Magado v Republic (Criminal Appeal E018 of 2024)
[2025] KEHC 6104 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E018 OF 2024

AM MUTETI, J

MAY 5, 2025

BETWEEN

JACKTONE ONYONKA MAGADO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the findings, decision and judgment of Hon. M. Nyigei delivered on 19th December 2023 in Kisumu Magistrate Court, Sexual Offence Case No. E14 of 2022 , Republic Vs. Jacktone Onyonka Magado)

JUDGMENT

1. The appellant in this appeal was tried and convicted by the Hon. Nyigei Principal Magistrate on 19th December 2023 in the CM's court Kisumu Sexual Offence Case No.E014 of 2022.

2. The appellant was charged with the offence of defilement in the main count under Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

3. The appellant also faced an alternative count of committing an indecent Act with a child contrary to Section 11 (1) of the Same Act.

4. He was however convicted of the main count and sentenced to serve 30 years imprisonment. At the time of sentencing the appellant, the court was told that the appellant was in his late 70's.

5. The appellant aggrieved by the decision of the learned Honorable magistrate appealed to this court raising the following grounds of appeal:-

    i. The Learned trial magistrate erred both in law and fact in failing to appreciate that the charge and particulars set out in the charge sheet were inapplicable to the facts of the case as presented by the prosecution.

ii. The Learned trial magistrate erred both in law and fact in failing to appreciate that there was no medical evidence in support of a charge of defilement.

iii. The Learned trial magistrate erred both in law and fact in failing to appreciate and find that there was no evidence establishing either defilement or indecent act with a child.

iv. The Learned trial magistrate erred both in law and fact in shifting the burden and incidence of proof to the Appellant.

v. The trial Magistrate erred both in law and fact in taking into account exterior issues and matters and hence arrived at a skewed decision..

vi. The trial Magistrate erred both in law and fact in failing to take into account the Appellant's defence as against the prosecution case which was weak.

vii. The trial Magistrate erred both in law and fact in heaping evidential value and buttressing a weak prosecution case as against the Appellant.

viii. The decision of the trial Magistrate is against the weight of the evidence on record. 9. The sentence imposed upon the appellant is manifestly harsh and excessive in the circumstances and in view of the provisions of Article 50(2) (p) of *the Constitution* of Kenya.

6. The issues that emerge from the grounds of appeal are:-

i. Whether the charge against the appellant was proved to the required standard of proof beyond a reasonable doubt based on the evidence on record.

ii. Whether there was any medical evidence to support the charge of defilement.

iii. Whether the burden of proof was shifted to the appellant

iv. Whether the trial court took into account extraneous matters in arriving at the decision to convict the appellant

v. Whether the trial court considered the appellant's defence.

7. The duty of this court as a fists appellate court is to re-evaluate the evidence on record, make its own findings and draw conclusions from the evidence remembering that unlike the trial court this court did not have the advantage of hearing and seeing the witnesses. See Okeno Vs. Republic [1972] EA 32 at page 36 where the court of appeal held that :-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

8. This court is to weigh conflicting evidence presented in the matter and draw its own conclusions. See Shantilal M. Ruwala Vs. Republic 1957 EA 57c.

9. The particulars of the charge in this matter were that on the 1st day of July 2022 at [Particulars Withheld] in Kisumu Central SubCounty in Kisumu County the appellant intentionally caused his penis to penetrate the vagina of EA a child of 11 years.

10. To establish the case to the satisfaction of this court the evidence of the prosecution must be able to establish the following ingredients :-

    a. Age of the victim.

    b. Penetration of the victim

    c. Identity of the appellant as the perpetrator of the offence.

11. The burden of proof in all Criminal cases rests with the prosecution and it must be evidence that meets the standard of proof beyond a reasonable doubt.

12. In the case of Miller Vs. Minister of Pensions (1947) 2 ALL ER 372-373 Lord Denning stated as follows:-

> " It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. If the Evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt , but nothing short of that will suffice."

11. On whether or not the court erred in convicting the appellant without medical evidence this court observes the following; Penetration may be proved otherwise than through the presentation of medical evidence. It could as well be through the oral testimony of the victim. In Kassim Ali Vs. Republic (2021) eKLR the court of Appeal stated:-

> " so the absence of medical evidence to support the fact of rape is not decisive as a fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."

11. However, in the instant case PW3 Tile Ouma a Senior clinical officer testified that he filled the P3 form. The patient according to him had an intact full dress without stains but had white mucus patches at the area of the genital.

12. The witness went further to state that the victims told him that a man grabbed her and took her to his bedroom. He lowered his pants and penetrated her vagina.

13. He observed that she had broken hymen and had some white deposits at the entry of the vagina.

14. He further observed that the possible cause of injury was Sexual penetration. He stated:

> "it was a penis penetrating causing injury. The finding is that she was sexually defiled."

15. The evidence of the witness PW3 shatters the argument by the appellant that there was no medical evidence to prove penetration.

16. As to whether the appellant was the perpetrator, PW1 testified under oath that:-

> " I left the house at about the time I met Boschol Amomuji. I told her I was feeling hungry. I met this one "she points at the accused". He called me in his house. He gave me Kshs.50, then he put me on his bed. I felt something wet pour on me. He was cooking on a stove.

> First, he told me the wet things were sperms, they are yellow in color. He took me to his bed. He lied on me. I thought he was peeing on me. That is when he told me they were sperms..... He put his thing here "she points at her private parts" he told me not to tell any one."

11. The evidence of PW1 clearly revealed that the appellant had intercourse with her. She was positive it was him. The evidence of PW1 is corroborated by PW3 on the presence of semen in her vagina.

12. The ingredient of penetration and identification where therefore adequately proved in this court's view.

13. On age the victim PW1 stated that she was 11 years old. The evidence on age was corroborated by PW2 EA the victim's grandmother who said that she was 11 Years old. PW2 also testified that PW1 had narrated her what the appellant did to her.

14. PW2 went further to testify that when he immediately confronted the appellant, he admitted having committed the act with the victim but he pleaded for forgiveness.

15. PW2 testified that she was the one who arrested the appellant and locked him up in a house until the police came and took him to the police station.

16. It is this court's finding that given the evidence adduced by all the prosecution witnesses, the offence of defilement was adequately proved.

17. DNA profiles from the vaginal swab matched the DNA Profile of the appellant according to PW5. The case for the prosecution was watertight.

18. I must commend the investigating officer No. 14xxx P.C Desmon Wainaina for conducting thorough investigations into this matter considering his rank in the service.

19. It is this level of investigations that all officers tasked with the investigation of Sexual Offences should emulate to ensure that no one is able to escape a conviction where one is merited.

20. The appellant's defense which he argues was not considered was clearly a mere denial. The learned Honorable Magistrate considered it in his judgment at page 29 of the record. The trial court observed that the appellant had not raised the issue of beatings throughout the proceedings thus in the trial court's the defense was an afterthought. The appellant did not also challenge the evidence on arrest thus this court finds no difficulty in upholding the lower court's decision on the defense.

21. This court has independently weighed the appellants defense against the prosecution evidence. It is clear that given the totality of the prosecution's evidence the defense by the appellant was not sustainable as it did not introduce any iota of doubt in the prosecution's case.

22. It is therefore the finding of this court that the charge against appellant was proved beyond a reasonable doubt thus the conviction was merited.

23. The appeal is therefore dismissed on both conviction and sentence.

24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Appellant Present in Person

Ms. Kibet for the state