Musungu v Director Of Public Prosecutions (Criminal Appeal 119 of 2019) [2022] KEHC 11589 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 119 OF 2019

WM MUSYOKA, J

JULY 22, 2022

BETWEEN

ALFAYO MUSUNGU .... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

(Being an appeal from the judgment of Hon. CN Njalale, Senior Resident Magistrate, delivered on 18th October 2019, in Butali SPMCSO No. 46 of 2017)

JUDGMENT

1. The appellant had been convicted of the offence of committing an indecent Act with a child, contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The facts, alleged, were that he had intentionally and unlawfully touched the vagina of a child of sixteen years, called BA, with his penis. He was sentenced to serve ten years in jail years.

2. Four witnesses testified, PW1 was the complainant. She said the appellant took her to a house, and started caressing her on her breasts and vagina. She was emphatic that they did not have sex, but the appellant wanted to have sex with her. PW2, the father of PW1, testified that he found the appellant with PW1 in bed. PW3 was an Administration Police officer, to whom a report was made that a crime was in the process of being committed, and came to the scene. He said that he saw the appellant and PW1 in bed, and he arrested the appellant. PW4 was the investigating officer. The appellant gave a sworn statement and called one witness. He denied the offence, although conceding that PW1 was at his house on the material evening, but watching television.

3. The appellant was aggrieved with the conviction and sentence. He filed the instant appeal, arguing that the prosecution had not proved its case beyond reasonable doubt, the sentence imposed was excessive, the defence was improperly rejected, and the court wrongly analyzed the evidence and came to a wrong finding.

4. In his written submissions, the appellant argued the four points raised in his petition of appeal. On the first ground, of the case not being proved beyond reasonable doubt, it is submitted that PW1 had testified that the appellant had only begun to caress her before the police arrived, and that she did not testify that he had touched her vagina with his penis. It is also submitted that the appellant was wearing underpants at the time of his arrest, and it would have been impossible to touch the vagina of PW1 with his penis while so dressed. In any case, it is submitted, none of the witnesses at the window saw the appellant caressing PW1. It is submitted that the evidence was doubtful. On the second ground, that the sentence was excessive, it is submitted that the circumstances of the case, and the mitigation by the appellant, were not considered. It is submitted that the period the appellant spent in custody should be considered. On the third and fourth grounds, it is submitted that the evidence was not properly analyzed, for if it had the trial court would have noted that the appellant had not removed his penis from his underwear, to access the vagina of PW1. It is submitted that the defence was not considered.

5. The offence charged is that defined in section 11(1) of the *Sexual Offence Act*. It is committed when there is contact between any part of the body of an accused person with the genital organs, breasts or buttocks of the complainant, but it does not include an act that causes penetration "An indecent act" is defined, in section 2 of *Sexual Office Ac*t, as follows:

> " "indecent act" means an unlawful act which causes-
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> b. ..."

6. The question is whether there was contact between any part of the body of the appellant with the genital organs, breasts or buttocks of PW1. The charge talks of the penis of the appellant touching the vagina of PW1. The evidence on record, from PW1, is that the penis of the appellant did not touch or come into contact with her vagina, instead he caressed her on her breasts and vagina. She did not define what was used to do the caressing. The standard meaning of the word "caress" is to touch gently, with care or love. That presupposes a touch with hands or any other body part. The offence under section 11(1) of *Sexual Offences Act*, would be established once established that any part of the body of the accused touched either the breasts or buttocks or sexual organs of the complainant.

7. The specific part of the body the appellant which allegedly touched the vagina of PW1 is not that which is mentioned in the charge. PW1 herself was emphatic, she was touched on her breasts and her vagina. That still constituted an offence, whether that touch was with the penis or the hands or feet or tongue or nose or whichever part of the body of the appellant.

8. Does the fact that it was not established whether the penis of the appellant touched the vagina of PW1 mean that the prosecution failed? I do not think so. Sexual offences are usually committed in privacy, and only the accused and the complainants can positively describe what happened. PW1 testified that the appellant caressed her breasts and her vagina. The appellant denied it. Who is to be believed? PW2 and PW3 testified that the appellant and PW1 were found together in a locked room, and could been seen through a window. Both were at different stages of undress. They were in a compromising situation so to speak. It could be that none of the two witnesses, PW2 and PW3, testified to seeing the appellant caress PW1, but the circumstances in which the two were found made PW1's testimony more reliable and believable than that of the appellant. The police, no doubt, interrupted a process that could have progressed to penetration. The two were placed together in states of undress, where there was opportunity for the appellant to caress PW1 in the manner described by PW1. The fact that

there was no evidence that the penis of the appellant touched the vagina of PW1 is not fatal, so long as there was testimony that the appellant touched PW1 on the breasts and vagina with any other part of his body. An offence under section 11(1) of *Sexual Offences Act* was still established, and section 179 of the *Criminal Procedure Code*, cap 75, Laws of Kenya, would apply to cure any anomaly.

9. Was the sentence excessive? PW1 was sixteen years old at the time of the alleged offence. She was a child, and, therefore, section 11(1) of the *Sexual Offences Act* applied to her. The penalty prescribed, under that provision. is imprisonment for a term of not less than 10 years. It is a mandatory sentence. In a sense, the hands of the trial court were tied. It awarded the minimum sentence prescribed in the section 11(1) of the *Sexual Offences Act*. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR(Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), on sentencing with respect to mandatory and minimum sentences, did not apply, by dint of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), and so the trial court could not consider any lesser sentence.

10. However, there have been developments since October 29, 2019, when that sentence was imposed. The High Court has, given, in *Philip Mueke Maingi & others vs. Director of Public Prosecutions & another* Machakos HCPet No E017 of 2021 (Odunga J), delivered on May 17, 2022, directions similar to those given in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR(Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), which outlaw mandatory and minimum sentences, and open the way for the courts to exercise some discretion in cases of this nature. In exercising the discretion, enabled by *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet No E017 of 2021 (Odunga J), there could be a case for revision of the sentence. According to his statement in mitigation, the appellant was an adult, married with three children. That being the case, he was taking advantage of a minor of sixteen. They were neighbours and relatives. PW1 was a primary school pupil. The appellant must have known that she was underage, before preying on her. I note some level complicity by PW1, but then the appellant was the adult and PW1 the child. A deterrent sentence, custodial in nature, was called for. I am disinclined to interfere with the sentence imposed, except for the application of the section 333 of the *Criminal Procedure Code*. The appellant was granted bond. It would appear that the bond was never processed, and he remained in custody throughout his trial. I shall order that the time he spent in custody be reckoned with respect to the ten-year sentence.

11. On the rejection of his defence, I note that the defence was considered, but the same was rejected, after the trial court juxtaposed it against the totality of the evidence. The trial court noted that the issue raised in the defence, of a family feud over land, was only raised when the appellant was put on his defence, he never confronted PW1 and PW2 with it at cross examination. I find that nothing turns on that.

12. On the evidence not being analyzed, I have carefully perused the un-paginated judgment, and noted that, in the last two pages, the trial court did analyze the evidence tendered, by both sides, before coming to the conclusions that it did. I have equally gone through the testimonies of the prosecution and defence witnesses, and I am a satisfied that the prosecution established a case beyond reasonable doubt.

13. Overall, I find no merit in the appeal herein, except to the limited extent that I have dealt with in paragraph 10 of this judgment. The appeal is, therefore, dismissed, except for the order that I have proposed in paragraph 10 of the judgment.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS...........22nd ....DAY OF ....July 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Alfayo Musungu, appellant in person.

Mr. Kagai, instructed by the Director of Public Prosecutions, for the Republic.