Macharia v Republic (Criminal Appeal E023 of 2021)
[2024] KEHC 4967 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4967 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E023 OF 2021

GL NZIOKA, J

MAY 13, 2024

BETWEEN

WILSON KAMANDE MACHARIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Honourable Daffline Nyaboke Sure Senior Resident Magistrate (SRM) delivered on 9th September 2021 vide Senior Principal Magistrate's Court at Engineer criminal sexual offence case No. E019 of 2021)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's court at Engineer charged vide criminal case S/O No. E091 of 2021 with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") and with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each counts are as per the charge sheet.

2. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution case is that, on 28th February 2021, PW2, HWW a minor aged 3 years old ("herein the complainant") was held by her mother PW1, MWG, on her back. That at about 7:00pm, the appellant approached PW1 W and requested for the complainant to go and buy her smokies. He took the minor as the mother entered the shop to take money for banking. That after PW1 W was done with banking, she went back and found the appellant and the child were missing. She inquired and was informed that, the appellant had walked away with the child. The mother started looking for the child and the appellant, with the assistance of fellow business people Joseph, Martin and Baba Kush, and went to the appellant's mother's who acknowledged seeing the appellant with the child.

3. The matter was reported to the police at Kinangop Police Station and the police officers went to the appellant's mother who led the officers to the accused's house. As they approached the appellant's house, they heard the minor complainant crying. That the door was unlocked and the officers entered the house. By the use of a torch, it was noticed that the appellant did not have a trouser and underwear. Further the child was naked and crying. She did not have a pant, trouser and skin-tight. That the complainant was rescued, her private parts were examined and blood stains was noted. That the appellant dressed up and availed the minor complainant to the police officers. The child was then taken to Engineer Sub-County Hospital where she was examined and a P3 form filled. In the meantime, the appellant was placed in the cells, and charged after investigations.

4. At the close of the prosecution case, the appellant was placed on his defence. The appellant told the court that, he wanted to register a new cellphone number as he had gotten a job in Nairobi and was re-locating. That, he went to the complainant mother's shop as she was selling lines. The line was registered. That later he met PW1's friend who inquired as to why he had given PW2 food, and he was cautioned from going to the shop of PW1. However, he went to the shop and got the person who cautioned him and he was reminded of the caution.

5. That he left for the market. He met PW1 who inquired into his whereabouts and later PW1 went to his house at 6.00pm while he was washing clothes and he asked her "why she left him to love her, yet she had a man." That PW1 told him she would return. That after 30 minutes she returned in a Probox vehicle in the company of someone else. She started screaming and when the neighbours enquired into the matter, he was told that, he defiled PW2. He was then arrested.

6. At the close of the entire case, the trial court delivered a judgment dated 9th September 2021, found the appellant guilty as charged on the main count, convicted him and sentenced him to serve life imprisonment.

7. However the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds: -

    a. That, the learned trial magistrate erred both in law and fact when he convicted the appellant in this case basing her conviction on the evidence adduced by the prosecution witnesses who were in credible and unreliable.

    b. That, the learned trial magistrate erred in fact and law by convicting the appellant in this instant case on circumstantial evidence yet failed to apply the principles applicable in similar cases.

    c. That the learned trial magistrate erred in both law and fact when she convicted the appellant in this case on evidence of the uncalled witnesses.

    d. That, the learned trial magistrate erred in both law and fact by convicting the appellant on the evidence of penetration yet failed to note that the same was not conclusively proved against the appellant by the prosecution.

    e. That, the learned trial magistrate erred in law and fact when she convicted the appellant in this instant case yet failed to consider the appellant's plausible defense.

    f. That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution never called a Gynecologist and Urologist to proof penetration and that the child in deed was defiled by the appellant.

g. That the learned trial magistrate erred in law and fact by failing to consider the principals of justice provide the appellant with a legal counsel by the fact that the appellant does not know how to read and write neither does he understand English which lead to unfair trial.

h. The trial magistrate erred in law and fact by failing to condenser contradictory of the prosecution witness.

i. The learned trial magistrate erred in law and in fact by failing to consider the inconsistency and contradiction of the persecution witness.

j. That, the learned trial magistrate erred both in law and fact when she convicted the appellant in this present case to a mandatory minimum sentence of life imprisonment yet failed to note that the same denies the judge's discretion to decide cases according to the circumstances of the individual case.

8. The respondent opposed the appeal based on the grounds of opposition that states: -

a. That in response to grounds 1 and 4, all the ingredients of the offence including age, identification and penetration were was sufficiently proved beyond reasonable doubt.

b. That in response to grounds 2, medical evidence was proper and corroborated the prosecution witnesses.

c. That in response to ground 3 and the appellants defence was duly considered by the trial court and so was his mitigation during sentencing.

d. That, the petition is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.

9. The appeal was disposed of vide filing of submission. The appellant in submissions dated 20th April 2023, and filed on 24th April 2023 argued that, the prosecution failed to call all the witnesses who went to the appellant's residence and who would have given independent evidence of the alleged offence, taking into account that, the evidence of PW1 and DW2 were contradictory. He relied on the case of; Donald Majiwa Achilwa & 2 Others v Republic [2009] eKLR where the court stated that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case.

10. Further, there prosecution case was based on circumstantial evidence as there was no eye witness who saw the appellant commit the alleged offence. That, the circumstantial evidence did not meet the criteria for basing a conviction as held in the case of; Rex v Kipkering and Another [1949] EA CA where it was stated that, in order to justify circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than his guilt.

11. That, the evidence adduced was ambiguous, did not point to the culpability of the appellant and cannot be relied upon for a conviction. That, the medical evidence was not clear whether or not there was spermatozoa seen; and whether there were injuries on the genitalia or not. Furthermore, the breakage of the hymen is not proof of defilement as held in the case of; Michael Odhiambo v Republic [2005] eKLR where the court stated that rupture of the hymen was not conclusive proof of defilement.

12. Additionally, that PW3 did not state the probable weapon used to cause the breakage of the hymen and relied on the case of David Mwingirwa v Republic [2017] eKLR where the Court of Appeal stated that, the observation by the clinical officer that, the broken hymen was suggestive of ongoing process

of defilement was not based on any other observation beyond the broken hymen and therefore the appellate judge erred to form a firm conclusion of defilement based on the broken hymen alone.

13. The appellant submitted that, Dr. Ntwiga who examined the complainant and filled the P3 form was never called as a witness despite there being a contention on whether the first P3 form, that was never produced in court. That, the evidence of PW3 Dr. Owour was hearsay and therefore not admissible.

14. The appellant further submitted that, he is illiterate as he cannot read or write and does not understand English and in the circumstances deserved the help of the trial court by appointing a pro-bono advocate which failure led to a violation of his rights under Article 49 and 50 of *the Constitution* of Kenya, 2010.

15. Lastly, the appellant submitted that, the trial court imposed the mandatory sentence as provided for in the Act which courts frown upon for limiting judicial discretion. He relied on the case of; S v Toms [1990] SA (A) at 806(h) – 807(b) where the South African Court of Appeal held that the infliction of sentences is a matter of the discretion of the trial court and that mandatory sentences reduce the court's sentencing function. That, the imposition of mandatory sentences by the legislature is undesirable as it reduced the court to a mere rubber stamp.

16. However, the respondent in submissions dated and filed on 24th November 2022 argued that, the prosecution witnesses adduced evidence that proved the element of the offence herein. That, the age of the complainant was proved by the evidence of PW1, the complainant's mother, who stated that she was three (3) years old at the time of the offence and which evidence was corroborated by the birth certificate produced by PW4 the Investigating officer that indicated the complainant was born on 13th February, 2018.

17. On identification, the appellant was well known to PW1 and pointed him out in court. That, the appellant physically took the complainant from her to go and buy smokies which was corroborated by the evidence of PW4 who stated that PW2 picked out the appellant in the police station.

18. The respondent submitted that, the complainant explained to the trial court using gestures how the appellant insert his penis into her vagina. That, the P3 and PRC forms that were filled on the day of the offence confirmed that, the complainant's hymen was broken, there were bruises at 5 O'clock, and pus and epithelial cells were noted after a high vaginal swab. Further, PW3 Dr, Odour laid a baiss for producing the medical evidence on behalf of Dr. Ntwiga who was unwell and, in any case,, the appellant did not have any objections and proceeded to cross examined PW3. Reliance was placed on the case of; Kenneth Mwenda Mutugi v Republic [2019] eKLR where the court held that, where expert evidence cannot be procured without unreasonable delay or expense, other experts working in a similar field of expertise and are familiar with the handwriting of the unavailable expert can be called to tender such evidence as provided for under section 33 of the *Evidence Act*.

19. The respondent further submitted that, the appellant's defence was full of side shows and that he could not explain why he went with the complainant to his house and what he was doing with her. Further, the trial court considered the appellant's defence and found him guilty, convicted him accordingly and after considering his mitigation sentenced him in accordance to section 8 (2) of the Act.

20. I have considered the appeal in the light of the material placed before the court and I find that the law is settled, the role of the first appellate court as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

21. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R 1975) 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"

22. To revert back to the matter herein the offence of defilement which the appellant was convicted of is provided for under section 8(1) of the Act. The said section states: -

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

23. Pursuant thereto the elements of the offence are settled asstated in the case of Bassita Hussein v Uganda Criminal Appeal No. 35 of 1995, where the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

24. In that respect, I have considered the first ingredients of age and I find that charge sheet herein states that the victim of crime was a child aged 3 years old. A child is defined under the *Children Act* as an individual who has not attained the age of eighteen years.

25. In proof the complainant's age, the prosecution produced her birth certificate No. 773xxxx showing that, she was born o 12th February 2018. The charge sheet indicates the offence was committed on 23rd February 2021, therefore the child was three (3) years and fifteen (15) days old. The ingredient of age was therefore adequately proved.

26. As regards the ingredients of penetration, the particulars of the charge are that, the appellant defiled the complainant. In her evidence in chief (PW2) the complainant pointed at the appellant as the person who "removed her clothe, touched her, at private parts, she felt pain and told the police that it was the appellant who put something in her private parts. The appellant had no question to the child in cross-examination.

27. Be that as it may, the medial evidence by PW3 Dr. Owour who produced a P3 form filled by Dr. Ntwiga testified that, upon examination it was established that the complainant had vaginal hyperemic introctus hymen broken at 5 o'clock. The same findings were reflected in the PRC form. The doctor indicated that the hymen was freshly broken. It suffices to note that, the complainant is said to have been examined immediately. She was rescued from the appellant's house and that explain why the hymen was fresh torn. The doctor further stated in cross-examination that the complaint that the complainant's vaginal opening was reddened showing forced penetration, that it was attempted forced penetration.

28. It is noteworthy that section 2 of the Act defines penetrations as the partial or complete insertion of the genital organs of a person into the genital organs of another person; to identify the perpetrator of the defilement. The particulars of the charge sheet points at the appellant. PW1- MWG the mother of

the victim testified that the appellant took the victim child from her to go and buy her smokie. That he disappeared with the child and was later found in his house defiling her. The evidence of PW1 was that, the appellant was known to her, as he used to do his business work at her building. That he used to carry luggage for people. He would greet her and that she knew him for about 2 months. Further he used to bring smokies for the child and play with her. She described their relationship as cordial.

29. PW2 pointed out the appellant as the perpetrator and the record indicate that, when the appellant removed his mask for identification the child turned away and refused to look at him.

30. The P3 Owuor doctor indicated that the child was brought with the history of defilement by "a well known person to her" PW4 No. 228705 Corporal Regina Wairimu testified that, when she interviewed the complainant she said that "Wilson bought smokies for her. He put her on a motor bike and took her to a house and defiled her. The child said it was a painful experience. I remove Wilson from the cells and the child picked him out.

31. In defence the appellant confirmed his name as Wilson Kamande Macharia and that he is a casual labourer. He confirmed that he was known to PW1 M as they were friends, and "had no issues" However, he blamed PW1 for fixing him over a relationship with someone else. He even alluded to issues of re-locating to Nairobi and purchase of a new cell phone line. His evidence given vide unsworn statement was rather distorted and of course as it was not vide a sworn statement, he was not cross-examined on it.

32. Further the issue raised in the defence were not rested during cross-examination and therefore are deemed to be unsubstantiated and an afterthought. Furthermore, it suffices to note that the appellant did not refute the evidence adduced against him during his defence case. He did not dispute that, he took the child nor was found defiling her.

33. However, the appellant would have been given the benefit save for the evidence of his own mother, DW2 AG. The evidence of this witness corroborated the evidence of PW1 M and the complainant DW2 A PW2 confirmed that she saw the appellant with a child. She thus testified that the appellant returned home at 5.30pm on 28th February 2021 and told her that, he was tired and wanted to go home. He entered a building in front of where she was working and after 10 minutes she saw "him leaving with the child". That it was not the first time she had seen him with the child. That she inquired from his fellow friend and she was told maybe the child belonged to his friend. That she saw the appellant "buy smokies for the child" After 20 minutes she saw PW1 Mirriam inquiring about Kamande (the appellant) and the child and she gave her the appellant's telephone number without realizing she was putting the appellant in trouble.

34. That later PW2 returned with police officer who inquired as to the appellant's residence and she took them there. That PW1 started screaming kicked the door and the "child was on the bed while the appellant was wiping his shoes". That he had a short and was arrested for being partially dressed. The evidence of DW2 Agnes confirmed the appellant was with the child, bought her smokies and was found with her in the house. The child was found to have freshly broken hymen the logical conclusion is that, it is the appellant who committed the offence. Therefore I find the convict to be safe and I uphold it.

35. As regards the sentence section 8(2) of the Acts states that: -

> " (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

36. Pursuant thereto, the sentence of life imprisonment meted out is lawful, legal and proper. There is no basis to interfere with it.

37. The upshot of the afore is that, I find no merit in the appeal and I dismiss it in its entirety.

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF MAY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kimathi for the appellant

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant