Kiinjo v Republic (Criminal Appeal E109 of 2021)
[2023] KEHC 3985 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E109 OF 2021

GMA DULU, J

MAY 4, 2023

BETWEEN

SAMSON WAMBUA KIINJO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E012 of 2021 by C. A. Mayamba –PM at Kilungu)

JUDGMENT

1. The appellant was charged with unlawful carnal knowledge with a woman of mental disability contrary to section 146 of the *Penal Code*.

2. The particulars of offence were that on May 25, 2021 at around 13:00hours in Kola location within Machakos county, intentionally and unlawfully had carnal knowledge of MMM aware at the time of committing the offence that MMM was mentally retarded.

3. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act* number 3 of 2006, the particulars of which being that on the same day and at the same place intentionally and unlawfully touched the vagina of MMM with his penis against her will.

4. He denied both charges. After a full trial, he was convicted on the main count of unlawful carnal knowledge with a woman of mental disability and sentenced to five (5) years in prison.

5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-

    1. That he pleaded not guilty to the charges.

2. That he is just a first offender and had never been caught on the wrong side of the law and hence prays for leniency.

3. That he prays for leniency and particularly asks for leniency because his relatives were not able to hire a lawyer for him.

6. 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.

7. This being a first appeal, I have to remind myself that I am duty bound to evaluate all the evidence on record and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.

8. In support of their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.

9. I have evaluated the evidence on record both for the prosecution as well as the defence. I have to bear in mind that the prosecution was required to prove all the elements of the offence beyond any reasonable doubt. I rely on the case of *Sawe v Republic* (2003) eKLR wherein the Court of Appeal held as follows:-

> suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence beyond reasonable doubt.'

10. The first element of the offence on which the appellant was convicted was the mental status of the (victim) complainant, that she was mentally retarded.

11. In this regard, no medical or psychiatrist report was tendered in evidence in court of her mental status. It was however the evidence on both from the prosecution witnesses and the appellant himself, that the complainant (victim) could not communicate properly. However, she was a person who could go places and find her way back home. She was not brought to court and no explanation was given why she was not so availed for the trial court to see her.

12. The section under which the appellant was charged, being section 146 of the *Penal Code* which requires the victim to be an idiot or imbecile, in my view, would require for the prosecution to have tendered evidence from an expert, a psychiatrist, to prove the mental status of the victim, and show whether she was or was not able to give consent to any act, including sexual acts, to prove this element of the offence. In my view the simple fact of someone being mentally unstable does not mean that he or she cannot given consent to sexual acts.

13. From the evidence on record, I find that the prosecution did not prove beyond reasonable doubt that the victim was mentally retarded as envisaged under section 146 of the *Penal Code*, to an extent that she could not consent to a sexual act.

14. The second element of the offence was sexual penetration. The victim is said to have said that she was sexually penetrated. The medical evidence tendered by PW3 Erick Kiriamani the clinical officer, was that the hymen was missing and there were pus cells. The clinical officer concluded that the girl was raped, but there is no supporting evidence of recent violent sexual intercourse. In my view, the fact of existence of pus cells perse in the genitals of the victim did not prove or establish an act of sexual penetration.

15. In addition, the evidence of the sexual penetration on record is not that the victim but that PW1 L and PW2 A, who claimed to have been so told by her. It is hearsay evidence. Such evidence in the

circumstances of this case, where the alleged victim did not volunteer such information until she was confronted by relatives PW2 AWM and PW1 LMM her grandmother, even if the victim testified in court, her evidence in my view would not be saved by the provisal to the section 124 of the *Evidence Act* (cap 80), as it would not amount be believable evidence which could be used to convict.

16. I thus find that the prosecution did not prove beyond any reasonable doubt that the victim was sexually penetrated on the alleged date of offence.

17. I now turn to the identity of the culprit. In this regard, PW2 AWM said that she saw the appellant walking and talking with the victim that day. The appellant himself stated that he met the victim that day. PW1 and PW2 said also that the victim informed them that the appellant penetrated her sexually that day. The appellant denied that he penetrated her sexually.

18. Having found that the prosecution did not prove beyond reasonable doubt that the victim was sexually penetrated that day, I also find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

19. Having found as above, the conviction herein cannot stand, and the sentence has also to be set aside. The appeal will thus be allowed.

20. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF MAY, 2023 VIRTUALLY AT VOI.

HON. GEORGE DULU

JUDGE

In the virtual presence of:-

Appellant

Mr. Kazungu for state

Mwendwa Court Assistant