GM v Republic (Criminal Appeal E002 of 2021)
[2022] KEHC 14144 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 14144 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E002 OF 2021

MN MWANGI, J

SEPTEMBER 23, 2022

BETWEEN

GM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment (conviction and sentence) by Hon. A.M. Karimi, RM, delivered on 9th March, 2020 in Voi Principal Magistrate's Court Criminal Case No. 5 of 2018)

JUDGMENT

1. The appellant herein, GM, 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. The particulars of the charge were that on the night of May 6, 2018 at about 1800hrs at [Particulars withheld] village within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the vagina of BM, a girl aged 4 ½ years.

2. The appellant pleaded not guilty to the charge. The matter proceeded to hearing and the trial magistrate, Hon AM Karimi after considering the evidence of the prosecution witnesses against the evidence of the defence found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was sentenced to serve 15 years imprisonment.

3. The appellant was dissatisfied with the decision of the trial court and he filed a petition of appeal dated the February 16, 2021, on the following grounds:

    a. That the learned trial magistrate erred in law and fact in convicting the appellant on an unsworn testimony of the complainant without clear corroborative evidence;

    b. That the learned trial magistrate erred in law and fact by failing to consider the inconsistencies in the prosecution evidence;

c. That the learned trial magistrate erred in both law and fact by holding that the prosecution had proved its case against the appellant beyond reasonable doubt while the evidence on record did not support such a finding;

d. That the learned trial magistrate erred in both law and fact in finding the appellant guilty of the offence while there was no direct evidence pointing to the appellant;

e. That the learned trial magistrate erred in both law and fact in failing to consider the mental health condition of the appellant;

f. That the learned magistrate erred in both law and fact in convicting the appellant on crafted charges aimed at settling scores between him and the complainant's family; and

g. That the sentence meted out against the appellant was harsh and excessive in the circumstances of the case.

5. The appeal was canvassed by way of written submissions. The appellant's counsel, Mrs Isika, submitted that the prosecution failed to discharge its burden of proof beyond reasonable doubt because the evidence on record was only to the effect that the appellant had defiled the complainant. However, nobody saw the offence being committed save for the complainant, who did not state how she met the appellant and why she went to the appellant's house.

6. On the issue of penetration, Mrs. Isika submitted that the evidence of the doctor PW4 was that there are many causes of bruises and inflammation of genitalia and as such penetration was not the only cause. Furthermore, medical evidence also showed there was reddening and inflammation of external genitalia but the hymen was intact. She contended that the issue of penetration was not proved since the reddening and inflammation of external genitalia is not proof of penetration. She cited the finding in *John Mutua Munyoki vs Republic [2017] eKLR*, where the Court of Appeal held that for the offence of defilement to be committed, the prosecution must prove all the ingredients of defilement beyond reasonable doubt.

7. On the issue of corroboration of the evidence by the complainant, she submitted that there was no proof that the appellant indeed committed the offence and the assertion that the appellant's trouser was not zipped did not mean he had defiled the complainant. Counsel submitted that the complainant's evidence was not corroborated as required under section 124 of the *Evidence Act* and as such, it could not be taken as conclusive evidence for that matter.

8. On whether the evidence of the appellant was considered, counsel submitted that the trial court disregarded it in its entirety as a mere denial of the offence thereby putting the appellant at a disadvantage and trampled upon his right to a fair trial.

9. On the issue of the sentence meted out to the appellant, Mrs Isiska submitted that the mitigation by the appellant was not considered before being sentenced, since the sentence imposed was high in the circumstances.

10. In opposing the appeal, the respondent through the Senior Assistant Director Of Public Prosecutions, Mr Chirchir, relied on section 2 of the *Sexual Offences Act* which defines penetration as 'the partial or complete insertion of the genital organs of a person into genital organs of another person.' He submitted that the medical evidence and the PRC form confirmed that the victim had been defiled and that she had bruises and inflammation on the outer and inner vaginal parts. He relied on the finding in *Mark Oiruru vs Republic [2013] eKLR*, where the court held that so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated as penetration needs not to be deep inside the girl's organ.

11. On the culpability of the appellant, it was submitted that he and the complainant knew each other very well because they were neighbours and the complainant knew the appellant by name. That she testified that she went to the appellant's homestead that evening after leaving a party since she used to have a friend there whom she used to play with. That PW2 had testified that PW3 found the appellant and the complainant in a compromising position in the appellant's house and that they were only the two of them. Mr Chirchir stated that it was also PW3's testimony that the appellant requested PW3 not to raise the issue with the complainant's mother.

12. On the issue of corroboration of the victim's evidence, he submitted that the victim's evidence was corroborated by PW1, PW3 and PW4. He submitted that section 124 of the *Evidence Act* provides that no corroboration is necessary in criminal cases involving a sexual offence. It was further submitted that the appellant's defence was considered by the trial court but the same was found not to have dislodged the prosecution's case, hence the defence was dismissed.

Determination

13. The duty of this court as a first appellate court is to re-examine and re-evaluate the evidence adduced before the lower court, bearing in mind that this court neither saw nor heard the witnesses testify and give due allowance in that respect before reaching its own independent conclusion. See *Okeno v R [1972] EA 32* and *Mohamed Rama Alfani & 2 others v Republic, Criminal Appeal No 223 of 2002.*

14. I have reviewed the evidence adduced in the trial court in light of the submissions made in this appeal. It has however come to my attention that there is a preliminary issue which this court needs to determine before it embarks in the merits of the instant appeal.

15. It is noteworthy that the appellant's counsel in ground no 5 of the appellant's grounds of appeal raised the issue of the trial court having convicted the appellant without considering his mental health condition. In my view, the complaint is valid and serves to dispose of this appeal. From the proceedings of the lower court, it is apparent that the trial magistrate overlooked a critical factor which she needed to interrogate arising from the evidence of PW1.

16. The said witness during cross-examination confirmed that the appellant studied at [particulars withheld] school as shown on page 13 of the record of appeal. Similar sentiments were echoed by the appellant's counsel when the appellant was put on his defence as evidenced at page 46 of the record of appeal. The proceedings show that on December 9, 2019 after the appellant gave his defence, Mrs Isiska made an application for witness summons to issue to the head master of [particulars withheld] school to establish that the appellant was a student in the special school. The said head master was however unavailable on three occasions and the defence closed its case. It is evidently clear that the lower court had reason to doubt the appellant's mental soundness, and to make an inquiry thereto as provided under section 162 of the *Criminal Procedure Code*.

17. The correct procedure that ought to have been followed is that an order needed to be made requiring the appellant to be taken for psychiatric examination, as stipulated under section 162 of the *Criminal Procedure Code*. The said provisions read as follows-

    (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

    2. If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

3. If the case is one on which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.

4. If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the minister for consideration by the President.

5. Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.'

18. The Court of Appeal in *Charles Mwangi Muraya v Republic [2001] eKLR* held as follows in regard to the process to be followed when inquiring into the mental conditions of accused persons when need arises or as required by law in certain cases:-

> ' ...We are fortified in our view by section 162(2) CPC which we quoted earlier in this judgment. It is obvious, that sub-sections (1) and (2) of section 162 of the CPC, must be taken together. The inquiry is carried out in terms of sub-section (1). If the inquiry indicates that the accused person is capable of making his defence, then the court adjourns further proceedings and the steps set out in the sub-sections 3, 4 and 5 of section 162 of the CPC are then taken. It is a fundamental requirement in criminal trials that an accused person should understand, follow and fully participate in his trial. Section 162 CPC as a whole, is a safeguard meant to achieve that fundamental requirement. That is the reason why the section makes it mandatory for an inquiry to be done immediately when the issue arises, and if, upon inquiry, there is evidence of unsoundness of mind, further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial.'

19. I am also persuaded by the finding by Gikonyo J in *Republic vs J W K [2013] eKLR*, wherein the learned judge held as follows;

> ' With tremendous respect, I think, the use of the words incapable of making his defence in section 162 may be the source of the believe (sic) by the prosecution that the section relates to a case whose hearing has commenced. I think, the phrase 'incapable of making his defence' refers to the entire course of the proceeding; from the inception of the charges and throughout the trial to the time when sentence is passed, for, the defence of the accused person begins, at least, immediately the charges are instituted in court, if not earlier. Section 162 of the *CPC* would therefore applies (sic) at the time of taking plea and at any other time during the trial. That is why under article 50 of the *Constitution*, the accused person should be fit to plead, be informed of the charge with sufficient details, be informed in advance of the evidence the prosecution intends to rely upon, be given sufficient time and facilities to prepare a defence and so on...

20. In criminal proceedings, the right to a fair trial under article 50(2) of the *Constitution* includes the right to be informed of the charge, to understand the charge, to be able to follow the proceedings and to make a defence. Therefore, if a person is suffering from a disease of the mind and cannot understand the proceedings or make his defence, then there is a fundamental flaw in the proceedings, which cannot be allowed to proceed. In my view, the appellant's trial in the lower court was a mistrial. A mistrial has been defined in Black's Law Dictionary (9th Edition) as:

> ' a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.'

21. In the circumstances, I quash the conviction and set aside the sentence imposed on the appellant. Pursuant to the provisions of section 163(3) of the *Criminal Procedure Code*, the appellant shall be discharged from lawful custody forthwith. The office of the Director of Public Prosecutions is however at liberty to charge the appellant for the same or similar offence on the same facts, if they wish to do so after it has been certified that the appellant is mentally fit to stand trial.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT VOI ON THIS 23RD DAY OF SEPTEMBER, 2022.

NJOKI MWANGI

JUDGE

In the presence of:

The Appellant

Mrs. Isika for the Appellant Mr. Sirima for the DPP

Mr. Otolo – Court Assistant.