Kithiki v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 1055 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1055 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E006 OF 2023

GMA DULU, J

FEBRUARY 8, 2024

BETWEEN

MUTUA KITHIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 5 of 2018 at Taveta Law Courts delivered on 14th February 2019 by Hon. G. K. Kimanga (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on diverse dates between 17th January 2018 and 26th January 2018 at Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of PMM a child aged 15 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same dates and at the same place unlawfully and intentionally touched the vagina of PMM a child aged 15 years with his penis.

3. He denied both the charges. After a full trial, he was convicted of the main count of defilement and sentenced to twenty (20) years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on amended grounds of appeal as follows:-

    1. The learned Magistrate erred in law and fact by convicting the appellant yet failed to find that the conduct of PW1 who was the victim of the offence does not paint a picture of someone who was defiled.

2. The charge sheet used to prefer the charges against him was fatally defective and could not be cured as per the provisions of Section 382 of the Criminal Procedure Code.

3. The learned trial Magistrate erred in law and fact by convicting the appellant yet failed to find that the prosecution had not proved its case beyond reasonable doubt.

4. The learned Magistrate erred in law and fact by failing to find that the appellant's constitutional rights under Article 50(g) and (h) were violated.

5. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see Okeno =Versus= Republic (1972) EA 32.

7. In determining the appeal, I also have to bear in mind that in accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80) the burden was on the prosecution to prove the guilt of the appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt.

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

9. The appellant has complained that Article 50(g) and (h) of *the Constitution* were violated. In his submissions, he has stated that he was not informed of his right to legal representation. In my view even if the allegation is true, it cannot make the proceedings fatal as he would have to pay for legal representation anyway. I find no violation of Article 50 of *the Constitution*. I dismiss that ground.

10. The appellant has also stated that the charge sheet was defective. Again, he has not clarified how the charge is defective. He has merely under this ground and ground 2, submitted on the conduct of the victim going to his home or house and living there, and cited Section 8(5) of the *Sexual Offences Act*.

11. I observe that, in his submissions on the conduct of the complainant, appellant has attempted to create an artificial and false court record of cross-examination, which is not on record, and is meant to mislead this court.

12. The only evidence on record on the sexual conduct of the victim PW1, was that she moved to the appellant's house not primarily for the purpose of sexual acts, but because she was already pregnant. Thus the defence under section 8(5) of the *Sexual Offences Act* does not apply in this case. I dismiss both ground 1 and ground 2 of appeal.

13. On ground 3 alleging that the evidence was not sufficient to sustain a conviction, in my view the age of the complainant PW1 was proved by the prosecution to be 15 years at the time of the alleged offence between 17th January 2018 and 26th January 2018 as she was born on 20th May 2002 as testified to by PW2 RMT her mother, who relied upon and produced her birth certificate as an exhibit.

14. I now turn to sexual penetration. PW1 the complainant stated that she was sexually penetrated severally, and was pregnant. The evidence of PW3 Paterson Mwapulu a Clinical Officer at Taveta Sub County hospital was that the complainant was 16 to 20 weeks pregnant (5 months) at the time of medical examination on 19th February 2018.

15. I find that sexual penetration was proved beyond reasonable doubt.

16. With regard to the perpetrator, PW1 testified that it was the appellant. PW2 RMT the mother of the complainant PW1 testified that on 26th January 2018 at midnight he found the complainant in the house of the appellant. The cross-examination of the appellant did not shake the testimony of PW2.

17. With the evidence on record, I find like the trial Magistrate that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.

18. I only note that the trial Magistrate misdirected himself by saying that unsworn defence testimony is not evidence, as an accused person has a right even to keep silent. I also find that the trial Magistrate misdirected himself by stating in the judgment that the appellant did not refute any of the evidence of PW1, as the record clearly shows that the appellant cross-examined PW1 which was a challenge to the evidence in chief of PW1.

19. Having noted as above however, I am of the view that the evidence on record was adequate to prove the charge and that appellant was not prejudiced. I uphold the conviction.

20. With regard to sentence, the appellant has relied on recently decided cases on minimum sentences. He now on appeal, states that he was arrested at 19 years, which he did not disclose to the trial court.

21. In the circumstances of this case where the victim or complainant was made pregnant and has to bear the burden of raising a child, and it is not being shown that the appellant intends to marry her and take care of the child, even if there was exercise of discretion in sentencing, I would still uphold the sentence imposed by the trial court. I will dismiss the appeal on sentence.

22. Consequently and for the above reasons I find no merits in the appeal. The appeal is hereby dismissed. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for State