Mwangashi v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 22806 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22806 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E023 OF 2022

GMA DULU, J

SEPTEMBER 26, 2023

BETWEEN

DISHON MWAFANI MWANGASHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E005 of 2020 at Voi Law Courts delivered on 7th May 2020 by Hon. C. K. Kithinji (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court at Voi with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 6 of 2006. The particulars of offence were that on September 21, 2020 at around 18:00hours in Voi Sub County within Taita Taveta County intentionally caused his penis to penetrate the vagina of CH a child aged 17 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 CH a child aged 17 years with his penis.

3. He denied both charges. After a full trial, he was convicted on both the main and the alternative count. He was sentenced to 25 years imprisonment on the main count of defilement. The sentence on the alternative count of indecent act with a child was left in abeyance.

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

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

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

3. The trial Magistrate erred in law and fact by failing to adequately analyse the appellant's defence, in addition to his application for the conduct of a DNA test.

4. That PW3 left out many details which were crucial for the just determination of his case and thus still crucial for the just determination of his pending appeal.

5. That PW3 was economical with the truth in her evidence since she was under pressure to testify in a choreographed manner from her father on account of the land dispute that existed between them as indicated in the evidence advanced in court.

6. That PW3 and him were and still are lovers and have even bore a daughter together.

7. That his child with PW3 was called Shalete Mwatwani and was named after his biological mother.

8. That his child with PW3 was born on January 18, 2021 which essentially meant that she was conceived around mid April to mid May 2021 during his trial which began on September 30, 2020.

9. That PW3 never told the trial court that she was pregnant with his child during her testimony. That there was no bad blood between him, PW3 family and his immediate family and PW3 even comes to visit him in prison.

10. That in view of grounds 4 – 10, he seeks indulgence of the court to allow him adduce additional evidence pursuant to Section 358(1) (2) of the *Criminal Procedure Code*, and the orders granted shall not prejudice the complainant in any way but shall be interest of justice to both the complainant and him.

11. That he requests the court to allow a fellow inmate Solomon Ngatia to assist him communicate in the appeal pursuant to Article 50(7) of the *Constitution* in the interests of justice, as a court may allow an intermediary to assist a complainant or accused person to communicate with court. This is because he lacks requisite legal knowledge to handle this appeal and he cannot afford the services of an advocate.

12. That 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 appellant's 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. In this regard, I have to put it on record that the appellant at the hearing, adopted his grounds of appeal as his submissions.

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

7. I have evaluated the evidence on record. At the trial, the prosecution called four (4) witnesses. The appellant, on his part, tendered sworn defence testimony and did not call any additional witnesses.

8. The appellant has raised both technical and substantive grounds of appeal. I will deal with technical grounds first.

9. The first ground is that he was not accorded rights to fair trial thus contravening Article 50(g) (h) of the *Constitution*. Having perused the record of the trial court however, I find that evidence was tendered against him, he cross-examined all prosecution witnesses, and was also given an opportunity to defend himself and tendered his defence on oath. I find no basis for this ground and dismiss the same.

10. The other technical ground is ground 11 and 12 where he asks this court to allow him to tender fresh evidence on appeal under Section 358(1) (2) of *Criminal Procedure Code* and also that he be allowed to be assisted in prosecuting the appeal by a prison inmate Solomon Ngati under Article 50(7) of the Constitution. I note that the appellant has laid no basis or justification for this request. The request has no basis, and I dismiss the same.

11. The other grounds, except ground 13 are with regard to adequacy of the evidence tendered in the trial court, and the court not taking into account his defence in the judgment.

12. Having perused and considered the evidence on record, the age of the complainant was established to be 17 years and some month. This is from the evidence of the complainant PW3 CH and PW4 PC Grace Chonga who relied on a birth certificate which was produced in court as an exhibit. I find that the age of the complainant was proved beyond reasonable doubt.

13. With regard to penetration, the evidence of PW3, and that of PW2 Joto Nyawa confirms sexual penetration of a girl of the complainant age. Even though no spermatozoa was found on PW3, I am of the view that sexual penetration was confirmed by the immediate report of the incident by PW3, and the medical evidence of missing hymen, and tender vaginal canal.

14. With regard to the perpetrator or culprit, there was no possibility of mistaken identity as the incident occurred in broad daylight and both the complainant and the appellant knew each other well by physical appearance as neighbours. Thus in my view, the appellant was proved beyond reasonable doubt to be the culprit.

15. When the appellant talks about pregnancy and a child on appeal, such evidence was not on record for consideration by the trial court. Infact, the appellant denied any sexual act with the complainant, thus he cannot raise such a narrative on appeal. The conviction thus has to be upheld.

16. The only error which the Magistrate made was to convict for both the main count of defilement and the alternative count of indecent act. In my view since the charge of indecent act was an alternative count, the trial Magistrate could only convict of one or the other of the two or none. The Magistrate could not convict on both counts at the same time. I thus quash the conviction for indecent act, but uphold the conviction for the main count of defilement.

17. With regard to sentence, the trial court sentenced the appellant to 25 years imprisonment. The Director of Public Prosecutions on appeal suggests that the sentence be reduced to the minimum of 15 years.

18. In my view, there are no existing aggravating circumstances in this case to justify sustaining the sentence of 25 years imprisonment imposed by the trial court. The minimum statutory sentence being quite severe, I will substitute the minimum sentence of 15 years imprisonment.

19. Consequently and for the above reasons, I quash the conviction for indecent act with a child, but uphold the conviction for defilement. I set aside the sentence of 25 years imprisonment, and order that instead the appellant will serve 15 years imprisonment from the date he was sentenced by the trial court. Right of appeal within 14 days.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Nusura/Alfred – court assistants

Appellant in person

Mr. Sirima for State