Maghanga v Republic (Criminal Appeal E066 of 2021) [2023] KEHC 24147 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E066 OF 2021

GMA DULU, J

OCTOBER 26, 2023

BETWEEN

PASCAL MWANAKE MAGHANGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E002 of 2020 at Voi Law Courts delivered on 13th May 2021 by Hon. D. Wangeci (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on 13th September 2020 at around 18:00hours in Voi Sub County within Taita Taveta County intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of JM a child aged 4 years and 5 months.
2. In the alternative, he was charged with committing an indecent act with a child act contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same time and place intentionally and unlawfully touched the vagina of JM. a child aged 4 years 5 months.
3. He denied both charges. After a full trial, he was convicted of the main charge of defilement and sentenced to life imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
    1. The learned trial Magistrate erred in law and facts by convicting him on a defective charge.

2. The learned trial Magistrate erred in law and fact by sentencing him to life imprisonment yet the age of the complainant which was the determinant factor was not proved.

3. Whether the mandatory life imprisonment meets the dictates of the *Constitution*.

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. At the trial, the prosecution called five (5) witnesses. On his part, the appellant tendered a sworn defence testimony, and was not cross-examined.

7. I note that in the submissions of the Director of Public Prosecutions, the complainant is depicted as PW4 a child of 10 years. From the record however, the complainant was PW1 (JM) a young child said in the charge sheet to be 4 years and 5 months, but who described her age to be 2 years.

8. That said, I have a duty as a first appellate court, to re-evaluate all the evidence on record and come to my own independent conclusions and inferences.

9. With regard to the age of the complainant PW1, no documentary evidence such as a birth certificate was relied upon. The grandmother PW3 RAO did not testify to the age of PW1. In the P3 form, PW5 Dr. Joto Nyawa testified that PW1 was said to be 4 years.

10. The Magistrate saw PW1 in court, and took her through voire dire examination. In my view, the prosecution proved the age of the complainant PW1 to be four (4) years.

11. On sexual penetration, PW5 Dr Joto Nyawa stated that the complainant PW1 was treated at the hospital. That the vagina was swollen, red, and hymen broken. She was treated on 26th November 2019, and medical examination (P3 Form) filled by him on 13th September 2020. He stated that he relied on treatment notes whose maker he did not identify, nor was that medical official called as a witness or reason given for failure to do so.

12. I observe that the appellant tendered sworn defence testimony denying committing the offence, and the prosecutor stated that he did not have any questions in cross-examination. Thus the defence of the appellant remained unchallenged.

13. With the above evidential situation in mind, I find that the entries on the sexual penetration findings in the P3 form made by PW5 were hearsay evidence. I thus find that sexual penetration was not proved beyond reasonable doubt.

14. With regard to the identity of the culprit, the evidence of both PW1 and PW2 on record is very shaky, being evidence of children of tender years, and with the evidence of PW3 Rose Anyango Okello stating that her problem was initially that the appellant bathed the two children and took them out in the early morning hours to help themselves in the bush, and the sworn defence testimony of the appellant denying the charge, which was not challenged through cross-examination. It is apparent thus that the allegation that the appellant committed a sexual offence was a twisting of the factual position.

15. In my view therefore, even if the complainant PW1 was defiled, there was no evidence to prove beyond reasonable doubt that the appellant was the culprit. This allegation could as well have arisen from a strained marital relationship between PW3 and the appellant who had cohabited as wife and husband.

16. I thus find that the conviction and sentence are not sustainable, and the appeal will thus succeed.

17. Consequently, 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 26TH DAY OF OCTOBER 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State