Muthanje v Republic (Criminal Appeal E044 of 2022) [2022] KEHC 15984 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E044 OF 2022

LM NJUGUNA, J

NOVEMBER 30, 2022

BETWEEN

JOHN MUCHANGI MUTHANJE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of Hon Gichimu J.W (S.P.M.) and delivered on 27.06.2022)

JUDGMENT

1. This appeal arises from the judgment of the learned trial magistrate aforementioned. The appeal filed by the appellant on July 13, 2022 seeks to nullify the said determination on the grounds as set out on the face of his petition of appeal.
2. The charge against the appellant was one of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*, 2006. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, 2006. The particulars are that the appellant on November 11, 2021 at [Particulars withheld] sub location within Embu county intentionally and unlawfully caused his penis to penetrate the vagina of CGN, a child aged 17 years.
3. At the conclusion of the trial, the trial magistrate convicted the appellant in the main charge of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act*, 2006 and sentenced him to 15 years imprisonment, as provided under the act.
4. It is the said conviction and sentence that form the basis of the instant appeal.
5. The court directed that the appeal be canvassed by way of written submissions which directions the parties complied with.

6. The appellant merged and submitted all his grounds of appeal as one. He submitted that the charge sheet was defective for the reason that the alleged date of the commission of the offence was different from the date indicated on the charge sheet. He argued that the discrepancy on the date was evidence that the charge herein was made up. He relied on the case of *Republic v Mohamed Bin Alui* (1924) EACA and *Terekali & Others v Republic* (1952) EACA 182 – 186. Further, he submitted that PW2 and PW3's evidence that they reported the matter on the same day was contrary to the medical examination report which showed that the complainant was sent to hospital on November 8, 2021 under the escort of police officers. In the same breadth, he submitted that the P3 form could not be relied on for the reason that the PRC form is normally filled up when the complainant appears in hospital at the earliest opportunity in order to capture the state of the complainant which in this case, the opposite was true.

7. That the P3 and PRC Forms were filled before the offence was committed as per the charge sheet. He reiterated that if indeed the complainant's hands were held by another person while the appellant was defiling her, he wondered why the other person was not arrested given that he also participated in the alleged commission of the offence. The appellant relied on the cases of *PNW v Republic* (2017) eKLR and *Ndung'u Kimanyi v Republic.* In the end, the court was urged to allow the appeal, quash the conviction and set aside the fifteen years sentence or the court do issue any other order that it deems fit.

8. The respondent submitted that upon evaluation of the five witnesses, the trial court convicted the appellant herein of the main charge of defilement and sentenced him to serve fifteen years imprisonment, a determination it fully supported. That the appeal herein is devoid of any merit as grounds 1, 3, 5, 7 and 9 were proved beyond any reasonable doubt. That the evidence of PW1,who examined the complainant, P3 and PRC forms were produced as exhibits 1 and 2 respectively which confirmed that the complainant had been defiled. Further, evidence of PW1, PW2 and medical documents also confirmed penetrative sexual intercourse. As to whether the complainant's age was established, the respondent relied on the case of *Faustine Mchanga v Republic* [2012] eKLR in that PW1 indicated in her evidence that she was born on 02.20.2004; further, a certificate was also presented as exhibit 3 which confirmed that the complainant was indeed 17 years old.

9. On identification, the respondent submitted that PW1 testimony denoted that the appellant herein was a person well known to her and as such, it was a case of recognition as opposed to identification. In response to ground 4, it was its case that section 137 sets out the rules for framing charges and further, the appellant did not in any way demonstrate how the defective charge sheet prejudiced him since the same could be cured by section 382 of the *CPC*.

10. On DNA, the respondent submitted that the same is not mandatory or necessary to establish an offence of defilement. Reliance was placed on the case of *AML v Republic* [2012] eKLR. While on sentence, it was its case that the same is provided for by the law as the minimum and mandatory sentence and as such, the court was urged to find that the grounds raised are not merited in as far as the contest of the decision of the trial magistrate to convict and thereafter sentence the appellant to fifteen years is concerned.

11. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think

there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

12. The elements of the offence of defilement arising from section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    i. Age of the complainant;

    ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    iii. Positive identification of the assailant.

13. On these elements; "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."(*Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013).

14. On the age of the complainant, the *Sexual Offences Act* defines "child" within the meaning of the Children's Act No 8 of 2001" as ".....any human being under the age of eighteen years."

15. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court stated that:-

    " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See *Alfayo Gombe Okello vs Republic* Cr Appeal No 203 of 2009 (KSM) where the Court of Appeal stated:-

    > "In its wisdom parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1)....."

16. PW2 in her testimony stated that she was aged 17 years. PW5 produced the complainant's birth certificate as Pexh3 which shows that the complainant was born on March 2, 2004 and the offence herein was allegedly perpetrated on November 11, 2021. As such, the same shows that the complainant was aged 17 years at the time when she was defiled. I am therefore convinced that the age of the complainant was proved appropriately.

17. On penetration, the *Sexual Offences Act* defines "penetration" as;

    " the partial or complete insertion of the genital organs of a person into the genital organs of another person"

18. The Court of Appeal, in the case of *Sahali Omar v Republic* [2017] eKLR, noted that:

    " .....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*."

19. In the case herein, PW1 testified that after examining the complainant, he established that the hymen was perforated and lacerations were healed; that there were inflammation marks on the exterior

genitalia. The laboratory test also showed epithereal cells in the urine which confirmed that there was friction on the vagina of the complainant. PW2 also testified that the appellant herein was the person who defiled her. From the evidence on record, I am satisfied that CGN was defiled.

20. On identification, PW2 stated that the appellant herein was a neighbor and therefore, a person known to her. I am guided by the decision on the way to approach the evidence of visual identification as was succinctly stated by Lord Widgery, CJ in the well known case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552 where he said:-

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

21. It is my finding that the appellant in the instant case was properly and positively identified by recognition based on the testimony of CGN which was corroborated by PW3. The appellant was someone well known to CGN in any case, the incident happened during day time as testified by the prosecution's witnesses more so PW2. It was also the evidence of PW3 that the complainant found her at the gate of the appellant immediately she had been defiled and she named the appellant as the perpetrator.

22. On the ground that the appellant was not medically tested to confirm if he was the one who committed the said offence, section 36 (1) of the *Sexual Offences Act*, 2006 provides thus:

> "36. Evidence of medical, forensic and scientific nature
>
> (1) Notwithstanding the provisions of section 26 of this act or any other law, where a person is charged with committing an offence under this act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

The wording of section 36 (1) above is couched in discretionary, rather than mandatory terms. The above provision was a subject of discussion by the Court of Appeal in the case of *Robert Mutingi Mumbi v Republic*, Criminal Appeal No 52 of 2014 (Malindi) where the Court of Appeal stated:

> "Section 36 (1) of the act empowers the court to direct a person charged with an offence under the act to provide samples for tests, including for *DNA* testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. ....DNA evidence is not the only evidence of which commission of a sexual offence may be proved."

23. This court in the case of *Martin Okello Alogo v Republic* [2018] eKLR (Supra), cited the case of *Williamson Sowa Mbwanga v Republic* where the Court of Appeal stated:

> ".........As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.........It is partly for this reason that section 36 (1) of the SOA is couched in permissive rather than mandatory

terms, allowing the court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

24. From the above, it is clear that medical examination on the appellant was not mandatory but discretionary as there are ways other than medical or DNA evidence to prove the commission of a sexual offence.

25. On the ground that he was charged using a defective charge sheet, I have perused the record and I note that indeed the alleged offence was noted to have occurred on November 11, 2021 while the complainant gave the date as November 5, 2021. The question that I ask myself is whether the anomaly rendered the charge sheet defective? The court in *JMA v R* [2009] KLR 671 stated that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge sheet is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in *Willie (William) Slaney vs State of Madhya Pradesh* [AIR] 1956 Madras Weekly Notes 391], held that:-

> "Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

26. Similarly, this court while faced with the same issue in *Isaac Nyoro Kimita & another v R* [2014] eKLR echoed those sentiments as follows:-

> "In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did the appellant appreciate the charge against him or was he confused by the anomaly on the dates noted on the charge?" [emphasis added]

27. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than form. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

28. Looking at the record and the evidence as a whole this court cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross examination of the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with CGN and therefore I find that the same was curable under section 382 of the CPC. [See the Court of Appeal decision in *Benard Ombuna v Republic* [2019] eKLR].

29. On the ground that the trial magistrate did not appreciate the appellant's defence, the trial magistrate in his judgement noted that the prosecution's evidence proved all the ingredients of the offence the appellant is facing and as such, the ground is hereby rejected.

30. On whether the charges herein were instigated by bad blood and thus the appellant was framed, the court noted in its judgment that the appellant herein was a neighbour to PW2 and PW3 and further,

the appellant in his evidence testified that indeed PW2 and PW3 used to buy vegetables from him and further, on the fateful day, the appellant had bought sugarcane from PW2. In my own view, the unfolding of the events herein did not portray bad blood between the appellant, PW2 and PW3. I therefore reject that reasoning.

31. On whether the sentence imposed was very harsh in the circumstances, I note that section 8 (4) of the *Sexual Offences Act* (supra) provides that upon conviction the offender shall be imprisoned for a term of not less than fifteen years. Sentencing is exercise of discretion by the trial court which should not be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See *Shadrack Kipkoech Kogo v R* and *Wilson Waitegei v Republic* [2021] eKLR].

32. It is thus clear that at the time of passing the sentence on the appellant herein, the learned trial court had his hands bound at the back by the strict sentences provided under the *Sexual Offences Act*.

33. I therefore find no merit in the appeal herein both on conviction and sentence. The same is hereby dismissed.

34. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2022.

L. NJUGUNA

JUDGE

..........................for the Appellant

.........................for the Respondent