NM v Republic (Criminal Appeal E068 of 2021)
[2022] KEHC 12241 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12241 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E068 OF 2021

A. ONG'INJO, J

JUNE 23, 2022

BETWEEN

NM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgement and sentence of Hon. P. Wambugu (PM) in CR 25 of 2019 delivered on 24th December 2021)

JUDGMENT

1. Appellant was convicted and sentenced to serve 30 years in prison for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* number 3 of 2006 in Criminal Case Number 25 of 2019 at the Chief Magistrates court at Kwale.

2. Particulars of the offence were that on the Febuary 15, 2019 at [particulars withheld] location at Kwale County unlawfully and intentionally caused his penis to penetrate the vagina of SMD a child aged 3 years.

3. Aggrieved he appealed against conviction and sentence vide a petition of appeal supported by an amended grounds of appeal reproduced herein;

4. That the learned trial court magistrate erred in law and fact by convicting and sentencing me to 30 years' imprisonment without proper finding that I the appellant was a minor below the age of 18 years when this offence was committed.

5. That the learned trial court magistrate erred in law and fact by failing to find that the evidence adduced did not establish all ingredients of the offence for the failure to call victim or state reasons why she was not called as a witness renders the identification evidence by PW1 as pure hearsay.

6. That the learned trial court magistrate erred in law and fact by failing to find that the mother of the child of the child who had a grudge against me the appellant was called to testify.

7. That the learned trial court erred in law and fact by failing to find that I the appellant was deprived of an opportunity to interrogate the evidence of the child who accused me the appellant by failure to testify in the trial court.

8. That the learned trial court magistrate erred in law and fact by failing to conduct a voire dire examination to the child and make its findings as to whether the alleged victim could testify in court.

9. That the learned trial court magistrate erred in law and fact by failing to find that there was no concrete and scientific evidence to prove that the sperms found on the victim's skirt belonged to me the appellant and nobody else.

10. That the learned trial court magistrate erred in law and fact by dismissing my defense without giving any cogent reason as to why my defense could not stand against the fabricated prosecution case which lacked corroboration.

11. The application was opposed vide grounds of opposition dated May 16, 2022. There are reproduce herein;

    a) Identification of the appellant was established.

    b) The age of the minor was proved at the trial court.

    c) The fact of penetration was proved.

    d) The trial court guaranteed the appellant right to fair trial.

    e) That the appellants defense was considered by the trial court and a finding made on the same.

    f) The prosecution proved its case beyond reasonable doubt.

    g) The sentence meted by the trial magistrate was lawful.

Summary of Prosecution's Evidence

12. The prosecution called three witnesses

13. PW1 was the mother of the victim testifying as an intermediary. It was her testimony that the victim was born on June 26, 2015 and she produced the mother and child health book as PMF11 indicating the date of birth. It was her testimony that on February 15, 2019, the victim reported to her that the appellant had done, 'tabia mbaya,'to her. She made the observations that the victims skirt was wet and smelt of sperms. The victim also had blood in her private parts. The appellant denied any wrongdoing on his part but when they went to the police station he confessed that something had gotten over him and he had defiled the victim. She was issued with a P3 form which she produced as PMF12 and sent to the hospital. It was observed that and the victim had sustained injuries in her vagina and anus. She was put on ARVs for a month.

14. PW2 was the medical doctor Enoch Iwathe. He carried out medical examination on the victim on February 5, 2019. It was his testimony that the victims skirt had blood stains and semen. Her vagina was torn and hymen was broken. There were no sexually transmitted infections and he put her on ARV'S. He produced P3 form PEXH 3 and treatment notes PEXH-2. It was his testimony that he never got to medically examine the appellant.

15. PW3 was PC Grace Wamboi 112570. It was her testimony that on February 15, 2019 at 5pm the appellant, victim, PW1 and father of the victim came to the station. They reported that the appellant had defiled the victim. She interrogated and the victim told her that Nyamvule tabia mbaya while pointing to her vagina. Appellant confessed that satan had led him to defile the victim. The appellant was put in the cells and victim was referred to hospital.

16. Upon close of prosecution's case the court put the appellant on his defense vide a ruling dated August 29, 2019.

17. The appellant gave unsworn evidence. It was his evidence that he was at the time 18 years of age. It was his evidence that PW1 had sexually harassed him forcing him to stop working as her employee in Dec 2018. However, husband top PW1 came to his aunties house and implored him to come back to work. He confessed that it was the behavior of PW1 that had made him quit. When we went back to work but PW1 was hostile towards him. On February 15, 2019 after undertaking his duties he laid down at a shade where pw1 woke him up inquiring what he had done to the child. He was later taken to the police station,

18. The appeal was disposed by written submissions. The appellant file an undated written submissions delivered on February 10, 2022. It was submitted that the appellant had not attained the age of majority when committing the offence and ought to have been dealt with as a child offender as prescribed under section 191 of the *Children's* and *Bostral Institution Act* that provides that children offenders should be held in a bostral institution for a period of 3 years. It is submitted that due to this factor the sentence of 30 years was an illegality. The appellant relies on *Mwanyele Daniel Thethe v Rep* Revision No 2014.

19. It is further submitted that the trial magistrate never conducted a voire dire examination and the victim was never presented in court and the evidence given by the intermediary was hearsay and proof of assailant was never proved beyond reasonable doubt. The appellant relied on *Cosmas Safari Tuva v Republic* HCCR APP No 75 of 2019 at Mombasa.

20. It was further submitted that the trial magistrate never gave any consideration to his defense. It was also erroneous on the court to conclude that the semen found on complainant's skirt was proof that the appellant had committed the offence with no scientific evidence to back this up.

Analysis and Determination

21. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon I find the issues for determination are;

    a) Did the prosecution prove its case beyond reasonable doubt?

    b) Was sentenced meted out legal?

22. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In *Pandya -vs- Republic* [1957] EA 336 where the East African the Court of Appeal set out the duties of a first appellate court as follows, "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor,

the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

23. The *Sexual Offences Act* under section 8 (1) of the *sexual offences Act* provides the following, 'A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. In *George Opondo Olunga v Republic* [2016], the court provided that ingredients of an offence of defilement are; identification are; recognition of offender, proof of penetration and age of victim.

Age of victim

24. The age of victim is not in dispute in this matter. PW2 gave evidence that the victim was born on June 26, 2015 and provided a child health booklet that attested to this. I find that this ingredient was proved beyond reasonable doubt.

Proof of penetration

25. It was the evidence of PW2 the medical doctor that the victim's vagina was torn and hymen broken and there was presence of blood. He produced treatment notes that affirmed these observations. I find that this ingredient was proved beyond reasonable doubt.

Proof of identity of Assailant

26. It is the appellant position that this element was not proved as the victim did not testify and instead an intermediary was called to testify on behalf of the victim. However, upon perusal of record, the lower did in fact make the observation that the victim was of a tender age and ordered the mother to testify on her behalf as an intermediary as per section 31 of the *Sexual Offences Act*.

27. The provision of the services of an intermediary in a criminal trial today constitutes a right to a fair trial guaranteed in article 50 (7) of the *Constitution*. It stipulates as follows, "in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court." The Court of Appeal in *M.M v Republic* [2014] eKLR also opined thus in regards to the evidence of victims of vulnerable age, 'Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice." I find that the evidence provided by PW1 as an intermediary linked the appellant to the act. It is the appellants assertion that no DNA was provided to link him to the defilement. However, it is well established law that evidence of defilement or rape need not be proved by medical evidence. This is provided under section 124 of the *Evidence Act* that provides thus, "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the 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 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." The Court of Appeal in *AML v Republic* (2012) Eklr also provided thus, 'The fact of rape or defilement is not proved by DNA test but by way of evidence.'

28. From the foregoing I find that the appellant was positively identified and this ingredient was proved beyond reasonable doubt.

29. In regards to the appellant's defence I find that it was merely an afterthought and dismiss it accordingly. From the foregoing I find that the trial court conviction of the appellant was safe and proper

Was sentence meted out legal?

30. The charge herein carries a mandatory sentence of life imprisonment. It is the appellants position that the lower court erred in sentencing him to 30 years in prison as he was a minor when he committed the offence. From evidence on record, particularly the birth certificate of the appellant he was 17 years 8 months and 7 days when he committed the offence on February 15, 2019 as he was born on June 7, 2001. It was therefore improper for the trial court to put him under trial as an adult as he was a child as envisaged under section 2 of the *Children's Act*. However, the appellant was past the age of majority when he was convicted on December 24, 2019 and could not possibly be sentenced under section 191 of the *Children's Act* which provides the methods to deal with children offenders.

31. The dilemma herein is what the proper sentence is. The Court of Appeal in Nyeri Criminal Appeal No 118 of 2011- *J.K.K VS R* [2013] Eklr was presented with a similar dilemma and said thus, "The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."

32. The High Court in Machakos in Petition Number E017 of 2021 *Philip Maingi and others v Attorney General and Another* outlawed mandatory minimum sentences in sexual offences. It stated thus, "To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

33. Guided by the above authorities I set aside the sentence of 30 years and substitute it with 15 years' jail term. Sentence to begin from the time appellant was put in custody on February 15, 2019.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD June 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

IN THE PRESENCE OF: -