimonies were all lies and that the court was wrong to convict him based on that evidence. That at the time when the alleged incident happened, he was unwell and could not possibly have met with the complainant that day. That if the allegations against him are true as alleged, then the aunt of the complainant should also have been a witness in the case. That PW2 lied when he said that he had gone across the lake to get cow feed and he rushed to the maize plantation in time to find the appellant lying on top of the complainant.

16. The respondent submitted that the appellant was positively identified as the perpetrator of the crime, according to the testimony of PW1 and PW2. That P5 confirmed that penetration occurred and he produced the P3 form with the necessary details. That the age of the complainant was verified from the birth certificate produced. They relied on the case of Bakare Vs. State (1987) 1 NWLR to affirm that the prosecution had proved its case beyond reasonable doubt.

17. After perusing the petition of appeal, written submissions and the trial court proceedings, in my view, the issue for determination is whether the offence was proved beyond reasonable doubt.

18. In order to determine the first issue of whether the offence was proved beyond reasonable doubt, 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.

19. The age of the victim was ascertained through his birth certificate produced in court. The birth certificate is sufficient proof that the victim was indeed a child according the *Children Act* No. 8 of 2001 which defines a child as ".....any human being under the age of eighteen years."

20. On the second element of penetration, PW1 stated that the appellant lured him into a maize plantation, took off his uniform, lowered his own pants and then inserted his penis into PW1's anus. This was corroborated by the testimony of PW5 who stated that from his examination, the complainant had lacerations on the anal orifice and reddening in the anal region which was soiled. He concluded that the child had been sodomized or defiled within the meaning of section 8(1) and (2) of the *Sexual Offences*

Act. The Court of Appeal in the case of AML Vs. Republic (2012) eKLR stated that penetration is proved through evidence. In my view, the same has been sufficiently proved beyond reasonable doubt.

21. Regarding positive identification of the perpetrator, PW1 stated that he saw the appellant because it was not yet dark and when it got dark, there was moonlight on that night. PW2 also saw the appellant lying on top of the complainant and when the appellant saw PW2, he ran away while pulling his trousers up. That PW2 had seen the appellant before the day of the incident and was therefore not mistaken. From these 2 pieces of evidence, the trial court was satisfied that the assailant had been positively identified. It is my view that the court had sufficient evidence on identification of the appellant and placing him at the scene of the crime in accordance with 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."

22. Similarly, in the case of Wamunge Vs 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. The appellant submitted that some of the evidence used to convict him was contradictory and the trial court erred by relying on it. If any fault or inconsistency in the evidence is to be decried, these inconsistencies do not disturb the appellant's understanding of the charges brought against him. While sticking to the substance of the case itself and the elements of the offence, I do not think that the few inconsistencies in the evidence are enough to unset the court's finding. In the case of Erick Onyango Ondeng' Vs. Republic [2014] eKLR the Court of Appeal cited with authority the Ugandan case of Twehangane Alfred Vs. 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. In light of the foregoing and considering the petition of appeal and the submissions in this appeal, I find no reason to interfere with the findings of the trial court on conviction. On the sentence, the court shall be guided by the Supreme Court's decision in the case of Muruatetu & another Vs Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2). Therefore, I do make orders as follows:

    a. The conviction of the trial court is upheld;

b. The sentence of life imprisonment is hereby set aside and replaced with a sentence of 40 years imprisonment running from the judgment date of the trial court.

25. 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