Mutunga v Republic (Criminal Appeal E065 of 2021)
[2022] KEHC 12273 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E065 OF 2021

GMA DULU, J

JUNE 28, 2022

BETWEEN

DANIEL MUTUA MUTUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. K. Too in Makindu Principal Magistrate's Court PMCR (S.O) Case No.01 of 2018 pronounced on 7th November, 2019)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on diverse dates between November 18, 2017 to July 24, 2018 at [particulars withheld] within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of NN a child aged 16 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 diverse dates and at the same place intentionally and unlawfully caused his penis to touch the vagina of NN a child aged 16 years.

3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to 20 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, relying on the following grounds –

    1) The magistrate did not appreciate that the charge sheet was grossly defective contrary to section 134 and 214(1) of the *Criminal Procedure Code*.

2) The trial magistrate failed to appreciate that there was unfair trial in the plea taking which was flawed as per article 47 (4), 50(1) and (2)(b) of the *Constitution 2010*.

3) The trial magistrate misinterpreted the scientific evidence of Pw3 contrary to section 48 of *Evidence Act* as she wrongly employed extraneously and farfetched ideas which were detrimental to the defence.

4) The trial magistrate disregarded vital features of the case, scrutiny which was not free from error and caution hence failure to consider the evidence objectively and dispassionately which grossly violated section 107 of the *Evidence Act* (cap 80).

5) The trial magistrate breached the law on burden and standard of proof contrary to section 11(2) (c) of the *Evidence Act*.

6) The trial magistrate failed to note that crucial and essential witnesses were not availed for testimony and cross-examination contrary to section 146 of the *Evidence Act*.

7) The trial magistrate erred by rejection of the defence statement which was plausible, yet the same was remarkably comprehensive in casting considerable doubt to the strength of the prosecution case and thus failed or fully violated the stipulation in section 212 of the *Criminal procedure Code* (cap 75).

8) That the trial magistrate failed to note that there was no corroboration amidst the glaring material contradictions and discrepancies.

9) That the trial magistrate was in breach of the *Constitution* in meting severe and disproportional punishment with regard to article 50(2)(p) and illegal sentence contrary to section 8(1) and 8(4) of the *Sexual Offences Act*.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by the appellant and those filed by the Director of Public Prosecutions.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to reconsider all the evidence on record independently and come to my own conclusions and inferences. See *Okeno v Republic* [1972] EA 32.

7. At the trial, the prosecution called three (3) witnesses, while the appellant tendered sworn defence testimony and did not call any additional evidence.

8. This being a defilement case, the prosecution had the burden of proving all the three ingredients of the offence beyond any reasonable doubt; the ingredients of the offence being the age of the complainant, the fact of penetration, and the identity of the culprit.

9. With regard to proof of the age of the complainant, Pw1 the complainant NN stated that she was born in 2002. She relied on a birth certificate which was produced in evidence as an exhibit. It is recorded therein that NN was born on September 8, 2002. The birth certificate was issued in 2013 and was not contested in any way.

10. In my view, the prosecution proved beyond any reasonable doubt that the complainant was aged 16 years at the time of the alleged offence.

11. Did sexual penetration occur? In this regard, the complainant Pw1 stated that she was penetrated sexually several times. The medical evidence tendered by Pw2 Faith Murumbi the clinical officer was

that the complainant had loose vagina, with hymen broken. No fresh tear or bruises were noted however.

12. In my view, the prosecution proved beyond any reasonable doubt that the complainant herein (Pw1) was penetrated sexually and that the hymen was broken much earlier before the date of medical examination.

13. I now turn to the third element, the identity of the culprit. The evidence on record with connects the appellant to the alleged offence was that of the complainant Pw1 alone. It was her evidence that she knew David Mutua as a person she had met on several occasions and had sex with. The appellant on his part denied the offence, and even suggested that he did not know the complainant (Pw1).

14. Under the provisal to section 124 of the *Evidence Act* (cap 80), the evidence of a single victim witness of a sexual offence can sustain a conviction provided it is believable and is so believed by the trial court, for reasons to be recorded by the trial court.

15. Is the evidence of the complainant Pw1 herein believable? In my view, that sexual penetration had occurred in her life is believable due to the medical evidence on record. However, there is a big gap created by the prosecution on whether the appellant was the culprit. This is because key witnesses, the school teacher SW, and A the aunt of the complainant, to whom the first reports of the incident were made and who took the initiative to make reports to the authorities, were not called as witnesses by the prosecution and no explanation for such failure was given to the trial court by the prosecution.

16. The consequence of the above failure by the prosecution to call these crucial witnesses created a big doubt whose benefit has to be given to the appellant, as the inference is that the evidence of these two crucial witnesses would contradict the other evidence of the prosecution – see *Bukenya v Uganda* [1973] EA. On that account alone, my finding is that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

17. The appellant has raised a number of technical grounds of appeal, like defective charge sheet, and unfair trial or plea taking. In my view, the technical grounds of appeal raised by the appellant have no merits and have to be dismissed, as the record shows otherwise.

18. As for sentence, since I have found that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit; the sentence imposed will also have to be set aside.

19. Consequently, and for the above reasons, 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.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF JUNE, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE