Nderitu v Republic (Criminal Appeal E073 of 2022)
[2025] KEHC 268 (KLR) (16 January 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E073 OF 2022

AK NDUNG'U, J

JANUARY 16, 2025

BETWEEN

NICHOLAS MAINA NDERITU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Nanyuki CM Sexual Offences Case No 812 of 2015– L. Mutai CM)

JUDGMENT

1. The Appellant, Nicholas Maina Nderitu was convicted after trial of being involved in the prostitution of a person with mental disability contrary to section 19(1)(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 22/07/2015 at [Particulars Withheld] in Nyeri County for favour to HMG a person with mental disability intentionally caused his penis to penetrate the vagina of the said HMG. On 30/04/2021, he was sentenced to nine (9) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he appealed to this court vide an amended ground of appeal accompanying his submissions. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by convicting him on a defective charge sheet that failed to comply with the evidence adduced contrary to section 214 of the Criminal Procedure Code.

    ii. The learned magistrate erred convicting him by relying on a mental assessment report that was not produced by its maker contrary to section 77 of the *Evidence Act*.

    iii. The learned magistrate erred by relying on a P3 form that was produced unprocedurally by an expert witness who was not conversant with the maker's handwriting and signature thus contravening section 77 and 72 of the *Evidence Act*.

iv. The learned magistrate erred convicting him on a single witness evidence which was not supported by circumstantial evidence.

v. The learned magistrate erred convicting him without appreciating that he was subjected to unfair trial for allowing adjournments by the prosecution thus contravening Article 50(2)(e) and Article 159(2)(b) of *the Constitution*.

vi. The learned magistrate erred by quashing his defence and failing to weigh it vis-à-vis the prosecution's case.

vii. The learned magistrate erred by failing to deduct the period he had spent in custody and by meting out a harsh mandatory minimum sentence.

3. The appeal was canvassed by way of written submissions. I have considered the submissions filed and the authorities relied thereon.

4. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

5. A recap of the evidence at the trial court is necessary.

6. The evidence before the trial court was as follows. PW1, the complainant testified that on the material date, she was cleaning utensils when the Appellant found her and asked if they could have sex. She refused and he led her to the children's bed. She told him that she did not want sex with him but he forced her into removing her clothes. After the ordeal, he wiped his thing with the children's clothes and he disappeared. He was however seen leaving the scene. She testified that she knew the Appellant well as he did not live far from her home. Her mother knew him as well and he used to greet her. That her sister-in-law informed her mother about the Appellant's visit and she informed her mother that she had sex with him and her mother reported to the police. She stated that he had promised her a cake but he did not fulfil the promise.

7. She maintained on cross examination that she knew the Appellant well from before and had not asked for sex prior. He forced her onto the bed, removed her shirt and pant, went over her and had sex. That she had sex prior with a J and others but on the material date, she slept with the Appellant. That she went to hospital on the next day when she had already cleaned her clothes and her private parts.

8. PW2, the complainant's mother testified that on the material date she returned home and found the complainant had not washed the dirty utensils and when she wanted to chase her, she informed her that Nicholas Maina Nderitu had raped her. She informed her that the Appellant found her cleaning utensils, held her hand and led her into the house and engaged in sex. She reported to the village elder. She testified that she knew the Appellant. She took the complainant to hospital and she reported the matter. She testified on cross examination that the complainant was never stable and sometimes would behave abnormally and she did not know the father of the complainant's daughter. She testified on re-examination that more than often the complainant would give misleading information.

9. PW3, the investigating officer testified that the matter was reported and the Appellant was escorted in by the area chief whom he had requested to arrest the Appellant. That after investigations, he charged the Appellant. He did not visit the scene. He testified on cross examination that the complainant appeared mentally sick but she stated clearly what had happened. That he did not visit the scene so he would not know whether a bed existed. That the Appellant was identified by the complainant at the police station and could not recall the name of the chief who escorted the Appellant to the station since he did not record his statement.

10. PW4, the clinical officer testified that she had a P3 form filled by her colleague who was on study leave. That she worked with him since early 2015 to September 2018. That she was conversant with his handwriting but not 100%. She stated that she had looked at the document and she felt that the maker should be availed to produce the same due to the nature of the offence. She was recalled and testified that she perused the hospital records and she was therefore conversant with the maker's handwriting and his signature. That she called him and confirmed to have prepared the P3 form. She testified that the complainant appeared mentally challenged. That HVS was taken and presence of spermatozoa was noted which was an indication of penetration. There was no recent tear of the hymen and she had a foul smelling discharge and she was put on antibiotics to clear the gram -ve basili. She produced the P3 and PRC form as Pexhibit1 and 2 respectively.

11. She testified on cross examination that the presence of gram -ve basili was a sign of an STD and she did not know whether the Appellant had an STD and therefore not clear where it came from. That the spermatozoa last for 72 hours and examination was done on 22nd though the P3 form was filled on 27th. That part 5 and 6 of the P3 form were not filled and hence it was incomplete. That it was not known whether the spermatozoa was from the Appellant or not.

12. In his sworn defence, the Appellant denied committing the offence. He testified that on the material day, he was at Nyeri to see his brother Edward and he was there from 9:00am up to 6:00pm. That the complainant is well known to her and that she is not normal. That the investigation diary indicated that she was mentally sick same as the medical report (Dexhibit1) which he was supplied with and which was not produced in court. That no other eye witness testified in favour of the complainant and a Sparanza was not called. He testified on cross examination that he had nothing to prove that he was not at the alleged scene of crime on the material date. He testified on re-examination that he did not prepare Dexhibit1 but read it as prepared.

13. DW2 was the Appellant's wife. She testified that on the material day, she was at home while the Appellant was in Nyeri at his brother's Edward Muteru and he returned at about 6:00pm. She testified on cross examination that she would not know whether he went to the brother's or not.

14. DW3 Muteru Nderitu testified that the Appellant is his brother and on the material day, he was expecting the Appellant who arrived at his place at around 12:30pm and left at around 4:30pm.

15. That was the totality of evidence before the trial court.

16. I have had occasion to consider the evidence as recorded by the trial court. I take cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions on record. The broad question for determination is whether the prosecution proved the ingredients of the offence charged to the required degree.

17. In his written submissions, the Appellant submitted that the charge sheet was defective in that the charge sheet did not accord with the evidence adduced during trial. He argued that the offence charged with is defined in a booklet titled 'A Popular Version of the *Sexual Offences Act* No.3 of 2006/2007';

> 'as any person who makes money by making a disabled person take part in prostitution is guilty of an offence called prostitution of a person with mental disability.'

18. Therefore, the prosecution was supposed to prove that the complainant was a person with mental disability and that the Appellant was making money out of coercing or enticing the complainant into prostitution.'

19. He further argued that the alternative charge was a non-existent as it was framed as causing an indecent act with an adult contrary to section 11(b) instead of committing an indecent act with an adult contrary to section 11(a).

20. I have considered the above sentiments by the Appellant. The Appellant was charged under section 19(1)(a) of the *Sexual Offences Act* which states as follows;

> "(1) A person who, in relation to a person with mental disability, for financial or other reward, favour or compensation to such person with mental disability or to any other person, intentionally—
>
> (a) commits any offence under this Act with such person with disabilities;
>
> is, in addition to any other offence which he or she may be convicted, guilty of the offence of being involved in the prostitution of a person with disabilities and shall, upon conviction, be liable to imprisonment for a term of not less than ten years."

21. A person with mental disability is defined by Section 2 of the *Sexual Offences Act* as:

> "means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was—
>
> (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;
>
> (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
>
> (c) unable to resist the commission of any such act; or
>
> (d) unable to communicate his or her unwillingness to participate in any such act;"

22. It therefore behoved upon the prosecution to prove that the complainant was a person with mental disability and that the offence was committed for financial or other reward, favour or compensation to such person with mental disability or to any other person.

23. As to what constitutes prostitution, the Black's Law Dictionary, Tenth Edition defines prostitution as;

> "The act or practice of engaging in sexual activity for money or its equivalent; commercialized sex."

Whereas a prostitute is defined as;

> "Someone who engages in sexual acts in exchange for money or anything else of value. -also termed sex worker."

24. The key evidence for the prosecution is the testimony of PW1. A report by Dr. M. Ricu Mwenda, a Consultant Psychiatrist at Provincial General Hospital, Nyeri on PW1 indicates that she was of abnormal mental status and she could not stand cross examination.

25. The trial court did an inquiry as to the capacity of PW1 to testify and made a finding that the witness was able to understand the questions put to her and to respond to them appropriately. The court ordered that she proceeds to testify and observed that the court was not opposed to cross examination as long as it was done in a professional way.

26. In making that finding, the court went against the Doctor's findings who had indicated that the witness could not stand cross examination.

27. It is therefore clear that the trial magistrate acknowledged that the complainant had some mental incapacity and as such, she ought to have made a finding as to his competency to testify as a witness to justify reception of his testimony in terms of section 125 of the *Evidence Act*.

28. In David Ndumba v. R, Court of Appeal at Nyeri Criminal Appeal No. 272 of 2012, [2013] eKLR, the Court of Appeal considered the competency of a mental patient and held as follows:

> " Mr. Kariuki urged us to find that the evidence adduced by F was not credible by virtue of the fact that she was a medical patient and no voire dire was conducted by the trial court to establish her competency as witnesses. Section 125 of the *Evidence Act* provides:-
>
> "125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.
>
> 2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

29. Based on the medical report it would have been appropriate to have PW1 testify through an intermediary but for some reason the trial court did not think so. This was in error.

30. A witness who is competent to testify and give rational answers is one who would do so in examination in chief and in cross examination. Evidence before court does not end at examination in chief. It includes evidence gathered from answers to cross examination. In view of the doctor's report, the credibility of PW1's evidence comes into question.

31. The evidence of PW1 is to the effect that the appellant forced her into sex. Though at the tail end of her evidence she states that the appellant had offered her cake which he never gave her, the evidence on record on what took place between PW1 and the appellant does not support the particulars of the charge.

32. I am guided by the holding in Nzoka Kamala v Republic [2014] eKLR where the learned Judge held that;

> " Prostituting would be a practice where a person engages in sexual relationship in exchange of some benefit like payment of money. Section 19(1) envisages a situation where an accused commits a sexual act with a person who has a disability for financial gain to either himself or such a person. No evidence was adduced to suggest that the appellant did engage in

prostitution with the complainant in that respect. In this regard the particulars of the offence did not disclose ingredients of the charge as framed."

33. In addition, the medical evidence by PW4 that would be said to corroborate the evidence of PW1 was in my view received by the trial court in total contravention of the law. The record of court makes a bizarre reading. Hannah Ogeto, a clinical officer was put on the witness stand on 26/11/18. She stated inter alia that;

> " With me is a P3 form filled by my colleague on 27/7/2015. He is Ken Kiprop Sang. He is on study leave. 1 year to September 2019. I worked with him since early 2015 to September 2018."

34. The prosecution sought time to avail the maker of the document. The application was allowed subject to the witness being availed by 5.00 p.m that day.

35. Later that day at 2.00pm Hannah Mageto was put on the witness stand and now stated that she had gone through the patient's record and was now able to testify on behalf of Kiprop.

36. The production of the medical evidence by Hannah did not meet the legal threshold set in law. The provisions of Section 33 clearly gives leeway for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. The prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence.

37. In the present appeal, the record of the trial court shows that Hannah was not familiar with the writing of Kiprop, the maker of the medical reports upon examination of PW1. She was candid about it and stated as much in open court. It is obvious that the decision to testify later was not informed by her becoming familiar with the handwriting in hours. It was a desperate act by the prosecution since an adjournment had been denied. The exhibits produced by her are unreliable.

38. Lastly, the prosecution failed to call PW2's daughter in law who was said to have witnessed the incident. Given the circumstances of PW1, corroboration to her evidence was key. In Bukenya & Others v Uganda 1972 EA 549, the court stated the applicable principle as follows;

> " The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favoured to the prosecution or not."

39. On the whole, the prosecution fell far short of proving its case beyond reasonable doubt. The appeal herein has merit and succeeds in its entirety. The conviction of the appellant is quashed and sentence set aside. The appellant is at liberty unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JANUARY 2025

A.K. NDUNG'U

JUDGE