Maina v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 12017 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E038 OF 2023

AK NDUNG'U, J

OCTOBER 8, 2024

BETWEEN

JAMES MUTHEE MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offences Case No.E56 of 2023– Hon. Lisper Gakii, RM)

JUDGMENT

1. The Accused, James Muthee Maina was charged with Defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. The particulars were that on the 28th day of August, 2022 in Laikipia East Sub-County within the Laikipia County, intentionally caused his penis to penetrate the vagina of S.M.N. a child aged (14) years. In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section II (1) of the *Sexual Offences Act* No. 3 of 2006. After trial he was convicted and sentenced to serve 20 years imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;

    i. That the learned trial magistrate erred in matters of law and fact by failing to note that the case was not proved beyond reasonable doubt.

    ii. That the learned trial magistrate erred in matters of law and fact by failing to note that the appellant herein has no previous records.

    iii. That the learned trial magistrate erred in matters of law and fact by not appreciating that the birth certificate was a forgery thus age of complainant was not proved.

iv. That the learned trial magistrate erred in matters of law and fact by failing to note that the charge sheet was defective/ Contrary to Section 134 of the CPC.

v. That the learned trial magistrate erred in matters of law and fact by failing to note that the appellant defence statement was quashed without cogent reasons.

3. The appeal was canvassed by way of written submissions.

4. This being a first appeal, it is the duty of the court to re-evaluate the evidence and reach its own findings on the matter.

5. 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."

6. The Court 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."

7. It becomes necessary, therefore, to summarize the evidence as recorded at the trial court. In a nutshell, PW1 testified that the Appellant picked her up in a car near a dentist area. PW1 sat on the back seat. The Appellant drove to a big hotel referred to by people as "64" near the hospital. He parked at a place where there were trees.

8. The Appellant went to the back seat where PW1 was. He removed his trouser and PW1's clothes. He put on a condom. He held PW1's hands and laid her on a pillow in the car. He inserted his penis in her private part for urinating. She screamed as the act was painful. The Appellant stopped. He dropped her at "Kwa Malory". She headed to her mother's shop.

9. One Stacey commented on her bloody clothes. She lied that she had been cut on the leg. She then confronted by Kawira and others and she told them what had transpired. Her mother took her to the police station and then to hospital.

10. PW2, the mother to PW1, confirmed that she took her to hospital after reporting to the police. A P3 form was filled.

11. PW3 examined PW1. Her hymen was freshly broken. She had a reddish vaginal discharge which was bloody. He concluded that there was penetration. He produced a P3 and PRC forms as exhibits.

12. Pw4 investigated the matter. She produced a birth certificate in respect of PW1 and photographs of the vehicle where incident took place, Certificate of photographic prints, a cover of Sure condom, 2 pillows and a bloodstained pink dress as exhibits.

13. In his defence the Appellant said he was just arrested for reasons he didn't know. At the police station he saw Mama Susan who was his Land Lady who ordered police to lock him up despite the Appellant pleading for time to pay rent.

14. Both parties submitted extensively and I have considered each and every facet of the submissions and case law cited.

15. I have re-evaluated the evidence tendered at trial. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and I have given due allowance for that fact.

16. The issue for determination is whether the prosecution proved its case to the required threshold in law, that is,beyond reasonable doubt.

17. It is opportune to emphasis that the burden of prove in a criminal trial is on the prosecution throughout and the accused person has no obligation to prove his innocence.

18. Section 8 of the *Sexual Offences Act* provides as follows:

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

    (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.

    (3) 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.

    (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

19. The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant. (See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013).

20. The age of the victim in this case presents no controversy. The same is proved by the production of the birth certicate.

21. As regards penetration, PW1 was clear in her evidence of the sequence of events of the day and gave graphic details of how the Appellant inserted his penis in her vagina. She explained that the act was painful. She screamed. She got bloodied.

22. This evidence finds material corroboration from the medical evidence by PW3 who shortly after the incident confirmed that the victim's hymen was freshly broken and there was a bloody discharge from her genetalia. The clothes produced confirm that PW1 bled at the material time. This is overwhelming evidence of penetration and that clinical officer concludes as much. Am satisfied the victim was penetrated in her genetalia.

23. As to the identity of the perpetrator, The Appellant was known to PW1 as he ran a barber shop near her mother's shop. The incident was in broad daylight. There was no possibility of PW1 mistaking the identity of the Appellant. It is in evidence that indeed the Appellant lured PWI severally that day offering to take her somewhere.

24. In countering this evidence, the Appellant introduces a dispute over rent with one Mama Susan ostensibly inviting the court to conclude that his arrest and charging was instigated by Mama Susan over rent arrears. I find this line of defence bizzare. In light of the evidence on record, this line of defence cannot possibly be true. One wonders how to draw a nexus between the rent dispute, if at all, and the clear injury on the Complainant's genetalia. There is no iota of evidence that the said Mama Susan, PW1 and PW3,the Clinical officer would harbor any common intention to harm the Appellant. His defence is a mere sham, a belated attempt to evade the consequences of his beastly act.

25. Am satisfied that the prosecution's case was proved beyond reasonable doubts.

26. The sentence meted out is challenged on the basis that the court imposed the minimum mandatory sentence to a first offender. I have reviewed the sentencing remarks by the trial court. Sentencing is at the discretion of the trial court. The court considered the mitigation put forth by the Appellant. It considered that minimum mandatory sentences had been found unconstitutional by the Court of Appeal. The court however found aggravating factors in the commission of the offence herein in the manner the offence occurred and the age of the victim.

27. The court did not err in principle neither did it consider irrelevant matters or fail to consider relevant matters. The sentence imposed is legal and not harsh or excessive. I find no grounds at all on which to interfere with the exercise of discretion by the trial court.

28. With the result that the appeal herein fails in its entirety. It is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER 2024.

A.K. NDUNG'U

JUDGE