DSM v Republic (Criminal Appeal 19 of 2019)
[2019] KEHC 851 (KLR) (23 December 2019) (Judgment)

David Sharif Mwambegu v Republic [2019] eKLR

Neutral citation: [2019] KEHC 851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 19 OF 2019

RN NYAKUNDI, J

DECEMBER 23, 2019

BETWEEN

DSM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and sentence in Kilifi Criminal Case No. 262 of 2015 as presided over by Hon. R. K. Ondieki (SPM) at Kilifi Law Courts dated 24th July 2018))

JUDGMENT

1. The appellant DSM was convicted after a full trial at Kilifi Senior Principal Magistrate for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* and thereafter sentenced to 10 years imprisonment.

2. Being aggrieved with both conviction and sentence, the appellant lodged an appeal based on the following grounds:

    1. That the Learned trial Magistrate erred in Law and fact to comply with Section 364 of the Criminal Procedure.

    2. That the Learned trial Magistrate erred in Law and fact by failing to record the right to a fair hearing under Article 50 (1) (2) of the *Constitution* was violated.

    3. That the Learned trial Magistrate erred in Law and fact that there was purported identification of the appellant.

    4. That the Learned trial Magistrate erred in Law and fact that the conviction and sentence were never proved beyond reasonable doubt.

5. That the Learned trial Magistrate erred in Law and fact that the first report did not link him to the scene.

6. That the Learned trial Magistrate erred in Law and fact in demonstrating the alibi defence.

3. The case upon which the appeal is based is on the evidence of four witnesses summoned by the state. The complainant BKM is a girl child aged 16 years of age and a step sister to the appellant. It was the case by the complainant that on 28.12.2014 she had been asked by the appellant to go and pack some charcoal into some sacks. This assignment was done by the complainant but on her return back home she met the appellant riding his motor cycle toward the charcoal site. This time complainant stated that she was requested by the appellant to ride with him the motor cycle so that they can go back and tie the charcoal sacks. As they accomplished the activity of tying the sacks a suggestion came from the appellant that they go together to check a friend of his at Sokoke forest.

4. According, to the complainant, she saw nothing wrong to accompany the appellant but in her testimony on reaching the said forest, appellant demanded to have sexual intercourse, in that deep location of the forest. The complainant narrated that she tried to resist but appellant could not hear of it but tied her hands to a tree with a rope, to aid him into committing the offence without any restriction.

5. In the complainant testimony this he did and after finishing to penetrate her, he untied the rope and they left together in the same motor cycle.

6. The second time happened on January 2016 when the appellant directed the complainant to go and fetch some charcoal. On her way back the complainant told the court she met the appellant who insisted that she accompanies her to a place they could take some soda. Again this time round the appellant looked for a place pinned the complainant to the ground to have sexual intercourse.

7. In all these occasions, the complainant testified that the appellant threatened her with dire consequences if she makes any attempts to report the incidents to any person.

8. It is also on record that the complainant shared with the trial court a third incident in March 2015 when appellant lured her that they go to a place where he could buy for her a blouse. However, on the way the appellant demanded that the complainant gives in to sex. That is when she managed to scream and fortunately her uncle heard the screams.

9. According to the complainant this last episode caused the mother PW2 (VMN) to be made aware that they were seen together with the appellant in the midst of the forest. PW2, in her testimony confirmed that on the 28.12.2014 the complainant and the appellant left for the forest to fetch firewood. All about were as stated by PW2 until March 2015 when she noticed that the complainant might be pregnant. PW2, carried out an inquiry which confirmed her fears that the complainant was carrying pregnancy in which the appellant was responsible.

10. In the evidence of PW2, since the complainant was school-going, the teachers were surprised and did later advise that the incident be reported to the police.

11. The prosecution further adduced evidence of PW3 – PC Peter Odhiambo of Bamba Police Station. PW3 told the court that upon investigating the incident of defilement he came to the conclusion that the evidence pointed to the appellant as the culprit. Among the evidence PW3 documented was that of the P3 to establish whether the complainant was defiled.

12. It was the testimony of PW4 – Dr. Aslaam Ahmed of Kilifi County Hospital that the P3 in question was filled by Dr. Bushira, upon examination of the complainant. Further PW4 testified that the

complainant was five months pregnant though no physical injuries were noted to the head, thorax and legs.

13. At the close of the prosecution case, the appellant was placed on his defence. The appellant defence was that the complainant had a boyfriend with whom they spent sometime together but personally he did not commit any offence of defilement as alleged by prosecution witnesses. Notwithstanding, the defence the Learned trial Magistrate established that there was sufficient evidence to proof the offence of defilement beyond reasonable doubt.

Analysis and determination

14. It is in the light of this position taken by the Learned trial Magistrate that an appeal was lodged for this court to consider whether the prosecution established the charge beyond reasonable doubt.

15. There is a line of authorities which sets out the duty of the first appellate court. I have in mind just to mention a few (*Peters v Sunday Post* [1958] EA 424, *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123). In both cases, the principles behind this duty is for the appellate court to reconsider evidence, evaluate it and draw its own conclusions giving due regard that it did not see or hear the witnesses. I would therefore proceed to consider the ground which forms the basis of the appeal.

Ground 1

16. The appellant submitted that in the entire trial his constitutional rights to a fair hearing under Article 50 of the Constitutional were violated by the Learned trial Magistrate. He accused the trial Magistrate for not seeing to it that witness statements and other relevant documentary material was supplied in advance to enable him prepare his defence. Further, the appellant alleged that the charges he was facing were not fully explained and that rendered the trial unfair. It was also contended by the appellant that the charges were not read nor explained in the language he confirmed he understood and spoke, thereby violating his right to interpretation. That the Learned Magistrate was enjoined to ensure the right is guaranteed and protected.

17. In the context of the record by the trial court its important to note that the appellant never raised the issues of witness statements or language of interpretation before, during or after the trial. Its important to note that the appellant fully cross-examined all the four witnesses called upon by the prosecution to exonerate himself that he committed the offence. There would have been a distortion of the record if indeed that in the trial the appellant did not follow the proceedings. The appellant's right to understand the charge and answer it appropriately must be understood in light of the record and perspective taken by the Learned trial Magistrate.

18. The mere fact that the Learned trial Magistrate did not record down that the appellant be supplied with witness statements and other relevant evidence relied upon by the prosecution does not mean he was deprived of his right to full disclosure.

19. The *Criminal Procedure Code* by itself does not provide iron clad rules and formulae on supply of witness statements. It is constitutionally permissible that under Article 50 (1) of the *Constitution* on right to the appellant having his criminal charge resolved by an appropriate, independent and impartial tribunal unless the contrary is shown he was not accorded a fair hearing. The purpose of this provision coupled with Article 10 of the Constitution on values and principles of governance is that the assertions made are supported by the required evidentiary material. That the interest of justice in regard to his criminal trial was violated by the trial court. That the trial was held in an environment which was in contravention of these Articles of the constitution. The criteria that the appellant was not supplied

with the witness statements nor there was no interpreter, may be justified by the special features of the proceedings in issue.

20. There is no dispute that in accordance with Article 50 (2) (M) of the *Constitution*, the appellant was entitled to have the assistance of an interpreter without payment if he cannot understand or speak the language of the court at the time of trial. In the words of the constitution, the respective languages used in court proceedings may either be English or Swahili. The basic text of the record in English language in this appeal on perusal of the record, the appellant did not seek special provision be made for the services of an interpreter that he was incapable of understanding Kiswahili or English language adequately during the trial.

21. This right according to the constitution is available to the accused persons who have demonstrated inadequately in understanding the proceedings or in challenging the prosecution witnesses as provided for under Article 50 (2) (k) of the *Constitution*.

22. There is nothing in this appeal to show that the right to interpretation and supply of sufficient detail of the charge to the appellant were infringed by the trial court.

23. The right to an impartial and independent tribunal under Article 50 (1) of th*e constitution* is protected and nothing has been shown by the appellant that the Learned trial Magistrate was biased or prejudiced or acted impartially in relation to the criminal trial leading to conviction and sentence.

24. That said given the scope of the record its clear that the right to a fair trial as entrenched in the constitution, dependent upon the fact of this appeal and submissions by the appellant has failed to demonstrate that the trial was characterized with unfairness. This ground therefore fails.

Ground 2

25. Whether the offence of defilement was proved beyond reasonable doubt. In order to proof defilement, the prosecution must adduce evidence to establish existence of the following elements:

    a). The act of penetration of a girl under the age of 18 years.

    b). The age of the victim.

    c). That the accused (appellant) committed the offence.

26. As regards penetration Section 2 of the *Sexual Offences Act* defines and recognizes that the act is stated to be complete upon proof of partial or full penetration of the genitalia of the victim by the sexual assailant.

27. On this ground the appellant contested the ingredient was not committed because of lack of DNA on the identity of the pregnancy to profile whether he was the father of the alleged unborn child.

28. In essence the appellant is challenging any involvement in penetrating the complainant as inferred from her testimony. The appellant also by implication is demonstrating that the complainant version of events which led to her pregnancy are a fabrication of her own making. As he stated in his defence the complainant was a truant girl whom they tried to counsel to abandon her relationship with a boyfriend apparently known to the appellant. I bear in mind that the evidence on this ingredient was delivered by a single witness. The complainant chronology of events shows that the acts of carnal knowledge with the appellant was not one off experience but several opportunities created by the appellant to justify having sex with the complainant.

29. I am also aware of the provisions of Section 124 of the *Evidence Act* on corroboration and the proviso which justifies that corroboration is not essential in sexual offences before a conviction of an accused person.

30. The correct position in law is that a fact can be proved by a single witness. The basis is found in Section 143 of the *Evidence Act* that provides:

> "No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact the proviso to Section 124 status as follows: provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

31. The thrust of the appellant arguments and answer is found in the Judgment of the Learned trial Magistrate. According to the analysis as demonstrated in the impugned Judgment the Learned trial Magistrate gave reasons why he arrived at the findings that there was unlawful sexual intercourse by the appellant against the complainant. For that position he relied on the testimony of the complainant and that of the medical officer PW4 of Kilifi County Hospital. The P3 Form was filled after the complainant underwent examination which showed her hymen was ruptured and the fact of pregnancy was consistent with penetration of the genitalia. In *Bassita Hussain v Uganda* Criminal No. 35 of 1995 UR, The Supreme Court of Uganda stated as follows:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence, the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt on penetration, the purported truancy evidence by the appellant did not exactly even partially exonerate him from the testimony of the complainant that he remained to be the culprit of the defilement."

32. Whether DNA was a must in the circumstances of this case, I echo the passage in the persuasive case of *Mujuni Apollo v Uganda* Criminal Appeal No. 20 of 1999 where the court stated:

> "It is clear to us that by basing this appeal on the absence of medical evidence, Mr. Bwengye is ..... medical evidence undue weight, overlooking the fact that it is merely advisory and goes to the fact and not law." The court has discretion to reject it. *R v Vett* [1930] Criminal Appeal 87, Matheson 42 Criminal Appeal R 145,
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> "the court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt."
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> There are certain fundamental features of sexual offences like defilement and rape which cannot be ignored in any event. By their very nature unlawful acts of carnal knowledge against adults or children under the age of 18 years go to the root of their right to humanity, dignity, security and privacy guaranteed by our constitution. While it is true that there might be exceptions to the rule for the plain reason that a victim of rape or sexual assault comes out in the open voluntarily to testify against the assailant is by itself prima facie that a wrong

has been committed which requires justice to be done." In *Kiame v R* [1976 – 1985] 282 the court observed:

> "Sentiments are a poor guide to justice. But I will say this without fear or favor. Looking at this girl in the witness box, all I could see, was a pristine face of innocence. I subjected her demeanor in witness box to an intensive and anxious examination. I followed every moment of her eyes. I studied her body language with meticulous care and curiosity. I followed her body expression, when faced with an embarrassing situation and revelation and I can say with full confidence that I could not detect any signs or sinister in this girl. In short, I can say with full confidence that she was a truthful witness. This is a young girl of some remarkable beauty. Why should she put her name, beauty and future to ruin. If she did not have a wrong to put right? She would have been much better off keeping silence. Why did she open up? There must be a strong motive and I find that motive to be in the search of justice."

33. It is also a matter of consideration in this case whether the complainant in making an allegation against her own step brother can be regarded merely as a busybody whose objective is to see him imprisoned without any wrong having committed with respect to her sexuality. In doing so this court must ascertain and be guided by the character and nature of the evidence whether its rooted on falsity and fabrication.

34. That being so, I find no misdirection on the part of the trial Magistrate to interfere with her decision on this ground. The appellant plea that he did not commit an act of penetration against the complainant fails.

35. Alongside the element of penetration, it was incumbent upon for the trial court to proof age of the complainant. It is evident from the record that the age of the complainant was proved by her testimony as corroborated with that of her mother (PW2). In addition, the prosecution produced in evidence the immunization card which is a mandatory card for every born child in Kenya to be issued with for purposes of dispersing various vaccinations provided for in the relevant policy document. It is vital that every child under the of 5 years undergoes vaccination as preventive measure against specific diseases set out by the Ministry of Health guidelines.

36. The quality of the evidence tendered by the prosecution satisfies the principle in *Francis O. Muroni v Uganda* (Criminal Appeal No. 2 of 2000). Therefore, age was proved beyond reasonable doubt.

37. The vexing question as the appellant puts it is whether the evidence on record identified him as the man who had carnal knowledge with the complainant or is the other boy friend?

38. The approach as to whether the threshold on identification or recognition was met by the prosecution is to be tested within the parameters laid down in *Abdullahi Bin Wendo v R* [1953] 20 EACA, *Roria v R* [1967] EA 583, *Turnbull v R* Criminal Appeal [1976] Vol. 63 The evidence on record from the complainant and as corroborated with that of the mother PW2 the appellant is a step brother to the complainant.

39. The complainant testimony sets out in details various episodes of sexual encounters and opportunities when sexual intercourse was committed by the appellant. It was clear from the complaint's evidence that in most of the cases, appellant designed the plan, share it with the complainant which she took in good faith coming from her step brother, but at the end of it, the appellant achieved his objective of having carnal knowledge with her.

40. PW2 told the court that specifically on 28.12.2014 the appellant came to her home and picked the complainant to go and assist him to collect firewood from the field.

41. I am of the view that this evidence was adduced to show that the appellant had a cordial sibling relationship with the complainant. The aftermath intimate relationship with respect to the appellant was rightly designed to influence the criminal acts. Their respective biological relationship would have made a difficult for the complainant to fabricate the act of carnal knowledge against the appellant. The result therefore is that the evidence of recognition was sound and watertight sufficient to prove that appellant was at all material times at the scene of the crime.

42. As pointed out by the complainant, the circumstances described in her testimony were that there was no room for any other hypothesis of innocence of the appellant save that he was convicted on the strength of the prosecution evidence. There are no discrepancies in the evidence by the prosecution witnesses to render the conviction doubtful.

43. Keeping in mind the quality of recognition evidence available and the opportunity the complainant had with the appellant, it was safe to convict on the single witness evidence alone even without corroboration.

44. Fortunately, in the instant case, (PW2) testified on oath and corroborated PW1 testimony on the commission of the offence in one of the flagged dates when he picked the complainant from the homestead. She was able to describe clearly the appellant degree involvement with the complainant to sustain a conviction on the charge of having defiled the complainant.

45. In the result the appeal on both conviction and sentence fails. The Judgment of the trial court is hereby affirmed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE