Muyale v Director of Public Prosecutions (Criminal Appeal E025 of 2021) [2022] KEHC 12615 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E025 OF 2021

WM MUSYOKA, J

JULY 22, 2022

BETWEEN

ZADOCK MUYALE .... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

(Being an appeal from the judgment of Hon. G. Ollimo, Resident Magistrate, delivered on 7th July 2021, in Butere PMCSO No. 27 of 2020)

JUDGMENT

1. The appellant had been convicted in Butere PMCSO No. 27 of 2020, of the offence of defilement, contrary to section 8(1), as read with section 8(4), of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The allegations against him were that on 4th June 2020, at [Particulars withheld] Village, Mundobelwa Sub-Location, Khwisero, Kakamega County, he had intentionally caused his penis to penetrate the vagina of VDN, a child aged 17 years. There was an alternative charge, under section 11(1) of the *Sexual Offences Act*, of committing an indecent act with a child.

2. The appellant had denied the offence, and the prosecution called five witnesses. PW1 was the complainant. She testified on how she went to the home of the appellant and spend the night with him, and they had sex. The next day a pregnancy test was done, and she implicated the appellant. PW2 was PW1's guardian. He testified on how he took PW1 to hospital after she said she was sick. A pregnancy test turned positive, and she implicated the appellant. He made a report to the police. PW3 conveyed information on the relationship, between PW1 and the appellant, which led to her being relocated to [Particulars withheld] Village. PW4 was the investigating and arresting officer. PW5 was the clinical officer, who had attended to PW1. After a laboratory investigation, he established that she was pregnant. A high vaginal swab revealed epithelial cells, and urinalysis revealed yeast cells, which were a sign of bacterial infection. He stated that he did not conduct Deoxyribonucleic acid(DNA) to confirm paternity.

3. After he was put on his defence, the appellant testified that on 3rd April 2020, PW1 was at his home, when he assisted her with a mathematics assignment. He said that after he stepped out she entered his bedroom, and when he asked, she did not respond. He asserted that he did not defile her. He said that she did a similar thing on 2nd May 2020 and 4th June 2020.

4. The trial court framed 3 issues and proceeded to answer them. On the age of PW1, the court found that she was 16 years of age, having been born on 12th December 2013. On penetration, the trial court found that the same was positive, and pointed at the testimony of PW1 and the evidence on the pregnancy. On whether, the appellant had committed the offence, the court found that he had been a boyfriend of PW1 since December 2019, the fact that he admitted have had to interacted PW1 over the period and that on the said date he did assisted her with a mathematics assignment. The court found the testimony of PW1 to be clear and consistent, and it believed her. The appellant was consequently convicted and sentenced to 15 years in jail. Hence the appeal.

5. In his petition of appeal, dated 26th July 2021, the appellant argues that his conviction was against the weight of evidence, the evidence on record could not sustain a conviction on a charge of defilement, the evidence of PW1 was uncorroborated, the evidence was contradictory, the age of the complainant was not sufficiently proved, his defence was rejected, the burden of proof was shifted to him, the sentence was excessive, and the judgment was inconsiderate, erroneous, unlawful, biased and untenable.

6. Directions were given on 6th October 2021, for disposal of the appeal by way of written submissions. Only the appellant filed written submissions.

7. In his written submissions, he dwells on lack of direct evidence, no independent witness, no evidence of penetration, no evidence that PW1 gave birth, no DNA test was done to connect him to the offence, the qualifications and experience of the clinical officer PW5 not disclosed, the person who filed the treatment notes not called to testify, no corroboration, and denial of fair hearing.

8. On the matter of there being no direct evidence linking the appellant to the crime, I find the submission curious because sexual offences almost always happen in secrecy, away from the eyes of any witness. It is only in a small number of cases that offenders would be caught in the act. It would be unrealistic to expect direct eye witness accounts of sexual assault by eyewitnesses, that is persons other than the victims themselves. I find that there is direct evidence from the testimony of PW1. She was the alleged victim of the offence. It allegedly happened to her. I believe that the appellant should be looking for other evidence, as opposed to direct evidence, for the testimony of PW1 is direct evidence by the victim, until the same is discredited, one way or the other.

9. On penetration, the starting point should be with the testimony of PW1 herself. She testified that on the night in question she was in the house of the appellant, from 10.00PM to 4.30 AM. She stated that he persuaded her to have sex with him," and she obliged. PW5, the clinician, attended to PW1, on the same or the next day, 5th June 2020. He said that he did a high vaginal swab which revealed epithelial cells, and a urinalysis test revealed yeast cells which he said were signs of bacterial infection. He produced a P3 form and treatment notes, both of which stated mirrored the oral testimony PW5. In both the medical documents presented and oral testimony, there is no conclusion as to whether whatever PW5 found was evidence of penetration that would have been critical when taken against his statement that PW1 had no tear and no blood stains. On vaginal examination the external genitalia and vaginal orifice were normal. What did the presence of epithelial cells and the yeast cells or bacterial infection mean? PW5 did not bespeak that. PW5 was presented as the person who treated PW1, and prepared the medical documents presented in evidence; and also as a medical expert, to interpret the findings to the court. Unfortunately, he only testified on how he attended to PW1 and his findings,

but he did not explain the meaning of the findings. He did not state whether those findings pointed to recent sexual activity or not, for that was why he was called to testify. From his testimony, therefore, I am not persuaded that he established any incident of recent penetration of the vagina of PW1.

10. The issue of the pregnancy of PW1 in the other consideration. The appellant argues that there was no proof that PW1 had given birth, and hence there were no DNA test results, to link him to the offence. Given the weak medical evidence, evidence of that the pregnancy was carried to them and a DNA test was done, which linked the appellant to it, would have been of some help.

11. The next issue raised relates to the qualifications and experience of PW5 as a medical officer. That would be crucial where medical evidence is concerned, as testimony that the witness had the requisite knowledge and expertise to conduct the type of tests that he carried out and to make the conclusions that he allegedly made. This is a criminal matter; where the liberty of the appellant is at stake. Indeed, he was sentenced to 15 years in prison. Proof that the witness is qualified to make and utter medical records is critical, if the court is to accept and rely on his testimony and the records he places before the court. In this case, he did not state his qualifications, nor his experience. Of course, that alone may not be fatal to the prosecution's case, but it can raise doubts as to veracity and probity of his testimony, and the material that he has placed on record. I have already noted above, at paragraph 9, that his testimony had his records fell short, as they did not definitively state that there was evidence of recent sexual activity.

12. On the person who prepared the treatment notes not being called to testify, I note that PW5 stated that he was the one who attended to PW1 on 5th June 2020. He said he was on duty, and I presume that he must have prepared the treatment notes. What should be of concern, however, is that treatment notes that he produced as evidence, to support his case, are dated 15th June 2020. That should raise concern. One, when did he actually attend to PW1, on 5th June 2020 or 15th June 2020? The dates are crucial. 5th June 2020 is closest to the time of the alleged assault, and would be most ideal for testing for medico-legal purposes in sexual offences. 15th June 2020 would be too late in the day, for the same would only yield insufficient results. Two, I take judicial notice of fact that treatment notes are prepared at the time the patient is being attended to. It should, therefore, be a matter of curiosity that PW1 was attended to or treated on 5th June 2020 and the notes on that attendance or treatment were generated 10 days later, on 15th June 2020. Three, the treatment notes bear the same date as the P3 form put in evidence, and it can be concluded that the same were created deliberately to suit the contents of the P3 form. The medical records are, therefore, suspect in the circumstances.

13. On corroboration, what constitutes it was ably defined in *Benard Kibiba vs. Republic* Kisumu CA No. 104 of 2000 (Chunga CJ, Akiwurii & keiwua JJA) and Nairobi HCCRA No. 58 of 1985(Schofield J) *Daniel Mwasi vs. Republic* (unreported). There was delay in reporting the matter. PW1 and PW2 were vague on details as to when the issue of the defilement first came up. PW1 alludes for a meeting on 5th June 2020 held to discuss the issue, but it is not clear how that arose. She also testified on being taken to hospital by PW2, but she did not give dates. PW2 testified that on a date he did not mention, PW1 looked sickly and he took her to hospital, and a pregnancy test was done, and it turned out positive, and it was from then on that he confronted the appellant. He reported the matter to the police on 12th June 2020. The treatment notes on record indicate that the pregnancy test was done on 13th June 2020 and the treatment on the sexual assault done on 15th June 2020. There is nothing in that chronology that pointed to the appellant's complicity. The appellant testified on being with PW1 on the material day, 4th June 2020, she got into his bedroom, and switched off the lights and his mother spotted her and forced her out. He asserted that he did not defile her. His statement was unsworn, and unsworn testimonies carry little weight. The burden was on the prosecution to establish its case to the required standard. Am not persuaded that there was sufficient corroborative evidence.

14. On violation of his trial rights, the appellant states that he was not informed of his trial rights, especially that to be represented by an Advocate of his own choice. The decision in *Joseph Kiemia Philip vs. Republic* [2019] eKLR (Nyakundi J) is cited. I have read through the record of the trial court. It is true, the trial court did not comply with Article 50(2)(b). The appellant faced a serious charge, with a mandatory minimum penalty of 15 years in prison. There was a duty on the trial court to inform the appellant of his right to legal representation. The trial court did not do that duty. Looking at the brevity of the answers given in cross-examination, it is clear that he appellant was handicapped in cross examination, and was, therefore, prejudiced. He would have benefited from legal representation. Indeed, the trial court should have informed him of the right to seek legal representation at State expense.

15. Overall, I am of the persuasion that the evidence marshalled by the State did not reach the threshold of a proof beyond reasonable doubt, that the appellant committed the offence that he stood charged of. Coupled with that is the fact that the trial did not also reach the threshold of the fair trial, for the appellant was not informed of some of his rights, contrary to what is required under Article 50(2)(b) of the *Constitution*. The appeal has merit, and I hereby allow the same. The conviction of the appellant by the trial court is hereby quashed. The sentence is set aside. It is so ordered.

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

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Osango, instructed by Osango & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.