AM v Republic (Criminal Appeal 35 of 2017)
[2022] KEHC 17096 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 17096 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 35 OF 2017

MN MWANGI, J

APRIL 28, 2022

BETWEEN

AM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment by Hon. A. Ndung'u, Resident Magistrate, delivered on the 24{{^th}} February, 2017 in Shanzu Senior Principal Magistrate's Court Criminal Case No. 433 of 2014)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on diverse dates between June 11, 2013 and April 28, 2014 at [Particularas withheld] Village, [Particularas withheld] Location in Kisauni District within Mombasa County intentionally caused his penis to penetrate the vagina of MR [name withheld] a child aged 16 years. He was sentenced to fifteen (15) years imprisonment.

2. The appellant was aggrieved by the decision of the trial court and filed a petition and grounds of appeal on March 6, 2017. He amended his grounds of appeal on November 21, 2019, with leave of the court. His amended grounds of appeal are-

    i. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the 15 years sentence imposed upon him was unlawful because the essential ingredient of identification was not proved;

    ii. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that no medical evidence was presented before the court linking him to

the alleged offence as no DNA was carried out to establish the paternity of the child and its father and mother;

iii. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the prosecution's case was not proved beyond reasonable doubt;

iv. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the source of his arrest was not established to have had any connection with the offence in question; and

v. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering his defence.

3. In his written submissions filed on March 9, 2020, the appellant stated that in the complainant's (PW1's) examination-in-chief, she stated that she did not know him and in cross-examination she also stated that she could not prove that it was him who had defiled her. He submitted that if he had defiled PW1 and if he had slept with her on several occasions, she would not have had trouble identifying him. He contended that he was wrongfully arrested and was now serving sentence in place of someone else, as he did not commit the offence. He relied in the case of *R v Turnbull* (1976) 3 ALL ER 549 on the issue of identification.

4. He submitted that it was on record that the present case was only reported when PW1 realized that she was pregnant. He contended that if a DNA test was conducted, it would have revealed who the perpetrator of the offence was. According to him, the main issue was not defilement but PW1's pregnancy. He alleged that PW1 had been defiled earlier but she did not report anywhere.

5. The appellant relied on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR in submitting that the sentence of 15 years imprisonment meted out on him was unconstitutional.

6. Mr Muthomi, prosecution counsel filed written submissions on January 24, 2020 to oppose the appeal. He stated that the issue of identification was satisfactorily proved without doubt since PW1 testified that she had had sex with the appellant on several occasions and that she had not slept with another man apart from him.

7. On the issue of DNA examination, the prosecution counsel submitted that a case of defilement does not need the said examination but a medical report suffices. He stated that the doctor's report indicated that PW1's hymen was not intact and that she was pregnant. He contended that there was no need for DNA examination since PW1 had testified that the appellant was the only man she had been sleeping with.

8. On the issue of proof of the charge against the appellant, Mr Muthomi submitted that the prosecution proved its case beyond reasonable doubt. He stated that PW1's age was established and that there was an age assessment report presented in court.

9. In regard to the issue of penetration, the prosecution counsel stated that PW1 explained how she and the appellant had sex in an incomplete building which resulted in pregnancy.

10. On the issue of the identity of the perpetrator of the offence, Mr Muthomi submitted that it was established since the appellant was well known to PW1 as they had engaged in sex on several occasions.

11. In concluding his submissions, he stated that the appellant's defence was an afterthought since during cross-examination of PW2, the issue of a dispute between him and the PW1's aunt, (PW2) did not arise but only arose in his defence.

Analysis And Determination.

12. This being the first appeal, this court has the duty to analyze and re-examine all the evidence adduced before the trial court afresh and arrive at an independent conclusion on both the facts adduced and the applicable law. This court must however bear in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. That was the principle espoused in various cases including *Kiilu & another v Republic* [2005] 1 KLR 174, where the Court of Appeal held that-

> " An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, only then can it decide whether the magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

13. In the evidence adduced before the lower court, PW1, [MRC] name withheld, a girl aged 16 years and in class 4, testified that on the June 13, 2013, she had gone to fetch firewood at [Particularas withheld]. That on her way back, she met the appellant who asked her to follow him to an incomplete building. Her evidence was that at the said building, he asked her to remove her clothes. That on asking him the reason as to why she should do that, he did not respond and he proceeded to remove her clothes. She also stated that the appellant also removed his clothes and then told her to lie down on the ground, which she did.

14. She stated that the appellant put his penis in her vagina and had unprotected sex with her and after he finished, she went home and had a bath. She disclosed that was not her first time to have sex, as she had done it on several occasions with the appellant. She testified that when her uncle SC went to their home, he told her that he had seen her with someone. She stated that she did not know the appellant but later found out that his name was Adam. That the appellant ran away but he was later arrested and taken to Kiembeni Police Station. She indicated that before he was taken to the said Police Station, he was taken to her home where he said he knew her and that "nilikuwa kipenzi chake" (I was his lover).

15. Her evidence was that she was taken to Coast General Hospital (Makadara), where she was examined and informed that she was 5 months pregnant. She stated further that there were other times that the appellant had slept with her in the same building. She stated that she gave birth to a child whom she named LA, as he was the appellant's son.

16. PW2, ACB [name withheld] was PW1's Aunt who used to live with her. She testified that in April, 2014 she noticed that PW1 was pregnant and that upon asking her about it, she denied. PW2 then took PW1 to one Mama Beko who safeguards the rights of children. PW2's evidence was that PW1 was interrogated and acknowledged that she was pregnant and said that she did not know the name of the man (responsible for the pregnancy) but she knew his appearance. That PW1 was referring to the man as 'Chege'. PW2's testimony was that they reported the matter to the chief and a week later, the appellant was arrested and taken to PW1's home where he said that he did not know PW1 but also said that she had been his lover.

17. PW3 was No 88052 Corporal Grace Wasu attached to Kiembeni Police Station and the Investigating Officer in this case. Her evidence was that on April 29, 2014 she was allocated a defilement case to investigate. She stated that PW1 was taken to the Police Station by her parents and PW2. PW3 also

stated that the appellant was taken to the police station with them. PW3 escorted PW1 to the hospital where she was examined and it was confirmed that she had been defiled and a P3 form was filled. PW3 also stated that PW1 was also taken for age assessment and her age was assessed as 16 years.

18. PW4, Doctor Mirfat Shatry, testified that she was not the author of the P3 form but she recognized the handwriting as that of Doctor Ngure who was no longer practicing medicine. She stated that PW1 who had a history of defilement was treated at Coast General Hospital on April 29, 2014. That on general examination, she had no physical injury but she had a single viable intra-uterine pregnancy at 21 weeks and 5 days. That her hymen was absent, and she had an old scar in her vagina. PW4 produced the P3 form, the obstetric scan and PRC form filled on April 29, 2014.

19. In his sworn defence, the appellant denied the charges against him. He stated that on April 29, 2014 at around 10.00 am., he left his home and proceeded to Bamburi using the Bambo Road as he is in the business of selling coconut oil. That on his way he was apprehended by three men who told him to accompany them to Kiembeni Police Station and he did so. He stated that he asked them why they wanted him to accompany them to the Police Station but they told him that he would be informed of the same. He also stated that he was taken to Kiembeni Police Station where he was arrested, placed in the cells and charged in court the following day.

20. The appellant stated that PW1 went to court to testify but during cross-examination she could not answer his questions. He stated that PW1's mother was his client to whom he used to sell coconut oil and steel wool and that she used to pay, but then started taking items on credit and when he asked for his money, she did not pay. That he got tired of asking for his money and informed her that she would no longer be his client. The appellant stated that she was not happy with his decision as her neighbours continued buying his goods but he refused to sell to her. He claimed that she became bitter and framed this case on him. He asserted that the reason as to why he was in court was because of the fall out between him and PW1's mother.

21. The issues for determination in this appeal are-

    a. If the penetration was proved;

    b. If the appellant was positively identified;

    c. Whether the prosecution proved its case beyond reasonable doubt; and

    d. If the sentence imposed on the appellant can be regarded as being either harsh or excessive.

If penetration was sufficiently proved.

22. Section 2 of the *Sexual Offences Act* defines "penetration" as:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person".

23. In this case, PW1 testified that the appellant inserted his penis into her vagina when he called her to an incomplete building and requested her to remove her clothes. PW4 when adducing evidence of the medical examination done on PW1 by Dr Ngure testified that the said doctor found that her hymen was not intact and that she had an old scar in her vagina. Additionally, PW1 was pregnant. This court notes that the fact that PW1's hymen was not intact, there was an old scar in her vagina (where the hymen was supposed to be) and the fact that she was pregnant, was evidence of penetration. Apart from the incident recounted in court, PW1's evidence was that she had had sexual intercourse with the appellant on different occasions.

If the appellant was positively identified.

24. As to whether the appellant was positively identified as the perpetrator of the offence, PW1's evidence was that he called her and led her to an incomplete building where he asked her to undress, he then undressed and inserted his penis in her vagina. In PW1's examination-in-chief, she stated that she did not know the appellant. PW2 in her evidence stated that PW1 was referring to the man who defiled her as 'Chege'. When PW1 was cross-examined by the appellant, she stated that she knew he was the one who defiled her. She however said it was at night and could not prove that he was the one who had defiled her. The prosecution counsel argued that since PW1 confirmed having had sex several times with the appellant that was sufficient to identify him. Mr Muthomi also argued that when the appellant was arrested, he said that PW1 "alikuwa kipenzi changu" which was sufficient evidence to show that the PW1 and the appellant, knew each other.

25. In *R v Turnbull* (supra) the Court held as follows-

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

26. What is evident from the evidence adduced is that PW1 did not know the appellant's name until after the appellant was charged in court. This court can however not overlook the fact that the appellant admitted before members of the public after he was arrested that PW1 was his lover. Given the said admission, the issue of mistaken identity does not arise.

If the prosecution proved its case beyond reasonable doubt

27. After the appellant was arrested, he was taken to PW1 and PW2 and upon being questioned by members of the public, he said that PW1"alikuwa kipenzi changu", which means that PW1 was his lover. In his defence, the appellant did not deny having uttered the said words. Apart from the days he used to defile PW1 at night, there is evidence on record that he defiled her one evening as PW1 was coming from collecting firewood and on the said date, she was questioned about having been seen with a man. PW1 recounted how she was defiled by the appellant. After investigations, it was found that she was five months pregnant.

28. It is apparent that PW1 did not know the appellant's name and at one time, she thought he was called Chege but she later found out that he was called Adam. My finding is that the appellant was convicted on sound evidence. The fact that he informed members of the public that PW1 was his lover was an admission of his culpability in the commission of the offence he was charged with. The defence put forward of a grudge between him and PW1's mother was properly rejected by the trial court as an afterthought. I am satisfied that the prosecution proved its case beyond reasonable doubt and I uphold the conviction.

If the sentence imposed on the appellant can be regarded as being either harsh or excessive.

29. As regards the sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. section 354 of the *Criminal Procedure Code* stipulates the powers of the High Court on appeal. Section 354(3)(a)(ii) provides that in an appeal against conviction, the court may alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence. Having considered the circumstances of the case herein, I hereby exercise my discretion and reduce the sentence imposed on the appellant to twelve (12) years imprisonment.

30. The appellant was in custody from April 30, 2014 to May 7, 2015, when he was released on bail pending trial. He stayed in custody for 1 (one) year as his trial was ongoing. The said period should be factored in when computing his sentence. The appellant was sentenced on December 5, 2016. The remainder of his sentence should be computed from December 5, 2016. The appeal succeeds only to the extent that his sentence has been reduced.

DELIVERED, DATED AND SIGNED AT MOMBASA IN OPEN COURT ON THIS 28TH DAY OF APRIL, 2022.

NJOKI MWANGI

JUDGE

In the presence of-

The appellant

Ms Mburu holding brief for Ms Keya for the DPP

Mr. Oliver Musundi – Court Assistant.