Mbuthia v Republic (Criminal Appeal E075 of 2023)
[2024] KEHC 12537 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E075 OF 2023

AK NDUNG'U, J

OCTOBER 16, 2024

BETWEEN

DAVID MBUTHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
Sexual Offence Case No.E044 of 2022 – L. Nyaga, RM)

JUDGMENT

1. The Appellant, David Mbuthia,was convicted after trial 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 3rd day of July, 2022 at Buuri Sub-County Meru County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of S.B a child aged 14 years. On 21/09/2023 he was sentenced to serve 20 years imprisonment.

2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal. He filed grounds of appeal challenging the conviction and the sentence on the following grounds;

    i. That the Learned Trial Magistrate erred in matter of law and fact by failing to note that the evidence tendered by the Prosecution was not enough to secure a conviction.

    ii. That the Learned Trial Magistrate erred in matters of law and fact by convicting and sentencing the Appellant without considering that according to the medical evidence the hymen was old broken, normal external genitalia according to PRC Form.

    iii. That the Learned Trial magistrate erred in matters of law and fact by convicting and sentencing the Appellant without considering that the sentence was harsh, excessive and exorbitant.

iv. That the Trial Magistrate erred in matters of law and fact by convicting and sentencing the Appellant without considering that there was no physical injuries, no discharge and no bleeding as indicated in the P3 and PRC Forms.

v. That the Learned Trial Magistrate erred in matters of law and fact by convicting and sentencing the Appellant without considering that the Appellant was not taken for medical examination, neither were the clothes they allege the Appellant used to himself examined.

vi. That the Learned Trial magistrate erred in matters of law and fact by convicting and sentencing the Appellant without considering that the case was full of contradictions and disparities.

vii. That the Learned Trial Magistrate erred in matters of law and fact by quashing the Appellant defence and alibi without cogent reasons.

viii. That the Appellant prays to be present during the hearing of his appeal in order to adduce more grounds and to be served with Trial Court Proceedings and Judgment.

ix. That the Appellant prays his appeal succeeds, sentence quashed and be set at liberty.

3. The appeal was canvassed by way of written submissions. In his hand-written submissions, the Appellant raised the following additional grounds of appeal –

x. That the Learned Trial Magistrate erred in law and facts by convicting the Appellant by relying on the confessions of PW1 made under duress contrary to Article 50(4) of *the Constitution*.

xi. That the Learned Trial Magistrate erred in law and facts by convicting the Appellant while relying on medical evidence which was procedurally and illegally adduced contrary to section 77 and 72 of the *Evidence Act*.

xii. That the Learned Trial Magistrate erred in law and facts by convicting and sentencing the Appellant by not appreciating that his right to adduce and challenge evidence provided under Article 50(2) (k) of *the Constitution* was violated thus rendering PW1's evidence null and void in law.

xiii. That the Learned Trial Magistrate erred in law and in facts by convicting the Appellant without appreciating that the scene of crime photographic evidence was produced by the Investigating officer without the requisite certificate of print which violated section 78 of the *Evidence Act* thus rendering the entire prosecution evidence null and void in law.

xiv. That the Learned Trial Magistrate erred in law and facts by quashing the Appellant's defence without weighing it against the flawed and week prosecution case.

xv. That the Learned Trial Magistrate erred in matters of facts by applying wrong principle during sentencing by meting out a mandatory minimum sentence which ignored all mitigations thus contravening Articles 19, 27 and 28 of *the Constitution* and the provisions of the Sentencing Policy Guidelines.

4. The Appellant filed written submissions. In a nutshell he challenges the evidence of PW1 in that it was irregularly obtained as PW1 was forced to confess that she had been defiled after being slapped by PW2. He urges that the medical evidence was produced in contravention of the law and that he was not informed of his right to challenge the prosecution's evidence. Further that photographic evidence was produced without a certificate of print and that his defence was not considered.

5. The appeal is opposed. In written submissions, counsel isolated two issues for determination being;

i. Whether the Prosecution's case was proved beyond reasonable doubt.

ii. Whether the sentence was excessive.

6. It is submitted that all the ingredients of the offence were proved to the required degree. Counsel submitted that penetration was proved not only by PW1's evidence but by the medical evidence produced. That the age PW1 was not contested and in any event a birth certificate was produced and finally, that the identification of the Appellant as the perpetrator was proper.

7. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal laid down the duty of the Court on a first appeal:

> " 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 v. R., [1957] 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, see Peters v. Sunday Post, [1958] E. A. 424."

8. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 stated: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

9. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

10. In Kiilu& Another v Republic [2005]1 KLR 174, the Court of Appeal held 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 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. 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; 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."

11. In a nutshell, the prosecution evidence is that PW1, a girl child was found entering the house of the Appellant. Information reached PW2 who together with others went to the scene and found the Appellant and PW1 locked inside the house. The Appellant was initially reluctant to open but he eventually did so. On interrogation, PW1 confirmed that the Appellant had had sex with her on his bed and he wiped himself using a pink clothing. On examination the bed was wet.

12. PW1 was taken for a medical examination and the result was that spermatozoa was found in her genetalia and she had a broken hymen. The Appellant was found with the minor in broad daylight and indeed PW6 had lived with him in the plot for 2years and therefore knew him well.

13. In his defence the Appellant stated that PW2 had been introduced to him by PW6 so that he could employ her. The Appellant gave her money to start a cake business which was initially profitable until prices of commodities went up following the Ukranian war. PW2 wanted to close the business but the Appellant was opposed to it. PW2 warned the Appellant that if he continued resisting he would do something to him that he would never forget. On 3/7/22, PW2 went to the Appellant and asked if he had agreed to her business request but he declined. PwW2 called 2 men who came to the plot. PW1 was slapped 5 times and ordered to state what she had been told to say. The appellant was arrested.

14. I have paid undivided attention to the evidence on record. I appreciate that this court did not have the opportunity to see and hear the witnesses testify and I have given due allowance for that fact. The issues for determination are whether the prosecution proved its case to the required degree with focus on the ingredients of age, penetration and identification, and, if in the affirmative, whether the sentence meted out by the trial court is harsh or excessive.

15. The age of PW1 was not contested and in any event the same was proved through the production of a birth certificate.

16. In EE –VS- REPUBLIC [2015] eKLR, the court observed that:

> "An important ingredient of the offence of defilement is that there must have been penetration. Penetration is defined in section 2 of the *sexual offences act* as 'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person. The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement.

17. In Bassita Hussein– Vs- Uganda, Supreme CourtCriminal Appeal No. 35 of1995, the court stated,

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence."

18. I have evaluated the evidence on record. There is the evidence of the complainant that she the Appellant had sexual intercourse. The medical evidence corroborates this evidence in that a high vaginal swab revealed the presence of spermatozoa and a broken hymen seen on examination of the victim. The Appellant was caught with his hands literally in the cookie jar by PW2, PW4 and PW6. In other words, the Appellant was caught red handed in circumstances that corroborate the evidence of the complainant.

19. The Appellant has made heavy weather of the regularity of the production of the medical evidence herein. I begin by stating that in this case, even in the absence of a medical report, and in line with the holding in the Bassita case(supra), other available evidence proves penetration.

20. The medical evidence produced by PW5 was so produced on behalf of Jackson Mutwiri, her colleague. PW5 testified that she was familiar with the hand writing of Mutwiri having worked with him for 3 years. I note that no foundation was laid as to why the maker of the document could not be called as required under Section 33 of the *evidence Act*.

21. I must reiterate that when documents such as the medical evidence in this matter are to be produced by a person other than the maker, the law must be complied with. The prosecution risks losing cases and in the process visiting injustice on victims of crime if the law on production of such documents is not followed. Useful guidance on the importance of strict compliance is found in Sibo Makovo V. Republic, Criminal Appeal [1997] eKLR, where the Court of Appeal addressing the legal requirement stated as follows;

> " The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called".

22. As to the identity of the perpetrator of the office, I find no difficulty reaching the conclusion that the identification of the Appellant was positive. The complainant identified him. He was caught at the scene by PW2, PW4 and PW6. There is no doubt that the Appellant was the perpetrator of the defilement of PW1.

23. As regards sentence, the Appellant has asked the court to, in the event that conviction is upheld, re-look into the matter of sentence with a view to reducing it as everybody deserves a second chance.

24. Section 8(3) of the *Sexual offences Act* provides for a sentence of not less than 20 years. The Appellant was handed 20 years imprisonment. The sentence is thus within the law. The trial court in sentencing considered the mitigation by the Appellant who gave a biblical quote and further the court called for a pre-sentence report which it considered. The circumstances of the offence were clearly considered.

25. In Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003 the Court of Appeal stated that: -

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into an account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

26. In Bernard Kimani Gacheru vs. Republic [2002] eKLR the Court of Appeal restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

27. The Appellant ought to have established that any one of the above parameters were met for this court to interfere with the sentence. None is shown to exist. The sentence is legal and passed procedurally.

28. From the above analysis, it is my finding that the prosecution proved its case to the required degree. The appeal herein lacks merit and is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 16 TH DAY OF OCTOBER ,2024.

A.K. NDUNG'U

JUDGE