Mwaniki v Republic (Criminal Appeal E057 of 2022)
[2024] KEHC 2338 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E057 OF 2022

LM NJUGUNA, J

MARCH 6, 2024

BETWEEN

COSMAS MACHARIA MWANIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. E. Wasike (PM) in the Magistrate's Court at Siakago MCSO No. 40 of 2019 delivered on 01{{^st}} September 2021)

JUDGMENT

1. The appellant has filed an undated petition of appeal seeking that the appeal be allowed, conviction and sentence be set aside and the appellant be set at liberty, on the grounds that the trial magistrate erred in law and facts:

    a. By failing to consider that the prosecution's evidence was contradictory and unreliable to sustain a conviction;

    b. By rejecting the appellant's defense without giving valid reasons hence violated Section 169 of the Criminal Procedure Code;

    c. When he failed to consider that the prosecution's evidence was full of inconsistencies and was uncorroborated hence Section163(1) of the *Evidence Act* was violated; and

    d. By imposing a harsh and excessive sentence upon the appellant without considering that he was a first offender.

2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on an unknown date in the month of August 2019 at Mbeere North Sub-county within Embu County, the appellant caused his penis to penetrate the vagina of W.M., a child of 14 years.

3. The alternative charge was the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars for the alternative charge were that on an unknown date in the month of August 2019 at North Sub-county within Embu County, the appellant unlawfully and intentionally caused his penis to touch the vagina of W.M. a child aged 14 years.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.

5. PW1 was the victim who gave sworn evidence. She stated that in August 2019, she was at her home when the appellant, who was her boyfriend, went and took her away and together they went to his home where she stayed for one month as husband and wife. That she returned to her home on 14th September 2019 and she was arrested and taken to the police station. That on an unknown day in the month of August 2019, the appellant took her to Felanda Hotel and Lodging where he had sex with her. She stated that she was born on 03rd June 2005 and she produced her birth certificate as evidence. That she stayed with the appellant for about 2 weeks and they were both arrested on 14th September 2019 and she was taken to the Hospital for examination.

6. PW2, AMN, PW1's brother stated that he reported the disappearance of PW1 at the police station. That PW1 had been missing for 2 weeks when his brother informed him that he knew where PW1 was staying with another young man. That he informed the police and together, they went to the home of the appellant where they found the appellant and PW1. That they were arrested and taken to the police station then PW1 was taken to the Hospital for examination and a PW3 form was filled. He stated that the appellant is known to him.

7. PW3, PC Daniel Chambe of Siakago Police Station stated that he took over investigations from Cpl. Sikolia who was transferred to another station and who handed over to him PW1's birth certificate, the casefile, the P3 form and a treatment note. That when he took over the case, 2 witnesses had already testified and he bonded the remaining witnesses.

8. PW4 was John Mwangi, a clinician at Mbeere District Hospital who stated that he examined PW1 and filled out the P3 form. He observed that she was in general fair condition, there were no bruises, tears or lacerations but a few pus cells were there. He also observed that there was an old perforated hymen indicative of vaginal penetration. He produced the medical documents as evidence.

9. At the end of the prosecution's case, the court found that a prima facie case had been established and the appellant was placed on his defense.

10. DW1, the appellant, stated that PW1 had told her that she was married and had only separated with her husband but when she returned to him, he had married another wife. That she narrated the story of her marriage to him when they met and she told him that she wanted to settle down in marriage. That it was at that point that he took her to his home. That one day he was working when his grandfather called him to return home where he was arrested by the police. On cross-examination, he stated that he did not know PW1 before the incident but she used to know him. That he wanted to settle down in marriage with PW1 and his grandfather had been asking him to marry. That he did not know that PW1 was a student and a minor. That he stayed with PW1 for 2 days and did not have sexual intercourse with her.

11. DW2, BN, the grandfather of the appellant, stated that PW1 used to go to his home in the company of her female friends and they used to spend the night there sometimes. That he did not know that PW1 was a student. That one-day PW1 went to his home and the appellant introduced her as his wife. That he did not agree with this and he told him to properly introduce himself to PW1's parents before

he could proceed but he refused. That when he asked the girl about her parents, she told him that her father was in prison and her mother was working far away from home. That he investigated and found the home of the girl but her mother was not there. That he later found PW1, her mother and the appellant at Siakago Police Station, having been arrested. On cross-examination, he stated that PW1 habitually visited his home to see his granddaughters and that he did not know she was a minor. That he had asked the appellant to find a wife but warned him against rushing into marrying PW1 without proper introductions according to their traditions.

12. In its judgement, the trial court found that the elements of the offence had been proved beyond reasonable doubt and the appellant was convicted accordingly. The appellant, in mitigation, stated that PW1 had proceeded to get married and had a child and that she is the one who enticed him to commit the offence. He was sentenced to 20 years imprisonment as prescribed by the *Sexual Offences Act*.

13. This appeal was canvassed by way of written submissions.

14. It was the appellant's submission that according to Section 8(5) of the *Sexual Offences Act*, the trial court should have considered the appellant's defense that he thought the girl was an adult because of the way she conducted herself and when she told him that she has been married before and wants to get married again. He argued that the trial court did not consider the pre-sentence report which was favourable and proceeded to impose a harsh sentence of 20-years imprisonment. He relied on the cases of Joshua Gichuki Mwangi v. Republic (2015) eKLR, Edwin Wachira & 9 Others v. Republic, Petition No. 97 of 2021 and Philip Mueke Maingi & 4 Others v. DPP & AG Machakos High Court Petition No. E017 of 2021.

15. The respondent submitted that the elements of the offence were proved beyond reasonable doubt. That the age of the victim was established from the birth certificate produced. That PW1 testified that the appellant inserted his penis into her vagina while they were at Felanda Hotel, and this testimony was corroborated by PW4 who conducted the medical examination. It relied on the cases of Hadson Ali Mwachongo v. Republic (2016) eKLR and Reuben Taabu Anjanoni & 2 Others v. Republic (1980) eKLR and stated that the appellant was positively identified by the victim since he was known to her.

16. That the appellant's averment that the prosecution's evidence was not corroborated, is not true because the testimonies of all the witnesses told the complete story while corroborating each other. It was its argument that the appellant's defense that the victim behaved like an adult and that he did not know she was a minor, was held as vexatious by the trial court and the same was rightly disregarded. That the appellant did not demonstrate that he took reasonable steps to ascertain the age of the victim. That the sentence meted out to the appellant was not harsh or excessive as the same is prescribed in Section8(3) of the *Sexual Offences Act*. On this argument, further reliance was placed on the case of Jonah Isindu Limiti v. Republic (2019) eKLR, Section 329 of the Criminal Procedure Code.

17. From a perusal of the petition of appeal and submissions, it is my view that the issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt; and

    b. Whether the sentence imposed was harsh and excessive.

18. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting

evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

19. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

20. According to the birth certificate of the victim, she was born on 03rd June 2005- meaning that she was 14 years old at the time of the offence. This is not in question and the trial court rightly determined the same. In the case of In Edwin Nyambogo Onsongo Vs Republic (2016) eKLR the Court of Appeal held that:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

21. On the element of penetration, PW1 stated that sometime in the month of August 2019, the appellant took her to Felanda Hotel and while in a lodging, he inserted his penis into her vagina. PW4 stated that there was vaginal penetration and he observed an old perforated hymen, thus corroborating the evidence of PW1. According to Section 124 of the *Evidence Act*, in sexual offences, the testimony of the victim is usually sufficient to prove the offence and it need not be corroborated. The same provision also stated that the trial court should record reasons why he finds the victim to be a credible witness. I have perused the trial court's proceedings and the judgment and I note that the trial magistrate indicated that his reasons for believing the testimony of the victim.

22. On identification of the perpetrator, PW1, PW2, DW1 and DW2 all testified that the victim and the appellant were not strangers to each other. PW1 stated that she knew the appellant and that he went to her home to pick her up to take her to his home. To me, these are 2 people who knew each other very well and there is no reason to believe that the appellant was wrongly identified. PW2 stated that the appellant was known to him and that his sister was found with him. DW1 denied that he knew the victim and that they met for the first time on the day that he took her to his home. DW2 stated that DW1 introduced the victim as his wife. With all this, it is my view that the appellant was properly identified as the perpetrator.

23. In his submissions, the appellant stated that the victim presented herself as an adult and that he did not know that she was a minor at the time. I do note that at the trial when he was placed on his defense, both DW1 and DW2 stated that they did not know that the victim was a minor. DW1 said that the victim told her that she had been married before and had separated from her husband but she couldn't return to her marriage because thee husband had married another wife. That when he heard the victim's story, he agreed to take her as his wife and then took her to his home. DW2 stated that he used to see the

victim visiting his granddaughters but he did not know that she was a minor. The trial magistrate disregarded this defense citing the victim's statue and termed that line of defense as vexatious and highly unbelievable.

24. The defense as provided for under Section 8(5) of the *Sexual Offences Act* states thus:

> (5) It is a defence to a charge under this section if-
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.

25. This provision has 2 limbs and both should be examined and proved at the same time if the appellants would have liked to use it as a defense. From the evidence, the appellant stated that the child actually misled him to believe that she was an adult and secondly, that he relied on the misleading information to believe that she was indeed an adult. It is immaterial that the appellant believed the victim's stories of her alleged marriage. That alone is not enough to invoke this provision as his defense. In my view, and in concurrence with the findings of the trial magistrate, the defense does not hold water.

26. As to whether the sentence is harsh and excessive, the trial magistrate sentenced the appellant to 20 years imprisonment as prescribed under section 8(3) of the *Sexual Offences Act* as the mandatory minimum sentence for this offence. During mitigation, the appellant stated that the victim has since gotten married to another man and she has a child. I have perused the probation officer's report and the same was favourable. Surely, an offence was committed and the same has been proved beyond reasonable doubt and so the unlawful acts must be subjected to the law.

27. The Supreme Court's decision in the case of Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) addressed the unconstitutionality of mandatory and minimum sentences stating that they curtailed the trial magistrates' ability to exercise discretion during sentencing. In that regard, I find that the sentence was harsh and excessive.

28. In the end, I find that the appeal partially succeeds with orders as follows:

> a. The conviction is hereby upheld; and
>
> b. The sentence of 20 years imprisonment is hereby set aside and substituted with a sentence of 10 years imprisonment.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

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

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