Dada v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 6021 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E031 OF 2023

JN NJAGI, J

MAY 22, 2024

BETWEEN

MUDA BAKAJO DADA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.S. K. Arome, Principal Magistrate, in Marsabit CM`s Court Sexual Offence Case No. E007 of 2021 delivered on 21/6/2023)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 15th February 2021 at (Particulars Withheld) grazing grounds in (Particulars Withheld) Sub County within Marsabit County he intentionally caused his penis to penetrate the vagina of G. U. W. (herein referred to as the complainant), a girl aged 14 years.

2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.

3. The grounds of appeal as per the supplementary grounds of appeal dated 20/2/2024 are:

   (1) That the learned trial magistrate erred in law and fact by failing to note that the charge sheet is defective.

   (2) That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution failed to prove penetration in this case.

   (3) That the trial magistrate erred in imposing an unconstitutional sentence.

(4) That the trial magistrate erred in both matter of law and facts by failing to take into consideration the appellant's mitigatory factors.

(5) That the learned trial magistrate failed to take into consideration the defence of the appellant.

4. The prosecution called three witnesses in the case while the appellant was the only witness in his case.

5. The complainant PW1 testified in an unsworn statement that she was at the material living with her grandmother. That on the fateful day, she was grazing livestock when the appellant approached her. He greeted her. He then held her and pushed her to the ground. He lay on top of her and pulled her dress up. He inserted his private parts into her vagina. When he finished he left her. She went to her manyatta and reported to her grandmother who took her to the police station. The police took her to hospital where she was examined. The appellant was arrested.

6. The Clinical Officer who examined the complainant, Bonsa Doti, PW2 testified that he examined the complainant on the 17/2/2021 and did not find her with any injuries on her body. The genitalia was normal but the hymen was broken. A urinalysis test was done that did not show presence of spermatozoa. The clinical officer completed her P.3 form and signed it.

7. The case was investigated by PC Bernard Mutai PW3 of North Horr Police Station. His evidence was that the complainant was escorted to the police station by her uncle. They took the complainant to North Horr Catholic Hospital. They were referred to Marsabit County Hospital. The appellant was also escorted to the police station by elders. They escorted both the complainant and the appellant to the County Hospital. Both were examined by a clinical officer, PW2. At the same hospital, the age of the complainant was done by one Naima Yusuf at the dental section who assessed the age at between 15 and 17 years. The appellant was charged with the offence of defilement.

8. During the hearing in court, the Clinical officer produced the P.3 form as exhibit, P.Exh.1. The Investigating officer PW3 produced the age assessment report as exhibit, P.Exh.2.

9. When placed to his defence, the appellant stated in a sworn statement that he lives in Noth Horr and that he is a casual labourer. That the complainant is like a daughter to him and he cannot thereby have defiled her. That he is of the age of her father.

Submissions

10. The appeal was canvassed by way written submissions of the appellant and the respondent.

Appellant`s submissions

11. The appellant submitted that the charge was defective in that the evidence which was adduced in the case related to an offence under section 8(4) of the *Sexual Offences Act* while he was charged under section 8(3) of the Act.

12. It was submitted that the evidence of the clinical officer that the hymen was broken did not connect the appellant with the offence since the clinical officer did not observe any injuries in her genitalia. It was submitted that a broken hymen is not proof of defilement as was held by the Court of Appeal in *P.K.W v Republic*, HCCRA No. 331 of 2008.

13. The appellant submitted that the case was not proved beyond reasonable doubt. The appellant referred to the meaning of that phrase as stated by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 All E R 372, that:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. 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, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

14. It was submitted that the sentence meted on the appellant was extremely harsh and excessive and against Sentencing Guidelines and Policy. That the trial court imposed the minimum mandatory sentence thereby rendering the sentence unconstitutional. The appellant cited the case of *Maingi & 5 others v Director of Public Prosecutions & another* (2022) KEHC 13118 (KLR), where Justice Odunga (as he then was) held that courts are at liberty to impose sentences prescribed under the *Sexual Offences Act* so long as the same are not deemed to be mandatory minimum prescribed sentences.

15. It was submitted that the trial court failed to consider the appellant`s mitigation. That the appellant mitigated before the trial court that he was aged 55 years but the court did not consider his age when it sentenced him to 15 years imprisonment.

Respondent`s Submissions

16. The respondent submitted that the age of the complainant was established to be between 15 and 17 years. The respondent cited the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR where the court stressed that what is critical in proving the age of the victim in a sexual offence case is that the nature of evidence preferred in proof of the victim`s age has to be credible and reliable.

17. The respondent submitted that penetration was proved by the evidence of the complainant who described how the appellant inserted his penis in her vagina. That the trial court stated in its judgment that it found the complainant truthful and reliable and thus satisfied to the proviso to section 124 of the *Evidence Act*.

18. On identification it was submitted that the appellant was a person known to the complainant and was positively identified as the person who defiled her. The respondent urged the court to uphold the conviction.

19. On sentence the respondent submitted that the recent jurisprudence after Muruatetu II is that magistrates have discretion to impose sentences other than the minimum sentences provided under the *Sexual Offences Act*. That this court can interfere with the sentence as the trial magistrate acted on the premise that he did not have any discretion in sentencing the appellant.

Analysis and Determination

20. This being a first appeal, the duty of the court is as was set out by the Court of Appeal in *Okeno vs. Republic* [1972] EA 32 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 vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting

> evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R*. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424."

21. The appellant was charged under section 8(1) as read with section 8(3) of the *sexual Offences Act*. The section 8(3) states as follows:

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

22. The appellant argued that the evidence adduced in the case indicated that the complainant was above the age of 15 years. That in the case he should not have been convicted foe defiling a girl aged 14 years.

23. It was the evidence of the complainant that she did not know her age. However, the age assessment report produced in court indicated that she was aged 15 and 17 years. The "apparent age" as observed in part 'C' of P3 form by the clinical officer who completed the P3 form was 15 years. The law is that where the age of the complainant is not known in a charge under the *Sexual Offences Act*, the court can go by the apparent age. It would appear that the complainant was above the age of 14 years. The prosecution should have amended the charge so as to charge the appellant under section 8(4) of the Act which provides for the offence of defiling a girl aged between 16 and 18 years which attracted a lesser offence than the one under section 8(3) of the Act. Though the appellant was sentenced under section 8(3) of the *Sexual Offences Act*, I find that there was no failure of justice as the error could be corrected under section 382 of *Criminal Procedure Code* by substituting the sentence to the one provided under section 8(4). The defect in the charge was thereby not fatal to the prosecution case.

24. The trial court conducted a voire dire examination on the complainant and found that she did not understand the meaning of giving evidence on oath. The court allowed the complainant to give unsworn evidence and be cross-examined by the appellant.

25. The complainant having given unsworn evidence, the critical question which was not considered by the trial court is whether the appellant could be convicted for the offence of defilement where the only material witness for the prosecution gave evidence not on oath.

26. The Court of Appeal in *Jamaal Omar Hussein v Republic* [2019] eKLR considered the place of unsworn evidence in our legal system and stated as follows:

> 8. The usual practice of courts in Kenya is to swear and clearly indicate on the record that a witness has taken oath before testifying as provided for under Section 151 of the Criminal Procedure Code and Sections 17 and 18 *Oaths and Statutory Declarations Act*. There is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subjected to cross- examination to test its credibility and veracity, then the same carries more probative weight. This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter. This Court addressed

the evidentiary value of unsworn statements, in *May v Republic* (1981) KLR (Law Miller & Potter, JJA.) as follows;

> " An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."

In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in *Mwangi v Republic* (2006) 2 KLR 94 held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.....it is trite that the court will not base a conviction on unsworn uncorroborated evidence, but where such evidence is corroborated by other evidence, then such a conviction would be safe.

27. The above being the position of the law in regard to unsworn evidence, the question begging is whether there is other evidence on record to corroborate the evidence of the complainant herein. The kind of corroboration required in support of the charge is one which affected the appellant by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it -see the case of *R v Baskerville* [1916] 2 KB 658. 34. In *Mukungu vs. Republic* [2002] 2 EA 482, the Court of Appeal citing *Mutonyi vs. Republic* [1982] KLR 2003, held that:

> " An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61."

28. In the appellant`s case, there was no other evidence to corroborate the unsworn evidence of the complainant that the appellant defiled her. The appellant could thus not be convicted on the basis of the unsworn evidence of the complainant.

28. The upshot is that the prosecution had not proved the charge against the appellant beyond reasonable doubt. The appellant was wrongly convicted of the offence. In the premises, the conviction is quashed and the sentence imposed on the appellant set aside. I order that the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 22ND MAY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant – appearing in person

Court Assistant – Jarso

14 days R/A.