Musau v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 6799 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEHC 6799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E011 OF 2023

GMA DULU, J

APRIL 16, 2024

BETWEEN

THOMAS MUSAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 004 of 2022 at Voi Law Courts delivered on 21st February 2023 by Hon. C. K. Kithinji (PM)

JUDGMENT

1. The appellant was convicted of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to twenty (20) years imprisonment.

2. The particulars of offence were that on diverse dates between 2020 and June 2021 within Taita-Taveta County intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of JW a child aged 15 years.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel Mwazighe & Company Advocates on the following grounds:-

    1. That the learned Magistrate erred in law and in fact to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant in convicting the appellant herein against the weight of the evidence adduced.

    2. That the trial court misdirected itself in law and fact in convicting the appellant yet the DNA report exonerated the appellant as the father of the child, the product of the alleged defilement.

    3. That the scientific test (DNA) conducted as per the provisions of Section 36(1) of the *Sexual Offences Act* No. 3 of 2006 to ascertain whether or not the appellant committed the offence of defilement excluded the appellant from the offence.

4. That the learned trial Magistrate erred in fact and in law in failing to take into account the result of the DNA test on the paternity of the complainant's child when the same was a material issue before her as the child was alleged to be the result of the act of defilement for which the appellant was charged.

5. That the learned trial Magistrate misdirected her mind and erred in law in delivering a speculative judgment that was not premised on the analysis of evidence.

6. That the sentence meted was harsh, excessive in the circumstances and bad in law.

7. That the trial court erred in law and fact by convicting the appellant when the mandatory ingredients of the offence of defilement had not been proved beyond reasonable doubt.

8. That trial Magistrate erred in law by not appreciating and disregarding the evidence of the defence throughout the case.

9. That the learned trial Magistrate erred in law and procedure by shifting the burden of proof from the prosecution to the defence.

10. That the learned trial Magistrate erred in law and fact in wholly premising her finding and conviction on her own personal views and opinions which were neither supported by the evidence before her nor the applicable law.

11. That in whole, the finding and holding of the learned trial Magistrate as contained in her judgment delivered on 21st February 2023 and sentence on 2nd March 2023 is inconsiderate, erroneous, unlawful biased and untenable in law.

4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mwazighe & Company Advocates for the appellant, as well as the submissions filed by the Director of Public Prosecutions.

5. 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 v Republic* (1972) EA 32, and *Francis M. Ogeto v Republic* (2019) eKLR.

6. The burden was on the prosecution to prove each of the elements of the offence – see Section 107 of the *Evidence Act* (Cap.80).

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

8. I start with the age of the alleged victim. She testified as WG PW1. She relied on a birth certificate which was produced in evidence as an exhibit. The name entered therein is JW and father JGM. The date of birth is 19th March, 2006. I find that the prosecution proved beyond reasonable doubt that the alleged victim was 15 years.

9. I now turn to penetrating of a sexual nature. On this element, there is the evidence of PW1 that she was penetrated sexually severally by a person she knew. The medical evidence of PW3 Joto Nyawa a doctor in Clinical Medicine was to the effect that the victim (PW1) was found to be 20 months pregnant. The medical reports were produced in evidence, and were not disputed. I find that the prosecution proved beyond reasonable doubt that the victim was sexually penetrated.

10. I now turn to the identity of the perpetrator. The evidence on this element is that of the victim (PW1) who testified that the appellant and herself became friends then lovers and had voluntary sexual activities many times.

11. On the other hand, the appellant stated in his sworn defence testimony that though he lived in Sofia area, he did not know anything about the case. He stated that on 17th January 2021 when asleep, his door was knocked and was arrested for an allegation he knew nothing about. He stated that there were contradictions in the prosecution evidence of PW1 the victim, the mother PW2 Jenita Wakio and the medical evidence of PW3 Dr. Joto Nyawa; and that infact DNA test showed that the child was not his.

12. I note from the evidence on record that no mention of DNA test was made by the trial Magistrate, nor did the appellant ask for such a test.

13. In my view, based on the provisions of Section 124 of the *Evidence Act* (Cap.80), the evidence of PW1 is believable, and I find nothing that could lead this court to disagree with the finding of the trial court. I thus, like the trial court, find that the appellant was proved to be the culprit or perpetrator.

14. Having so found as above however, I am of the view that the defence under Section 8(5) of the *Sexual Offences Act* applies in this case because the victim PW1 willingly and on several times engaged in free sexual acts with the appellant. She certainly conducted herself like an adult and any reasonable man in the position of the appellant could have been misled to believe that she was an adult. On that account alone, I will allow the appeal, quash the conviction and set aside the sentence.

15. For the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Mwazighe for the appellant

Appellant

Mr. Sirima for State