Makori v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 17849 (KLR) (Crim) (23 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E043 OF 2022

K KIMONDO, J

MAY 23, 2023

BETWEEN

COSMAS MOMANYI MAKORI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment in Criminal Case No. 138 of 2017 in the Chief Magistrates Court at Makadara by M. A. Opondo, Principal Magistrate, dated 28th February 2022)

JUDGMENT

1. The appellant was charged with sexual assault contrary to section 5 (1)(a)(1) as read with section 2 of the *Sexual Offences Act* (hereafter the Act). He also facedan alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Act*.

2. He was adjudged guilty on the main count and sentenced to imprisonment for 10 years; the term to run from October 3, 2017 when he was first placed in remand custody.

3. The particulars were that on September 27, 2017 at [Particulars Withheld] within Nairobi County, he "unlawfully used his fingers to penetrate the vagina of FM [Particulars Withheld] a child aged 8 years".

4. He lodged an appeal on March 30, 2022 raising eight grounds but which can be condensed into three: Firstly, that the totality of the evidence was contradictory, uncorroborated, doubtful and did not establish the principal ingredients of the offence; secondly, that the learned trial magistrate failed to properly analyze the evidence and thus reached an erroneous finding; and, lastly, that the sentence meted out was unlawful.

5. Learned counsel for the appellant, Mr. Manyara, filed submissions dated September 30, 2022 together with a list of authorities. He contends that that the prosecution's case was riddled with inconsistencies;

and, that the learned trial magistrate misapprehended the evidence. In a synopsis, he argued that the charge was not proved to the required standard.

6. The appeal is contested by the Republic through grounds of opposition dated January 25, 2023 and written submissions of even date. In a nutshell, the State submitted that all the elements of the offence were established beyond any reasonable doubt.

7. On April 26, 2023, I heard further arguments from both learned counsel for the appellant and respondent.

8. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.

9. The trial court conducted a detailed voire-dire examination. The learned trial magistrate found that the minor was not "intelligent enough" and did not comprehend the nature of an oath. She thus gave unsworn evidence. I am satisfied that the trial court employed the correct procedure in taking the evidence of a minor. See generally, *Republic v Peter Kiriga Kiune* Criminal Appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

10. PW1 testified that on September 27, 2017, she was sent by her mother (PW2) to deliver some vegetables to Mama Yvonne. The appellant beckoned her into his house promising that he would be "her friend and buy [her] yoghurt". He then asked her to remove her clothes and to lie on the bed. He inserted his finger into her vagina followed by his penis. He then dismissed her. She said she felt a lot of pain.

11. When she got home, her mother (PW2) became suspicious because her undergarment was "above the trouser...the panty was under the trouser". PW1 testified that her mother asked her to "look for a basin. She asked me to take a bath but I did not". Upon further enquiries, PW2 took the complainant to the police and then to the hospital.

12. Under cross examination, PW1 said the incident took place in the afternoon. She could not pinpoint the time or the finger the assailant used. When asked some more probing questions she either went silent or looked down.

13. PW2 said she sent out her daughter to deliver the vegetables between 19:30 and 20:00 hours on the material day. When she returned, her pants were above her waist, apparently because she had put both legs through one opening. After questioning her thoroughly or beating her, she disclosed that a man had taken her into his house. She, PW1 and another man, Kilonzo (PW5) went looking for the appellant. PW2 and PW5 said they knew the appellant. But he denied committing the offence. They made a report to the police who referred them to Makadara Health Centre where PW1 was given some medication.

14. PW5 had known the appellant as a neighbuor for about three months. The appellant was residing in the house in issue and is the one who opened the door for them. PW1 identified him as the assailant. PW5 and a village elder known as Regan arrested the appellant and took him to the Administration Police Camp. He said that the complainant told them that she was given Kshs 5 before being defiled and another Kshs 10 after the incident.

15. PW3 was Dr. Joseph Maundu. He examined the complainant four days later on October 2, 2017. The genitalia were "normal though external part was inflamed. Her hymen was broken. 3 tears were noted at 3, 6 and 9 O'clock". On cross-examination, he said that although the appellant was charged with sexual assault, his findings disclosed a case of defilement. He could not say for certain what raptured the hymen.

16. The Post Rape Care Form and P3 Form (exhibits 2 & 3) were produced by Jacinta Gatungu (PW4), a clinical officer, on behalf of her colleague, Caroline Munyagia. The outer part of the vagina "was reddening but there was no internal injury. The hymen was broken at 3, 6 and 9 O'clock". No spermatozoa were detected. The complainant was given preventive medication for HIV and STI diseases.

17. The last witness was PC Thomas Oduso. He took over the investigations from one Corporal Catherine. On cross examination, he said the latter's statement (MFI-1) did not indicate the date of the offence; or, mention the condition of the complainant's clothing; or, state whether the complainant was referred to the clinic.

18. When the appellant was placed on his defence, he protested his innocence. He said that on the material date, he was away at work at Ibrahim's Supermarket until 20:00 hours when he took public transport home. Some people then came to his house, beat him up and delivered him to the chief's office. He said the first time he saw the complainant was at the police station and later in court.

19. In a nutshell, the appellant claimed that he was the victim of a trumped-up charge. On cross examination, he said the employees at the supermarket would fill up an attendance register but he did not avail it court or summon any witness.

20. I take the following view of the matter. It is a truism that the legal and evidential burden rested squarely on the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. I am unable, on the totality of the evidence to say that the burden was shifted to the appellant.

21. The appellant in his submissions questioned his identification by the complainant. From the voire dire examination and her testimony, the complainant was not intelligent. But she held up very well through the evidence in chief and cross examination. Like I pointed out she did not answer some probing questions such as which finger the appellant used to penetrate her. She also looked down at times. But I remain alive that this is a young child who had gone through a traumatic experience and was undergoing counselling.

22. Furthermore, she is the one who led her mother, PW5 and the village elder to a particular house and identified the appellant as the person who led her into that house and committed the offence. It was the appellant's house. PW1 came across as truthful and despite the hour, I have no reason to doubt that she positively identified the house and the appellant and she reconfirmed it at the trial.

23. Regarding her age, I am satisfied that she was a child of tender years. From her mother's evidence, she was born on March 1, 2009. That is also backed up by the Child Health & Immunization Card (Exhibit 1). It was accordingly proved that she was aged about 8 years at the time of the incident.

24. The only live question then is whether the appellant penetrated her with any part of his body or using any object. From the evidence of the complainant, the appellant touched her with his finger, and then he inserted it into her vagina. He followed it up by inserting his penis into her vagina. True, the complainant could not tell which finger. She was lying down on a bed. But the medical examinations by both Dr. Joseph Maundu and the clinical officer Caroline Munyagia as documented in the Post Rape Care Form and P3 Form (exhibits 2 & 3) leave no doubt in my mind about the penetration: The complainant's genitalia were inflamed. Her hymen was broken with three tears noted at 3, 6 and 9 O'clock positions.

25. I do not believe the appellant's evidence that he was not in his house at the material time; or, that he was framed up by the minor. There was no evidence that the minor or her mother had any grudges prior to the incident. I am at a loss why the complainant would falsely accuse the appellant. Like the learned

trial magistrate, I find that the appellant preyed on the mind of the complainant with false promises of friendship or some yoghurt. It was a ruse and he sexually assaulted her.

26. I accept there were discrepancies in the evidence. For instance, the complainant said that the appellant lured her by promising to be her friend and to buy her yoghurt. But according to PW5 and the investigating officer (PW6) the appellant gave her Kshs 5 before being defiled and another Kshs 10 after the incident. Again, the complainant had difficulties pinpointing the time of the offence. But from the timelines given by her mother, she was sent to deliver vegetables between 19:30 and 20:00 hours.

27. My finding is that those incongruities were immaterial. Furthermore, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.

28. I stated earlier that despite her condition, PW1 came across as a truthful witness. Under the proviso to section 124 of the *Evidence Act*, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful.

29. But in this case, and as I have pointed out, there was clear corroboration from her mother (PW2) and irrefutable medical evidence from PW3 and PW4. In addition, when the incident occurred, the appellant and the complainant were alone in his house. He clearly had the opportunity to commit the offence which amounted to further corroboration. *Opo v Republic* [1976-80] 1 KLR 1669.

30. The upshot is that the conviction was safe and I uphold it.

31. Under section 5 of the *Sexual Offences Act*, the offender is liable to a prison term of not less than 10 years. When a penal provision is prefaced by the words "liable to" the sentence following is not a minimum sentence. Furthermore, the Court of Appeal has given fresh guidance on minimum sentences under the Act in *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

32. The trial court considered that the appellant was a first offender and remorseful. He has three children and seems to have turned to theology. But the life of a vulnerable child has been scarred by his conduct. The appellant has been in custody since October 3, 2017, a period of more than five years. I will accordingly reduce his sentence to the period already served. The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Mr. Manyara for the appellant instructed by Osoro Onyiego & Manyara Advocates.

Ms. Oduor for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.