LUCAS MWASHAUA MWAKATI v Republic (Criminal Appeal E036 of 2023) [2024] KEHC 9184 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9184 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E036 OF 2023

GMA DULU, J

JULY 24, 2024

BETWEEN

LUCAS MWASHAUA MWAKATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E015 of 2022 at Voi Law Courts delivered by Hon. T. N. Sinkiyian (PM) on 25th July 2023)

JUDGMENT

1. The appellant herein was convicted of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on diverse dates in mid March 2022 at [Particulars Withheld], Kisagu location Voi sub county Taita Taveta County caused his penis to penetrate the vagina of L.S (name withheld) a child aged 9 years.
2. On conviction, he was sentenced to life imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied upon the following amended grounds of appeal:-
    1. The learned trial Magistrate erred in law and fact by convicting him yet failed to find that the prosecution did not prove their case beyond reasonable doubt as required in law.
    2. The learned trial Magistrate erred in law by failing to consider the appellant's defence yet the same was cogent and believable.
    3. The sentence imposed was both harsh and excessive since it was applied it mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the fact and circumstances unique to the case.

4. 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.

5. This being a first appellate court, 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.

6. In deciding this appeal also, I have to bear in mind that the burden was on the prosecution to prove all the ingredients of the offence as codified under section 107 of the *Evidence Act* (Cap.80). This being a criminal case, the standard of proof was beyond any reasonable doubt.

7. In proving their case, the prosecution called seven (7) witnesses. On his part, the appellant tendered sworn defence testimony and called two defence witnesses.

8. The crucial elements of the offence of defilement on which the appellant was convicted are firstly, the age of the complainant who should be below 18 years. Secondly, sexual penetration even if partial. Thirdly, the identity of the culprit or perpetrator – see Charles Wamukoya Karani =Versus= Republic – Criminal Appeal No. 72 of 2013.

9. I will start with the age of the complainant PW1 LS. She stated in evidence that she was in Standard 4 at [Particulars Withheld]. That she was 10 years old when she testified and relied upon her birth certificate. The father SMM PW6 produced the complainant's birth certificate in court as an exhibit.

10. In my view, the prosecution proved beyond any reasonable doubt that the complainant PW1 was 9 years old when the alleged defilement occurred.

11. Did sexual penetration occur as alleged? The complainant PW1 stated so in evidence. The medical evidence from Joto Nyawa PW3 medical doctor, was to the effect that the vaginal orifice of the complainant was wide open, and at her young age, that situation proved sexual penetration.

12. In my view, the above evidence of PW1 and PW3, together with the evidence of PW6 that the complainant had informed him of sexual assault, as well as the evidence of PW2 EW of Compassion NGO to whom the complainant also disclosed the acts of sexual penetration, proved beyond any reasonable doubt that sexual penetration on the complainant did occur.

13. I now turn to the identity of the culprit. The prosecution alleged that the appellant was the culprit. The appellant denied the allegation, and tendered sworn defence testimony and called 2 defence witnesses.

14. The only person who could know the culprit of the offence was the complainant PW1, as nobody else witnessed the sexual incident. It is a case of a single victim witness of a sexual offence, and under the provisal to Section 124 of the *Evidence Act* (Cap.80), such evidence can sustain a conviction without further corroboration, if believable and is so believed by the court on reasons to be stated in the proceedings.

15. In my view, the evidence of PW1 herein was believable as PW1 did not have anything to gain by falsely implicating the appellant. PW1 was also consistent in reporting the incident and mentioning the culprit to her father PW6, as well as PW2 EM of Compassion NGO, and in addition, her testimony in court was unshaken though she was cross-examined at length.

16. Though the appellant tendered sworn defence testimony denying the allegation, his testimony was evasive and he even tried to bring in the name of Agneta Sezi to confuse the trial court, whom he knew was a totally different person from the complainant herein LS. His first witness also DW2 Gloria

Eunice Habibu came to be involved in the matter after the report had been made to the authorities and said in evidence, that she asked the complainant questions while alone. The said witness wanted to divert attention of the court to what she alleged occurred at the school, instead of tendering evidence on the allegation against the appellant.

17. DW2 Gift Inosi Abibu on her part, did not testify to the allegations, against the appellant herein, but instead stated in her evidence that the child should have been heard in court, which appears to indicate that she was not conversant with this case, as the child had already testified in court. Her evidence thus did not assist the appellant at all.

18. Taking into account all the evidence on record, like the trial Magistrate, I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus uphold the conviction.

19. With regard to sentence, the sentence imposed by the trail court was the statutory minimum. I will thus uphold the sentence.

20. To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court. Right of appeal within 14 days explained.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State