Nzelu v Republic (Criminal Appeal E046 of 2021)
[2022] KEHC 13036 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E046 OF 2021

GMA DULU, J

SEPTEMBER 22, 2022

BETWEEN

SIMON MUSYOKA NZELU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon E. Muiru in Kilungu Principal Magistrate's Court PM (S.O) Case No.83 of 2019 pronounced on 14th April 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with sub-section (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on November 15, 2019 at around 5:00pm at Kwale Location in Mukaa Sub County within Makueni County intentionally caused his penis to penetrate the vagina of PM (name withheld) a child aged 13 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 were that on the same date and at the same place intentionally touched the vagina of PM a child aged 13 years with his penis.

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 of the trial court, the appellant has come to this court on appeal on the following grounds –

    1. That the learned magistrate erred in law and fact when he convicted and sentenced him without observing that the charge sheet was defective due to the way the charges were framed and the sections of the law in the charge sheet which rendered the same to be termed as duplex charges.

2. The learned magistrate erred in law and fact when he convicted and sentenced him without regard to his basic rights for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2) (j) of *the Constitution* of Kenya 2010.

3. The learned magistrate erred in law and fact by failing to observe that the trial was conducted in contravention of section 19 of the *Oaths and Statutory Declarations Act* concerning reception and admissibility of evidence of a child of tender years, Article 4 of *the Constitution* and section 2 of the *Sexual Offences Act*.

4. That the learned trial magistrate erred in law and fact when he convicted and sentenced him without considering that there was no evidence to prove the offence of defilement to the required standards in law beyond reasonable doubt.

5. The learned trial magistrate erred in law and fact by failing to apply section 124 of the *Evidence Act*, and to observe that the prosecution case was full of contradictions, inconsistencies which rendered the prosecution case unbelievable.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public prosecutions. It is important to note that both sides relied on decided case authorities.

6. This is a first appeal. As a first appellate court, I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno –vs- Republic* (1972) E.A 32.

7. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered unsworn defence testimony and did not call any additional evidence.

8. This being a case of defilement, the prosecution was required to prove the three elements of the offence beyond reasonable doubt. The first element is the age of the victim which should be below 18 years. The second element is the fact of penetration, even if partial. The third element is the identity of the culprit.

9. Was the age of the victim Pw1 proved? The complainant said that she was 13 years old. She did not give her date or year of birth. The victim's mother Pw2 Fransiscah Wause did not testify to the age of the complainant. She however referred to a birth certificate and a child immunization card. When she tried to produce as exhibit a copy of the birth certificate, the defence objected and the original was not produced. Later Pw4 the Clinical Officer Jackson Nzivo produced a P3 form which the magistrate relied upon to establish the age because it annexed copy of child immunization card.

10. In my view, with the evidence on record the prosecution did not prove the age of the victim beyond reasonable doubt as the victim who was mentally challenged and had to testify through an intermediary did not state her year of birth. The mother Pw2 also did not mention the year of birth. Pw2 also failed to produce or avail the original birth certificate of the victim, and no explanation was given by the prosecutor for such failure. The child immunization card relied upon by the trial court in determining the age was not mentioned in the evidence of Pw4 thus it cannot be said that it is a genuine child immunization card and whether it relates to the victim herein.

11. I thus find that the prosecution did not prove beyond reasonable doubt that the victim herein was aged 13 years as alleged or that she was below 18 years.

12. With regard to sexual penetration, the victim Pw1 said that she was sexually penetrated. The mother Pw2 stated that she caused the victim to say that she had sexual intercourse. The medical evidence of

Pw4 the Clinical Officer was to the effect that hymen was broken, but not freshly and no lacerations were noted. It took a number of days before the medical examination was done, that is 6 days.

13. In my view, though the prosecution proved sexual penetration, it did not prove that sexual penetration occurred on the date alleged beyond reasonable doubt.

14. What about the culprit? The victim Pw1 stated that the culprit was the appellant. The appellant was a next door neighbour known to her. There is no other supporting evidence as the girl who allegedly was the go between was not called to testify.

15. In my view, though the provisal to section 124 of the *Evidence Act* (cap.80) does not require such evidence of a single victim of a sexual offence to be corroborated to sustain a conviction, in the circumstances for this case, the evidence of the victim cannot be said to be believable because the go between was not called to testify and the prosecutor did not suggest any reason why not even a statement was recorded from her.

16. I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. The appeal therefore has merits, and will be allowed, conviction quashed and sentence set aside.

17. 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 22ND DAY OF SEPTEMBER 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE