Mulema v Republic (Criminal Appeal 71 of 2020)
[2022] KEHC 9769 (KLR) (Crim) (26 April 2022) (Judgment)

Neutral citation: [2022] KEHC 9769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 71 OF 2020

LN MUTENDE, J

APRIL 26, 2022

BETWEEN

CHARLES ASIGO MULEMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction in Criminal Case No. 84 of 2016 at Chief Magistrates Court Kibera by Hon. Juma –SPM on 12th April 2019)

JUDGMENT

1. Charles Asigo Muema, the Appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on August 26, 2016, in Lang'ata Sub- County within Nairobi County, intentionally and unlawfully caused his penis to penetrate the anus of MG, a child aged 8 years.

2. In the alternative he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on August 26, 2016, in Lang'ata Sub-County within Nairobi County, intentionally and unlawfully touched the buttocks of MG a child aged 8 years.

3. The appellant denied charges, and was taken through full trial. The trial court considered evidence adduced found him guilty, convicted him for the main count of defilement and sentenced him to serve life imprisonment.

4. Aggrieved, the appellant preferred this appeal.

   Pursuant to leave of the court following the provisions of Section 350 (v) of the *Criminal Procedure Code* (CPC) the appeal was premised on grounds that: The charge sheet was defective having been

contrary to Section 134 and 214(1) of the *CPC*; the trial was unfair due to wrong procedure adopted in plea taking; scientific evidence was wrongly interpreted; evidence was not considered objectively; the legal burden of proof was breached; an incredible, hostile and unreliable witness was admitted; crucial and essential witnesses were not availed; and, that the defence statement which was plausible that cast doubts to the strength of the prosecution's case was rejected hence violated Section 212 of the *CPC*.

5. The case as presented by prosecution was that on August 26, 2016, PW2 MG, the complainant left home going to play at about 9.00 am. He encountered the appellant, his neighbour who grabbed his hand and took him to his house where he molested him. He returned home and informed his mother, PW1 CMK, who confronted the appellant while in company of the complainant and a neighbour, PW4, Linda Shanyisi Lichondo, and he allegedly claimed that he only checked if the child was circumcised.

6. The complainant was taken to Nairobi Women Hospital where he was examined and treated. The matter was reported to the police and No 97782 P C Paulin Tundu was tasked to investigate the case. PW3 Dr Kizzie Shako examined the complainant and found him having sustained wounds that were healing. The appellant was arrested and charged.

7. Upon being put on his defence the appellant explained that on the material date, PW1 confronted him with allegations of having defiled a child. He denied having committed the offence and argued that he could not have seized the opportunity to do so. Then he went on to point out contradictions that he found apparent in the prosecution's case.

8. The trial court, however, believed the complainant having observed his demeanor and found him truthful; and injuries sustained having been confirmed by medical evidence, it convicted the appellant.

9. The appeal was canvassed through written submissions. The appellant urged that the alternative charge as drafted is far-fetched since the provision cited did not disclose the alternative and there was non-disclosure of the exact time as to when the allegations were committed; yet the P3 clearly stated that the offence was committed at 13.00 hours. He cited the case of *Jason Akumu Yongo v R* (1983) eKLR where the court stated that:

> " In our opinion a charge is defective under Section 214(1) of the *Criminal Procedure Code* where:
>
> a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> b. It does not, for such reasons, accord with the evidence given at the trial; or
>
> c. It gives a misdescription of the alleged offence in its particulars."

10. And *Boniface Obiero v R* (2019) eKLR Criminal Appeal No.112 of 2008 where Ngenye-Macharia stated that:

> " At that point the prosecution ought to have amended the charge sheet to reflect the correct date of defilement. It can safely then be concluded that the charge sheet was not supported by the evidence adduced."

11. That the plea taking process was flawed and the Appellant was not afforded impromptu information regarding his rights.

12. That the credible medical examination report on record was the P3 form which indicated that PW2's anus was normal upon examination rendered major inconsistencies with the report from Nairobi Women's Hospital in terms of the examination dates and findings; and it was also in conflict with the PRC form.

13. On the area of contention that vital features were disregarded, it was urged that an uncertified copy of the complainant's birth certificate was produced in evidence which indicated the complainant's age as eight (8) years at the time of the sexual assault, but the document was improperly admitted in evidence; having been marked for identification but not produced as an exhibit.

14. That there was no nexus between the alleged time of sexual assault and the evidence stated of the anus having been normal with healing wounds. That crucial witnesses namely PW1, PW2, PW3, PW4 and PW5 were hostile, and not straight forward and some witnesses were not availed to testify which included the person who sent the complainant to buy vegetable by the railway line.

15. In conclusion it was argued that the defence put up was not considered.

16. The appeal is opposed by the State/Respondent. It is Submitted that there was evidence of penetration of the complainant; the age of the child was proved through evidence adduced of a birth certificate; and the identification of the assailant was positive. On the question of sentence, this court was called upon to be guided by the case of *Ogolla s/o Owuor v Republic* (1954) EACA and *Stephen Mweizela Mutuko and 2 others* (2020) eKLR and find that a sentence cannot be altered unless it is f ound that the trial court acted upon wrong principles or overlooked some material factors.

17. This being a first appellate court, it is obligated to reappraise and re-evaluate evidence adduced at trial and reach its independent conclusions. This was well stated in the case of *Okeno v Republic* (1972) EA 32, where the court of Appeal delivered itself thus;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] E A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Ruwala v R*, [1957] E A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see *Peters v Sunday Post*, [1958] E A 424."

18. Section 8 (1) (2) of the *sexual offences Act* provide thus;

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

19. The prosecution's argument was that the appellant herein molested the complainant by defiling him through the anus. The particulars of the offence alleged that the appellant caused his penis to penetrate the anus of the complainant. Section 2 of the *Sexual Offences Act* (SOA) provides that the genital organ of an individual includes the anus. Therefore, to prove the main charge of defilement the prosecution was required to prove ingredients of the offence beyond reasonable doubt. These ingredients were

summed up in the case of *Charles Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013, where it was stated that;

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. It is the contention of the appellant that the charge as drawn was defective for failure to conform to Section 134 of the *CPC* which states as follows:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged

21. The charge as drawn contains the statement of the offence, the section that creates it and penalty section; the date when the offence was alleged to have been committed, and the act that was committed. In the case of *Omambia v Republic* (1995) eKLR the court stated that:

> " In this regard, it is pertinent to draw attention to the following provisions of S 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge:
>
> > Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence".

22. Similarly the alternative count has ingredients required for the offence. The omission of the "time, thing, and matter" referred to is inconsequential. In the case of *Peter Sabem Leitu v R*, Cr App No 482 of 2007 (UR) the court stated that:

> " The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

23. The appellant also faults the trial court for proceeding with an equivocal plea. Section 207 (1) of the *CPC* provides that:

> 1. The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

Section 208 (1) of the *CPC* provides:

> (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

24. This was a case where the appellant denied the charge at the outset therefore the court entered a plea of not guilty and proceeded to hear both the prosecution and defence witnesses. The question of the plea having been equivocal does not arise. The charge having been read out to the appellant, he responded,

a response that was recorded. He was aware of the charge that he faced. He participated in the case by cross-examining the witnesses who testified and eventually defended himself. No prejudice was suffered.

25. To prove the age of the complainant the prosecution relied on both oral and documentary evidence. In the case of *Kaingu Elias Kasomo v Republic* Criminal Appeal No 504 of 2010, the court of Appeal stated that:

> " Age of the victim of the sexual assault under the *sexual offences act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim....' (Emphasis added).

26. In the case of *Francis Omuroni v Uganda*, Cr Appeal No 2 of 2000, the Court of Appeal stated as follows:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....."

27. PW1, the biological mother of the complainant told the court that he was Eight (8) years old. The prosecution adduced in evidence a child health immunization card which had a record of birth of the child as September 29, 2008. The document was adduced in evidence as Exhibit 4. No objection was raised regarding the document at the point of being produced. It was alleged to have been secondary evidence then. That notwithstanding the age was proved by the complainant's parent. Therefore the fact of age was proved to the required standard.

28. On the question of penetration; it is defined by Section 2 of the *Sexual Offences Act* as:

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

29. The complainant herein was a child of tender years.

Section 124 of the *Evidence Act* provides thus:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

30. Prior to testifying the complainant was taken through voire dire examination and found to be an intelligent child who understood questions that were put to him. He also understood the meaning of the oath and gave sworn evidence. He testified that the assailant undressed him. He removed his pair

of shorts and inserted his penis into his anus then gave him Kshs 5 and told him not to tell his mother. He put on his short and went home but started feeling pain in his anus.

31. At the outset, the minor complainant was taken to Nairobi Women Hospital for treatment. PW5 Kinuthia Edward Mbugua the Clinical Officer adduced in evidence a Post Rape Care Form filled in respect of the minor. It was filled by Dr Omwenga. According to the findings of the Medical Officer who examined the child, the anal area was found to be tender and moisty. Subsequently the minor was examined by PW3 Dr Kizzie Shako five (5) days later who found the minor complainant having sustained an abrasion or healing wounds.

32. In its analysis the trial court appreciated that there was conflicting medical evidence and that the minor was treated at Nairobi Women Hospital on the same day but the injuries were not noted. However, the learned magistrate was of the view that the minor complainant was not capable of stage managing the alleged event; therefore, opined that the complainant had given an accurate version of the events that took place. The court also observed that there were no pre-existing grudges between the witnesses and the appellant. It observed the demeanor of the minor complainant and was satisfied that he was telling the truth.

33. The trial court gave reasons for arriving at the decision to believe the minor as provided by Section 124 of the *Evidence Act*. However, the conflicting medical evidence leave a doubt as to whether there was penetration.

34. On the alternative count, the *Sexual Offences Act* defines Indecent Act as follows:

> " Indecent act" means any unlawful intentional act which causes-
>
> a. Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;
>
> b. Exposure or display of any pornographic material to any."

35. The complainant was emphatic that the assailant used his penis to touch his anus therefore his genital organ which is part of his body came into contact with the anus of the complainant.

36. Regarding identification of the assailant, the appellant was the neighbour of the complainant and his parents. He did not allege that there was bad blood between them. Therefore the identification in question was positive.

37. The appellant also complained that crucial witnesses were not availed. Section 143 of the *Evidence Act* provides that:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

38. This principle of the law was stated in the case of *Keter v Republic* (2007 EA 135 where the court stated thus:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

39. The witness the appellant argues that should have been called to testify, "a *mama mboga*" was not present when the act was committed. Her evidence was inconsequential. In the case of *Julius Kalewa Mutunga v Republic* (2006) eKLR the Court of Appeal stated that:

> " "....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. From the foregoing the appeal succeeds partially, in that I quash the conviction for the offence of defilement and set aside the sentence meted out; which I substitute with a conviction for the alternative charge of committing an Indecent Act with a child.

41. Section 11(1) of the *Sexual Offences Act* provides that

> Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

42. I note that the appellant was out on Bond, therefore, I sentence him to serve ten (10) years imprisonment, with effect from the date of conviction, April 12, 2019.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF APRIL, 2022.

L N MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Ms Oduor for Respondent

Court Assistant – Mutai