FKM v Republic (Criminal Appeal 28 of 2018)
[2023] KEHC 546 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEHC 546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 28 OF 2018

RM MWONGO, J

FEBRUARY 2, 2023

BETWEEN

FKM ..... ACCUSED

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment dated 7th May 2018 of Hon GK Odhiambo, RM, in PMCC Case SO No 5 of 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006; and an alternative charge of committing an indecent act with a child contrary to section 11(1). On conviction for defilement, he was sentenced to life imprisonment.

2. The particulars were that on the diverse dates between 15th days of January 2017 and 18th day of February 2017 in Kirinyaga East sub-county within Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate into the vagina of EMM a child aged 5 years.

3. Aggrieved, the appellant filed an appeal, subsequently amended, raising the following grounds:

    i. The trial magistrate erred by rejecting his defence.

    ii. The trial magistrate erred by filling the glaring gaps in the prosecution's case.

    iii. The trial magistrate erred by failing to subject the appellant to a psychiatric before trial commenced.

    iv. The trial magistrate erred by convicting him on weak prosecution evidence.

4. It is now trite that the duty of the first appellate court is to analyze and re-evaluate the evidence adduced in the lower court bearing in mind that it has neither seen nor heard witnesses testify. See *Okeno v. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424."

5. The essential facts of the case are that the complainant, EMM, was a pupil at [Particulars Withheld] Academy in Pre Unit. She knew the accused as Kamau who stayed near [Particulars Withheld]. She testified she knew the appellant well by name (Kamau); That on 18th February 2017, the Appellant took her to a coffee plantation where he ordered her to remove her trouser; that he made her lie down on the ground; that he then defiled her by putting his hairy thing for urinating in her thing for urinating; and that she was in pain. She candidly described what transpired and that the Appellant warned her that if she ever told anybody he would remove her eyes. She also testified that it was her mum who took her to hospital when she found her in pain when bathing.

6. PW2, MN was the complainant's mother. She testified that on 18th February 2017, she was bathing the minor when she noticed something unusual about the minor: that she was in pain and restless whenever she touched her private parts making her suspicious; That it was only after beating the minor that she revealed what the appellant had been doing to her on several occasions; That she said that the appellant used to defile her when they went to pick tea in the farm but she could not tell anyone otherwise the appellant would prick her eyes.

7. MN confirmed that the complainant was born on 22nd February 2012 and pointed at the birth certificate (MFI-1). She said she summoned the appellant and he did not deny the offence; that she called her husband and thereafter took PW1 to Bethesda Clinic where she was advised to report to the police. She reported the issue at Kiamatuga Police Station and the appellant was arrested. She took PW1 to Kianyaga sub-county hospital where she was examined and tests done. She identified the P3 form, Medical notes and lab requests. She confirmed that the complainant was born on 22nd February 2012 and referred to the birth certificate (MFI-1).

8. Ibrahim Kimani PW4, was the clinical officer who did the medical examination of the minor. He formed an opinion that she had been defiled after confirming that she had a broken hymen though it was not freshly broken. He also had noticed some tenderness and inflammation on her labia, and puss cells were noted. He produced the P3 Form, Medical Notes and lab request Form, that were marked as Exhibits 3,4 and 5 respectively.

9. In his defence, the appellant gave an unsworn statement. He testified that he was a resident of [Particulars Withheld] and a casual labourer. He said he was employed by the complainant's mother as a casual labourer; that she had asked him to baby sit her child, and when he refused, she threatened to have him jailed. He said he then left employment and went to work somewhere else. Later, he was arrested.

10. As correctly argued by the state the elements of defilement which have to be proved are:

    a. The age of the minor

    b. Penetration

    c. Positive identification of the perpetrator

11. In this appeal the issues that arise from the appellant's submissions are as follows.

    1. Whether the appellant should have been subjected to a mental assessment test.

    2. Whether age assessment of the appellant should have been conducted.

    3. Whether it was proved that the complainant was defiled by the appellant.

Whether the trial Magistrate erred in failing to subject the appellant to psychiatric test before the trial commenced.

12. The appellant's complaint under this head was in ground 3. He argued that the trial magistrate erred in law and fact in failing to subject the appellant to a psychiatrist before the commencement of the trial. The appellant submits that in his earlier submissions dated 27th January 2020 he had annexed copies of documents to show that indeed the appellant was mentally, handicapped at the time of the alleged offence and hence unfit to take plea. Thus, the prosecution and by extension the investigating officer did not carry out sufficient investigation before putting the appellant to trial. He submits that failure by the prosecution and by extension the trial court to subject the appellant to mental assessment renders the conviction and sentence unlawful and the only remedy is to quash the conviction and sentence.

13. I have perused the documents filed by counsel that allege that the appellant was enrolled as a special student. The first document was a letter from the Chief dated 16/8 2019 which states that the accused attended primary school up to standard two and then dropped out. The second is a Kenya Primary School Leaving Certificate dated 20/05/2019 showing that the accused was enrolled in [Particulars Withheld]Primary School in class 2 in 2002 and left in 2006 in special class SME Unit. The Head Teacher's report states that he was "mentally handicapped."

14. These documents were apparently not brought to the attention of the court at any stage of the proceedings, they are not documents that are of a medical nature to show that the accused had mental impairment.

15. The record of proceedings shows that at the hearing on 21/2/2017 the charge was read to the accused and he responded "It is true". On 22/2/2017 when the facts were to be read the Accused stated:

> " I did not understand the offence yesterday. I pray it be re-read to me. I understand Kikuyu."

    The chargse were then read afresh to the accused and he pleaded "It is not true" A plea of Not Guilty was entered by the trial magistrate.

16. On 6th April 2017, an application to Amend the Charge Sheet was made by the prosecution. When the main charge and alternative charge were read out to the accused, he replied that it was "not true". A plea of not guilty was again entered. The accused then stated:

> " I am not ready to proceed because I do not know what I am charged with. I have listened to the Kikuyu interpretation but I did not understand"

17. The charges were then re-read to the accused in Kikuyu and every element explained to him, and he pleaded "Not Guilty". The Appellant understood what the charges were and there were no signs of him being unable or unfit to take plea. There was no question that arose in the mind of the trial court that the accused was of unsound mind. There was nothing that suggested that the trial court needed to act in accordance with the provisions of Section 162 of the *Criminal Procedure Code* as there was nothing compelling in its consideration that the Appellant had mental challenges.

18. Finally, at some stage during the trial, the appellant was represented by counsel. No issue was raised concerning the appellant's mental status. In fact, after the court found that the appellant had a case to answer, the accused stated that his advocate was not present and requested that the hearing should be adjourned to see if he would attend. The court duly adjourned to a later time. When the time for hearing reached, the accused stated that his advocate would not be coming and he would represent himself. All these actions and facts tend to show that the accused was not of unsound mind

19. Likewise, I do not see any basis for a conclusion that the accused was either of unsound mind or unable to comprehend the charges or proceedings. As such there is no rationale to conclude that the statutory presumption of sanity of an accused person, explicit in section 11 of the *Penal Code*, should have been replaced with a suggestion of insanity of the accused.

Whether age assessment of the appellant should have been conducted.

20. This issue arose from the fact that at mitigation, counsel for the accused urged the court before sentencing to do an age assessment on his understanding that the accused was below 18 years of age.

21. From the proceedings, it is clear that the issue was dealt with by the trial court on 22/2/2017 where the prosecutor requested, and the court ordered, that the accused be escorted to Kianyaga Sub County hospital for age assessment. The parties came back to court on 24/2/20187 when the prosecutor notified the court that he had been able to get the accused's birth certificate which showed that the accused was 19 years old.

22. On 7/5/2019, the issue of the accused's age came up again and the court noted that it had been addressed when the amended charge sheet was dealt with on 6/4/2017 as it had been indicated that the accused was a child. The prosecutor indicated then, that he had the birth certificate which showed that the accused was above 18 years. On 7/5/2019 the proceedings note as follows:

> " The issue of the age of the accused person was dealt with by Hon AN Makau....The court has seen in the court file a photocopy of the Birth certificate of the accused person. The court to be supplied with the original birth certificate of the accused person S/No xxxx"

23. On 8/5/2019, the proceedings show:

> "JWK: I'm the mother to the accused person, I gave the prosecutor the birth certificate of FKM when this matter commenced. I misplaced the original birth certificate"

24. In light of the foregoing, I do not see any reason for holding that the accused was not the age indicated in the proceedings at the time of the amendment of the charge sheet.

Whether the prosecution proved the offence of defilement as against the accused

25. Age of the accused: This aspect was proved prima facie by production at the hearing of the birth certificate of the complainant, EMM, marked as PExb 1. The certificate shows that EMM was born

on 22/2/2012. The offence having been committed on 18th February 2017, the complainant was then aged 5 years.

26. Penetration and Identification of Perpetrator: The appellant submitted that the trial magistrate concluded that the prosecution had proved its case against appellant beyond reasonable doubt, whilst there was no evidence that the appellant was subjected to any medical tests to conclusively proof that he indeed committed the offence as charged. It was the duly of the prosecution to subject the appellant to such tests.

27. It is true that the only eyewitness evidence of the offence was that of the complainant. The record shows that during cross examination after the minor had testified, the Appellant in fact said: "I pray to be released I will not reeat that thing again." This may have been an accidental slip, or an implicit admission by the appellant of the offence. The trial Court noted this without, correctly so, making a determination that there was an admission. In her judgment, the trial magistrate also noted that the accused stated when cross examining PW2 that: "I pray to be forgiven I will not repeat the offence."

28. In her judgment, what the trial magistrate did was to note that the accused did not controvert the evidence of both EMM and her mother as to the facts they stated and the identification of the alleged perpetrator.

29. In this case, EMM testified that the appellant put his thing with hair into her thing. From the P3 form there was evidence only of inflammation of both the labia and the vaginal wall. From the medical notes the PRC Form, it was indicated that there was tender inflammation of the labia as did. The hymen was broken, but the tear was not fresh.

30. The trial magistrate considered the definition of penetration noting that it was a partial or complete insertion of the genital organs of a person into the genital organs of another. The trial magistrate considered the case of *JOO v Rep* [2015]eKLR which cite the Court of Appeal case of *Mark Oiruri Mose v R* [2013]eKLR where the Court stated that :

> " So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organs..."

31. The trial magistrate went further and cited authority from *Josphat Muoki Muunda v R* [2016]eKLR where the court held that judicial notice could be take of the use of words like "Kitu"'or "thing" to refer to the genitalia of both males and females.

32. EMM's testimony was that

> " K told me to remove my trouser so that he can put his thing with hair into mine. I removed my trouser..He told me to lie down on the ground and I lied down....(she points to her vagina) He put it behind me (points to her butttocks and here (points to her vagina)....I felt pain here (she points at her vagina) His thing for urinating has hairs...."

33. The evidence of EMM is clear and convincing. When read together with the evidence from the medical officer, there can be no doubt as to whether the complainant's vagina and anus were violated by contact with the appellant's hairy thing for urinating. The case law cited by the trial magistrate was on point, and I see nothing to raise any doubt or suggestion that the complainant was not defiled the by the appellant.

34. The evidence of PW2 also clearly indicated that when she, PW2, asked EMM how many times the appellant had had done that to her, she counted 1,2,3 (times) When she asked EMM why she hadn't told her as her mother, EMM replied that the threat that her eyes would be "pricked off"

35. Thus the issue of positive identification of the perpetrator was also properly proved.

36. The appellant alleged that he was not represented by an advocate when he gave his unsworn evidence that he was framed by the child's mother for failing to baby sit the minor. The trial magistrate did not consider this as a sufficient reason for the child's mother to frame the appellant and noted that there was no evidence that the appellant had been so employed.

37. All in all, I find nothing in the evidence that suggests that the appellant was not properly convicted and I affirm the conviction and hereby dismiss the appeal in its entirety.

38. Orders accordingly.

DELIVERED AT KERUGOYA THIS 2ND DAY OF FEBRUARY, 2023.

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R. MWONGO

JUDGE

In the presence of:

1. No representation for Ndata Mugo for the Appellant

2. Mamba for the State

3. Mr. Murage Court Assistant