Maghema v Republic (Criminal Appeal E001 of 2023)
[2023] KEHC 22722 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22722 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E001 OF 2023

GMA DULU, J

SEPTEMBER 27, 2023

BETWEEN

JONATHAN MNYIKA MAGHEMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the judgment in Sexual Offence Case No. E013 of 2020 at Voi Law Courts delivered on 10th January 2023 by Hon. C. K. Kithinji (PM)

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on November 10, 2020 at around 11am in Voi Sub County of Taita Taveta County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of NS (name withheld) a child aged fourteen (14) years.

2. In the alternative, he was charged with 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 and at the same place intentionally and unlawfully touched the vagina of NS with his penis.

3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 20 years imprisonment.

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

    1. The learned Magistrate erred in law by convicting and sentencing the appellant yet failed to find that the conduct of PW22 who was the victim of the offence does not paint a picture of someone who was defiled.

2. The learned Magistrate erred in law and in fact by failing to find that penetration was not proved thus the prosecution did not discharge its duty pursuant to Section 107 of the *Evidence Act*.

3. The learned trial Magistrate erred in law in convicting and sentencing the appellant yet failed to find that his *constitution*al rights to fair trial under Article 50(g)(h) were violated.

4. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellants mitigation and the facts and circumstances unique to the case.

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

6. This being a first appeal, I am bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see *Okeno =v= Republic* [1972] EA 32.

7. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and called one witness DW2 Peris Wakesho Maghana his mother.

8. The critical ingredients of defilement for which the appellant was convicted have been highlighted in many decided cases. It will suffice if I refer to the case of *Michael Mumo Nzioka v Republic* (2019) eKLR in which the court stated as follows:-

> " The first is whether there is penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration is by the appellant."

9. In this appeal, the appellant raised technical as well as substantive grounds of appeal. I will deal with the technical grounds first.

10. The appellant has complained that his rights to fair hearing under Article 50(g) and (h) of the *Constitution* were violated. I have perused the record of the proceedings and find no procedural impropriety or action or default in the proceedings that would have denied the appellant of his right to fair hearing. I dismiss that ground.

11. The appellant has in the substantive grounds complained that the offence was not proved against him beyond reasonable doubt, as required under Section 107 of the *Evidence Act* (Cap.80). From the evidence on record, in my view the age of the of the complainant PW2 was proved beyond reasonable doubt to be 14 years, since a birth certificate was relied upon, which was not controverted.

12. With regard to penetration of a sexual nature, PW2 stated that she was penetrated by the appellant that morning. There is also evidence on record, even from the mother of the appellant DW2, that the appellant and PW2 were lovers. The appellant in his sworn defence denied the incident, but did not cross-examine the complainant PW2. The evidence of PW3 Joto Nyawa a MOH at Moi Referral Hospital Voi was to the effect that the vagina opening of PW2 was wide open and hymen was missing but no fresh bleeding.

13. In my view, from the totality of the evidence on record, and taking into account the provisal to Section 124 of the *Evidence Act* (Cap 80) regarding the weight to be placed on the evidence of a single victim witness of a sexual offence, the prosecution in the present case proved beyond reasonable doubt that PW2 was sexually penetrated that day, as the said evidence of PW2 was consistent and believable.

14. With regard to whether the sexual penetration of PW2 was by the appellant, it is clear from the evidence on record that PW2 and the appellant knew each other well. They were lovers. There was no possibility of mistaken identity. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.

15. Having stated as above however, the conduct of PW2, from her own evidence, of going to a young man's house to exercise her voluntary discretion to engage in sexual acts, is conduct that could mislead any reasonable person who was not closely aware of her date or year of birth, to believe that she was an adult. Thus in my view, the statutory defence under Section 8(5) of the *Sexual Offences Act* is applicable in this case.

16. On that account alone, I will allow this appeal. I will thus quash the conviction and set aside the sentence.

17. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated, signed and delivered this 27th day of September 2023 in open court at Voi.

GEORGE DULU

JUDGE

In the presence of:-

Nusura – Court Assistant

Mr. Sirima for State

Appellant