Makunga v Republic (Criminal Appeal E006 of 2022)
[2024] KEHC 16300 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E006 OF 2022

REA OUGO, J

OCTOBER 25, 2024

BETWEEN

JOSEPH JARAMOGI MAKUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the conviction and sentence in the Chief Magistrate's Court at Bungoma in SO 121 OF 2020 by Hon. A.A. Odawo (RM) on 20th January 2022)

JUDGMENT

1. The appellant, Joseph Jaramogi Makunga, was charged with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between 2nd September 2020 and 9th November 2020 within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DNM a child aged 16 years old.
2. After a full trial, the appellant was convicted of the offence and sentenced to 15 years imprisonment.
3. The appellant has filed this instant petition on the following grounds of appeal:
    1. That, I did not plead guilty to the said charges.
    2. That, the trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant as per provisions of the Laws of Kenya hence null and void.
    3. That, the trial magistrate erred in law and fact in convicting the appellant without proper inquiry and investigation.
    4. That, the trial magistrate erred in laws and fact by failing to put into consideration the fact that the witness had contradicting ages with regard to the age.

5. That, the trial magistrate erred in law and fact in arriving at a decision while ignoring the fact that the accused was not served the charge sheet during trial.

6. That, the trial magistrate erred in law and fact by applying wrong principle in convicting the appellant on the weakness of his defence that sufficiently created a reasonable doubt to the prosecution's accusation.

7. That, the trial court acted with bias by favouring the prosecution side in decision making.

4. The appellant also filed further supplementary grounds of appeal:

1. That the trial court erred in law and in fact in finding the appellant as the perpetrator of the offence where the evidence on record and prosecution evidence about the same is in doubt and too remote.

2. That the trial court erred in law and in fact in not making a finding that the mandatory nature of the minimum mandatory sentence under section 8 (4) of the *Sexual Offence Act* No 3 is unconstitutional and not warranted on plea. Hence discretion of the appellant's sentence to a least severe one.

3. That the trial court erred in law and in fact in not ordering the appellant's sentence to run from the date of arrest pursuant to proviso of section 333 (2) CPC and section 38(1) PC.

5. This being a first appellate court, I am under a duty to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify (see *Okeno vs. Republic* [1972] EA 32).

6. The victim's mother, RN (Pw1) testified that on 29/9/2020 her third born B was sick. As she rushed to the hospital, she met DNM (Pw2) and asked her to get money from her workplace for B's medication. At the hospital, she was informed that she had to pay Kshs 250/- for B's admission, so she went home to get the money from Pw2. Pw1 did not find Pw2 at home and a neighbour told her that her daughter had been conversing with the appellant for a long time. Pw2 had picked the money, bought bread for her younger siblings, and went with the rest. Pw1 asked the appellant if he knew where Pw2 was and he responded to the negative. Pw1 reported the matter to the police station.

7. Pw2, DKM, testified that her mother had taken her brother to the hospital and at around 7:00 p.m.. The appellant talked to her about love and sex. She told the appellant that she could not have sex with him. She gave her siblings supper, went to the toilet and when she came back, she found that Pw2 had locked her out. She went to the appellant's house and they slept on the mattress. In the morning, the appellant did not allow her to leave and locked her in. At 11:00 a.m. he came back and opened the door for her. She went home and her siblings told her that Pw1 was going to beat her. Pw2 went to Bungoma town where he met the appellant who took her to a house in Sinoko. She testified that they had sex eight (8) times and never used condoms. She explained that the appellant would use his private parts for urinating and put in her private parts. A chief discovered that they lived together while patrolling the homes and the chief took them to his office and then the police station. Pw2 testified that she went to the hospital and was told she was not pregnant.

8. No xxxxxxx PC AK (Pw3) testified that on 9/11/2020 a village manager came to the station with both the appellant and Pw2. She stated that while doing her patrol, she bumped into Pw2 in one of the estates. Upon interrogating Pw2 she found out that she was still in school. Pw3 conducted investigations and found that the appellant had turned Pw2 into a wife yet she was a minor. They traced Pw2's parents and took Pw2 to hospital. Pw3 testified that he visited the house where they lived.

9. Dr. Wena Wafula (Pw4) testified that Pw2 was examined, no physical injuries were noted and the pregnancy test was negative. She had no lacerations or bruises but her vagina had a whitish foul-smelling discharge She had no hymen and white blood cells were noted in the vaginal swab. Pw4 believed that she had a sexually transmitted infection and had been defiled severally. According to the age assessment done by the dentist, Pw2 was 16 years old.

10. The appellant in his defence testified that he is a casual worker. He testified that between 2nd and 9th November 2020 some people asked him to join the 1-acre fund. After joining, he was told that the processing would take 4 days. He denied knowing the complainant.

Submissions

11. The appellant submits that no witness was brought to court to ascertain that the appellant lived with the complainant for 30 days. The village elder who arrested the appellant was not called to testify. The time it took to arrest him was also too long without any explanation. Although the victim had an STI, he submitted that he had no STI. He submits that the absence of hymen is not conclusive proof of penetration.

12. He further submitted that Pw2 was not truthful and the court should not have accepted her evidence under section 124 of the *Evidence Act*. He cited the case of *John Cardon Wayne v Republic & 2 Others* (2001) eKLR. He also relied on the case of *Martin Charo v Republic* (2016) eKLR. He submitted that the minimum mandatory nature of the sentence under section 8 (4) of the *Sexual Offences Act* was unconstitutional.

13. The prosecution submitted that the complainant was 16 years old as per Exh No. 1. On penetration Pw4 testified that the hymen was broken and produced the P3 form. The appellant was positively identified as Pw2 and had known him since June 2020. They conceded to not serving the appellant with the charge sheet, however, they advanced that no constitutional right was violated as he was served with witness statements.

14. On sentence, the respondent submits that the trial court considered all facts of the case and the mitigation from the appellant. The trial court sentenced the appellant to 15 years imprisonment. The sentence was commensurate to the offence and was within the law.

Analysis and Determination

15. Having carefully considered the appeal and the rival submissions, the issues that fall for determination are as follows:

    a. Whether the ingredients of defilement were proved to the required standard.

    b. Whether section 8(4) of the *Sexual Offences Act* is unconstitutional.

    c. Whether the sentence was excessive.

16. The appellant contends that he was not served with the charge sheet. It is clear at the pretrial hearing on 13/11/2020 that the appellant confirmed that he was supplied with witness statements and did not bring it to the attention of the court that in addition, he required a copy of the charge sheet. In any event, when arraigned the charges and every element thereof were read to the appellant and he entered a plea of not guilty. The appellant understood the charge and no prejudice was therefore caused. the particulars

17. The appellant has argued that he was not the perpetrator of the crime. According to the testimony of Pw1 her child, B, was sick on 29/9/2020 and she took him to the hospital. Pw1 did not find Pw2 home and reported it to the police. Pw2 testified that she lived with the appellant for about 30 days. Pw3 testified that the appellant was arrested on 9/11/2020 when he was presented to the station by a village elder. Pw3 went to his house and ascertained that the appellant and the victim lived together. There was also evidence from both Pw1 and Pw2 that the appellant was their neighbour. The appellant was a person well known to Pw2 and she spent sufficient time with him. This was evidence of recognition (see *Wamunga v Republic* [1989] KLR 424). The appellant was positively identified as the perpetrator.

18. On penetration, the appellant argues that he was not tested for an STI and that the only proof of penetration was a broken hymen which is not conclusive proof of penetration. The trial considered both the testimony of Pw2 which was corroborated by medical evidence. Pw2 explained that the appellant would use his private parts for urinating and put in her private parts. She testified that they had sex about 8 times. The P3 form concludes that Pw2 was repeatedly defiled and from the sexual encounter contracted trichomoniasis. Pw4 noted that there was a foul-smelling vaginal discharge. The evidence of penetration was not solely the broken hymen. The trial magistrate cannot be faulted for finding that penetration was proved considering the evidence of Pw2, Pw4 and medical reports.

19. There is no dispute that the complainant was 16 years old. Dr Duncan Wafula used the dental formula method in Pw2's age assessment and found that she was 16 years old. The appropriate sentence under the *Sexual Offences Act* has been prescribed by section 8 (4). The appellant argued that the sentence prescribed by section 8 (4) was unconstitutional. However, the appellant did not demonstrate how the section is unconstitutional or the nature of any constitutional violation. The trial magistrate considered the nature of the offence, the appellant's mitigation and the fact that he was a first offender and sentenced him to 15 years. The sentence cannot be described as excessive. The appellant was arraigned on 13/11/2020 and remained in custody throughout the trial. The sentence shall commence from 13/11/2020.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF OCTOBER 2024

R.E. OUGO

JUDGE

In the presence of:

Joseph Jaramogi Makunga/ Appellant – In person

Miss Matere -Respondent

Wilkister -C/A