**Mwaniki v Republic (Criminal Appeal E039 of 2021)**
**[2022] KEHC 2998 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 2998 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CRIMINAL APPEAL E039 OF 2021**

**LM NJUGUNA, J**

**APRIL 28, 2022**

**BETWEEN**

**SALESIO MUNYI MWANIKI .............................................................. APPELLANT**

**AND**

**REPUBLIC ........................................................................................ PROSECUTION**

***(Being an appeal against conviction and sentence of Hon. Ndengeri (S.R.M) in Embu Criminal (Sexual Offence) Case Number No. 38 of 2019)***

**JUDGMENT**

1. The appellant herein filed the instant appeal which was instituted by way of a petition in which he challenges both the conviction and sentence by the trial court in Embu CM's Criminal Case (Sexual Offences) No. 38 of 2019.

2. The appellant was charged with the offence of rape of a person with mental disability contrary to section 7 of the *Sexual Offences act* No.3 of 2006 and particulars being that on 15.10.2019 at around 1300 Hrs at [Particulars Withheld] Village, Itabua Sub location within Embu County, intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of JWJ without her consent, a person with mental disability. He also faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No.3 of 2006 and particulars being that on 15.10.2019 at around 1300hrs at [Particulars Withheld] Village, Itabua Sub Location within Embu County, intentionally touched the vagina of JWJ

   with his penis against her will.

3. The appellant was tried and convicted of the alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* and sentenced to 10 years imprisonment.

4. It was the conviction and the sentence that necessitated the instant appeal which was instituted vide the petition of appeal wherein he raised Eight (8) grounds of appeal that :

   i. The learned magistrate erred in law and fact in convicting the appellant without considering that the prosecution failed to prove its case beyond reasonable doubt as provided by the law.

   ii. The learned magistrate erred in law and in fact by convicting the appellant on insufficient prosecution's evidence that it was the appellant who defiled the complainant.

   iii. The learned magistrate erred in law and in fact by convicting the appellant whereas it was clear that the complainant did not positively identify the appellant as the person who committed the offence to her.

   iv. The learned magistrate erred in law and in fact by convicting the appellant whereas there was no medical evidence to prove that it was the appellant who indeed defiled the complainant.

   v. The learned magistrate erred in law and in fact by convicting the appellant whereas even the complainant's mother on 05.02.2020 told the Honourable court that she was not certain if indeed it was the appellant who defiled the complainant and at that time wanted to withdraw the case against the appellant and this clearly shows that the complainant's mother had not been categorically told by the complainant that it was the appellant who defiled her.

   vi. The learned magistrate erred in law and in fact by convicting the appellant whereas the medical records showed that the complainant had a repeated sexual encounter and the medical condition of the complainant as presented by PW4 showed that the complainant was mentally challenged and therefore could not clearly report what happened to her and who the perpetrator was.

   vii. The learned magistrate erred in law and in fact by dismissing the appellant's defence that the complainant had said another man had defiled her and was ready to be medically examined to prove that he was not the perpetrator of the offence.

   viii. The learned magistrate erred in law and in fact by imposing sentence that was harsh, oppressive and excessive considering that the appellant was a first offender.

5. The issues for determination thus can be summarized as: -1.

   1. Whether the prosecution discharged the burden of proof.

   2. Whether the sentence is harsh, oppressive and/or excesive.

6. The appellant submitted that the prosecution did not discharge the burden of proof for the reason that PW1 being the mother of the complainant herein had stated that when she called the complainant, she came out of the thicket carrying her clothes and when she was asked what had happened, she pointed at her private parts. It was further submitted that the court was not told which clothes she was carrying and that she had said that the appellant herein had raped her while the trial court on page 5 of the record of appeal noted that the complainant was mentally challenged and that when the court tried

to have her testify ,she only gesticulated and smiled and therefore the observation by the court created doubts in this case which the Honourable Court ought to have resolved in the appellant's favour.

7. It was further submitted that the appellant was not positively identified as the person who assaulted the complainant in that PW1 said it was the appellant herein who was responsible for the assault while we have not been told what exactly the complainant said. That the doctor testified on the complainant's mental capacity and with such kind of mental capacity, the complainant could not have positively identified the appellant herein.

8. In regards to sentencing, the appellant submitted that the court convicted the appellant and handed him an unlawful sentence of Ten (10) years way above the one provided for by the provisions of the law and as such, the sentence in his view was harsh and excessive in the circumstances. It was his case that he was only connected to this offence because he was cutting fodder for his cows. He further denied the offence and thus prayed that the conviction be set aside and he be set at liberty.

9. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 and is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR).

10. I have considered the grounds of appeal and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution following the principles in Okeno v Republic (supra) and re-stated in Kiilu and Another v R (supra), and the written submissions by the appellant herein.

11. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond any reasonable doubt. This was well buttressed in the well stated principles in the cases of *Woolington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273.

12. Section 11A of the *Sexual Offences Act* provides that: -

> " Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."
>
> An indecent act is defined in Section 2 of the said Act as an unlawful intentional act which causes—
>
> a. any contact between any part of the body of a person with the genital organs, breasts of buttocks of another, but does not include an act that causes penetration;
>
> b. exposure or display of any pornographic material to any person against his or her will;

13. As such, from the above definitions, the prosecution had a burden to prove that: -

There was an act which caused—

a. any contact between any part of the body of a person with the genital organs, breasts of buttocks of another

b. The act was by the appellant

c. The victim was an adult

d. The act was unlawful and intentional.

14. The trial court conducted voire dire examination on the complainant and from the examination, the trial court determined that from the demeanor of the complainant, it was clear that she was mentally challenged and as such, the court allowed an intermediary in terms of section 31 (3) of the *Sexual Offences Act* to testify on her behalf. The appellant has since challenged his conviction by arguing that the trial court was never told what exactly the complainant said andthat in his own view, the allegations were created by PW1.

15. Article 50(7) of *the Constitution* which protects fair trial provides thus:

> In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

16. Section 2 of the *Sexual offences Act*, defines an intermediary to mean:

> “.....a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.”

17. Section 31(2) of the *Sexual Offences Act* provides that: -

> (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of –
>
> (a) ...
>
> (b) Intellectual, psychological or physical impairment;

18. The procedure of conducting proceedings through an intermediary was dealt with in *John Kinyua Nathan v Republic* [2017] eKLR where the Court of Appeal cited the decision in *M. M. v Republic* [2014] eKLR and expressed itself as hereunder:

> “In this case, the High Court appears to propound the legal position that a child of tender years lacks capacity to testify and is thus not required to give evidence at all. With respect, this is erroneous. The error, in our view, arises from a misapplication of the decision of this Court (differently constituted) in *M. M. v Republic* [2014] eKLR which we must re-examine in extenso. In that case, the child was aged 4 years and was, unlike this case, called to testify. However, the trial court stood her down after conducting the voire dire and making a finding that she was “too tender and does not comprehend what she is being asked.....She cannot adduce any evidence.” There was, nevertheless, direct and independent evidence

from the mother of the child who found the defiler lying on top of the child with his trousers down to his knees. There was also medical examination of the child a few hours later which confirmed she was defiled. That was sufficient evidence linking the appellant with the offence, even without the evidence of the infant. . In the *MM* case (supra), the Court, examined at length the existing provisions of the law relating to the testimony of children and other vulnerable groups through intermediaries and stated:

"The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."

19. Further, as a general rule of evidence embodied in section 125 of the *Evidence Act*, no person is precluded from giving evidence, except to the extent the court may determine. Section 125 provides that:-

" 125.

(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

20. Because of the reality that the complainant herein is mentally challenged and had difficulties relating to the trial court events in the case, the whole object of the proceedings through an intermediary was to achieve fairness in the determination of the rights of the complainant and further to promote her welfare as a vulnerable witness.

21. Turning to the appeal herein, it is evident that the complainant did not herself testify due to her mental incapacity. In cases like this where the victim is mentally challenged, section 33 of the *Sexual Offences Act* allows the trial court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both. It was the statement of PW1 that she had left the complainant alone as she went to quench her thirst and that upon coming back, she found the complainant missing and upon calling her name she came out of a thicket carrying her clothes. That upon being asked what had happened, the complainant pointed at her private parts and told PW1 that she had been defiled. P.W.1 testified that she proceeded to the thicket where she was led by the complainant and found the appellant cutting grass and there was an indication of disturbed grass and vegetation as if someone had laid there. She also stated that some discharge was oozing out of the complainant's vagina. That she found the appellant alone in the thicket and further that, he was well known to the complainant as he was a regular visitor at their home and that the incident happened at 13.00 hrs.

22. In determining whether the prosecution discharged its duty, the record shows that the trial magistrate in her ruling dated 5.02.2020 after conducting voire dire on the complainant observed that the demeanour of the complainant depicted a mentally challenged person; and that after trying to have her testify, the complainant mainly gesticulated and smiled. Further, the court observed that the complainant pointed at her private parts and breasts and said what the appellant herein did. It is of

importance to note that, that notwithstanding, even in the absence of the complainant's testimony (gesticulations), there was independent evidence of the complainant's mother, PW1 who testified that the appellant herein had suggested the issue could be resolved at a family level and PW 4 who confirmed that the complainant herein had been sexually assaulted.

23. PW4 in the same breadth, corroborated the evidence of PW1 and the complainant in that the injuries sustained by the complainant were within the range of time that the complainant had been allegedly sexually assaulted and the cause of the injuries noted to be caused by a sliding force.

24. The appellant in his petition of appeal has heavily relied on the medical condition of the complainant in that she is mentally challenged and therefore could not report what happened to her and who the perpetrator was. As earlier stated, section 33 of the *Sexual Offences Act* allows the evidence of surrounding circumstances to be adduced in sexual offences to prove whether a sexual offence is likely to have been committed and towards or in connection with the person concerned. In the case herein the evidence of P.W.1 on how she found the scene, that it was the complainant who led her to the scene where they found the appellant, is ample evidence to connect the appellant with the commission of the offence.

25. The complainant is a person who is mentally challenged and as such, could not have capacity to give consent to the indecent act by the appellant. The act was therefore unlawful. [See *King v Phatsakahle Mike Mndzebele* SDV 51/15; *Uganda v Kusemererwa* HCT - 01 –CR- SC - 0015 - 2014].

26. The appellant further alleged that it was another man who had sexually assaulted the complainant in that he was even ready to be medically tested. It was his case that the prosecution ought to have had medical examination done immediately on the complainant and further that, he was equally ready to be medically examined to prove that he was not the perpetrator of the offence. It is of equal importance to note that there is no requirement for an accused to be medically examined in cases of sexual offences to prove their guilt or otherwise. [See the case of *Kassim Ali v Republic* (2006) eKLR].

27. The appellant equally faulted the trial court for not having considered his defence. It is outright that the appellant's defence was considered but the court found it not to be viable. This court notes that from the record of appeal page 28, at paragraphs 13 and 14 the court factored in the defence of the appellant herein but trashed the same giving its reasons. As such, that ground equally fails.

28. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., (1950) 18 E.A.C.A 147:"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor. "To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky, (1912) C.C.A. 28* T.L.R. 364."

29. Section 11 A under which the appellant was convicted provides as follows:

> Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.

30. Having analysed the evidence as above, I find that the learned magistrate erred in convicting the appellant on the alternative charge. The trial court ought to have convicted him on the main charge, and I do hereby convict him as charged but since the sentence provided for under Section 7 is Ten (10) years, I hereby order that he serves the sentence that was imposed by the trial court. The appeal is hereby dismissed.

31. It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF APRIL, 2022.**

**L. NJUGUNA**

**JUDGE**

.......................................................for the Appellant

...................................................for the Respondent