Mandu v Republic (Criminal Appeal 20 of 2022)
[2023] KEHC 19053 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 20 OF 2022

AC MRIMA, J

JUNE 21, 2023

BETWEEN

GODFREY MANDU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of conviction and sentence of Hon. J. R. Ng'arng'ar, (Chief Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No.92 of 2016 delivered on 28 th March, 2022)

JUDGMENT

Background:

1. The Appellant, Godfrey Mandu, was charged with the offence of Defilement of a child contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on 30th June 2016 in Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of NNT, a child aged 7 years.

3. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the offence are that on 30th June 2016 within Trans-NzoiaCounty, the Appellant intentionally caused contact between his genital organ namely, penis and genital organ namely, vagina of NNT a child aged 7 years.

5. The Appellant was arraigned in Court and pleaded not guilty. At the close of the prosecution's case, the Appellant was placed on his defence and after full trial, he was convicted of the main charge and sentenced to life imprisonment.

The Appeal:

6. Through the Petition of Appeal dated 4th April, 2022, the Appellant sought to set aside the conviction and sentence of the trial Court on the following grounds: -

    1. That the learned trial magistrate erred in law and fact by convicting the appellant on contradictory evidence of prosecutions witnesses.

    2. The learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.

    3. The learned trial magistrate erred in law and in fact by convicting the Appellant on doubtful evidence adduced by the prosecution side.

    4. That the learned trial magistrate erred in law and in fact and failed to appreciate that the prosecution failed to prove its case against the appellants beyond reasonable doubt as required by law.

    5. That the sentence against the appellant is harsh.

The Submissions:

7. The Appellant urged his case through written submissions dated 18th October, 2022. He pointed out that during examination-in-chief, the complainant, PW1, gave contradictory evidence by testifying that the Doctor gave her medicine and during re-examination, it was her evidence that she was not given any medication.

8. It was his case further that there was contradiction on the time the complainant claimed to have been defiled. He submitted that whereas the complainant testified that it happened at 11am, her mother, PW2, gave evidence that her daughter was defiled at 4pm.

9. The Appellant further submitted that PW2's statement indicated that she received the information of defilement on 1st July, 2016, but during cross examination, she testified that she received it on 2nd July 2016

10. The Appellant further pointed out several gaps in the Respondent's case including the fact that despite PW2 giving evidence that her daughter left home on 30th July 2016, it came out during cross-examination that she had not indicated that in her statement. He submitted further that PW2 claimed to have visited the scene of crime but did not record it in her statement.

11. The Appellant further stated that whereas PW1 stated that she met him when she was coming from her grandmother's place, PW6's evidence was that PW1 complained that she was waylaid by the appellant while going to her grandmother's home.

12. The Appellant submitted further that PW2 admitted in cross examination that she did not tell the police the exact words the complainant told her.

13. In asserting more contradictions which ought to have been ruled in his favour, the Appellant referred to RSE, PW4's evidence and submitted that it in her evidence-in-chief, she claimed to have reported the matter to PW2 on 1st July 2016 while PW2's evidence was that she received the report on 2nd July 2016 from one LYD.

14. The Appellant further punched holes on the Respondent's evidence by submitting that during cross-examination, PW5, No. 62740, Corporal James Wachira, indicated in the investigation diary that the incident occurred on 30th June, 2016 while the matter was reported on 2nd July, 2016.

15. With respect to the P3 form, the Appellant submitted that it was PW5's evidence that the complainant's labia minora was normal and that it did not indicate whether the torn hymen fresh or old.

16. In reference to the Clinical Officer's evidence, Peter Masake, (PW6), the Appellant submitted that his statement was that hyperaemia is an inflammation that can be caused by infection or injury and that he did not indicate in the P3 form the cause of perforation of the hymen.

17. The Appellant further submitted that PW5 admitted during cross-examination that despite indicating 'changed clothes' in section A of the P3 form, he did not indicate where he got the information that the complainant had changed her clothes. It was his case further that the treatment notes neither indicated that fact.

18. In urging the Court to allow the appeal, the Appellant referred to *MM -vs- Republic* (2020) eKLR where it was observed thus: -

> ...I think it is also high time that our medical practitioners besides telling us of a missing hymen indicate to the court whether the hymen was freshly torn or not. A missing hymen per se is not proof of penile penetration as there are many causes of a missing hymen in a child.

19. In further seeking to assert that the threshold of the offence of defilement was not achieved, the Appellant referred to various decisions among them, the Court of Appeal in *John Mutua Munyoki -vs- R* (2019) eKLR where it was observed: -

> ...therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above beyond reasonable doubt...the clinical officer testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge, in addition there were no spermatozoa and yeast cells or fungal cells. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration.

20. On sentencing, the Appellant submitted that it was too harsh. He drew support from *Too -vs- Republic* (2020) eKLR where it was held;

> ...on the other hand, the court cannot be constrained by section 8 to impose the provided sentences prescribed if the circumstances of the case so demand it. The argument that mandatory sentences are justified because sometimes Courts impose unreasonable or lenient sentences which do not deter commission of the particular offence is not convincing, granted the express right of appeal or remission available in the event of arbitrary or unreasonable exercise in sentencing.

21. To further bolster the discretion Courts have in meting out sentences, the Appellant relied on *Robert Mwangi -vs- Director of Public Prosecution* (2021 eKLR) and in *Kazungu Kalama Jojwa -vs- The Director of Public Prosecutions* where the following declaration was made: -

> ...sentencing was a discretionary power exercisable by court and involves the deliberation of appropriate sentence. To the extent that the provisions of section 8(2), (3)(4), 11(1), 20(1)

> and 3(3) of *sexual offences Act* deprive Court of the discretion determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the nation of a fair trial contemplated under Article 50(1) of the *Constitution*.

22. In conclusion, the Appellant submitted that the Trial Magistrate erred in imposing a mandatory life sentence without considering the facts, merits and circumstance of the case thus infringing on his right to fair trial.

23. He urged the Court to allow the appeal.

The Respondent's Case:

24. The State opposed the appeal through written submissions dated 23rd January, 2023.

25. From the outset, it was its case that the age of the victim, penetration and identity of the perpetrator, being the elements necessary to prove the charge of defilement, were established.

26. To that end, it was submitted that the charge sheet indicated that the complainant was 7 years old and PW3 assessed her age and produced and age assessment report. The Respondent also referred to PW2's evidence stating that her daughter was 8 years old.

27. As for penetration, it relied on *Daniel Wambugu Maina -vs- Republic*. In the case, it was held that the law does not envisage absolute penetration into the genitalia nor the release of spermatozoa or serein of the male organ for the act of penetration to be complete.

28. The Respondent refereed to the evidence of PW1 where she stated as follows: -

> ... Inserted his organ (as she points the position of her body between the front thighs) into her private part that she uses to urinate (points at her vagina by touching that part of the body).

29. The State corroborated the foregoing by referring to PW4's evidence when she stated that she found the appellant naked with the complainant in a maize plantation and that according to PW6's evidence, the complainant's hymen was perforated and her vagina hyperaemic.

30. As regards identity of the perpetrator, the Respondent submitted that the complainant testified that the incident happened in broad day light at around 11am and she knew the Appellant prior to the material time.

31. The Respondent submitted, therefore, that the complainant was able to recognize the Appellant.

32. The Respondent submitted that the contradictions referred to by the Appellant were minor and could not cast material doubt on the firm and consistent prosecution's case.

33. The case of *Twehangane Alfred -vs- Uganda*, Criminal Appeal No. 139 of 2001 was referred to where it was observed that not every contradiction warrants rejection of evidence. It was further observed that the Court will ignore minor contradictions unless the Court thinks they point to deliberate untruthfulness.

34. The Respondent sought to downplay the inconsistencies even further by relying on *Philip Nzaka Watu -vs- Republic* (2016) eKLR where it was held;

> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be

> expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way.

35. The Respondent rebutted the Appellant's claim that the trial Court erroneously shifted the burden of proof to him by submitting that at no time did it ever shift to the Appellant.

36. The only ground the Respondent conceded was the severity of the sentence. It was the State's submission that the trial Court did not take into account mitigating factors by ensuring that the pre-sentence report was availed thus handing the Appellant maximum sentence.

37. The Respondent relied on the Supreme Court in Petition No. 15 of 2015, *Francis Karioko Muruatetu & Another -vs- Republic* where it was observed: -

> The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed... it is without doubt that the court ought to take into account evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.

38. In the end, Respondent maintained that they were able to prove all the elements of its case beyond reasonable doubt and that the appellant's appeal ought to be dismissed save for resentencing.

Analysis:

39. This being a first appeal, the principles this Court must abide by, as was observed by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR are as follows;

> ... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect ...

40. Similarly, in *Peters -vs- Sunday Post Ltd* [1958] EA 424, the Court spoke to the parameters within which an appellate Court must exercise its jurisdiction while reviewing the evidence of a trial Court. It observed;

> .... Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.

41. From the foregoing, this Court will proceed on the understanding that it has unfettered liberty to relook afresh at the evidence, arrive at its own independent conclusions only bearing in mind the shortcoming of not assessing the demeanour of the witnesses but, making due allowance for that.

42. This Court will first deal with the issue of contradictions which was heavily relied upon by the Appellant in impugning the conviction.

43. PW1, the complainant, gave evidence that the incident happened on her way back home from her grandmother's home.

44. In her testimony, she described the Appellant by the name 'Goddy' a fact that speaks to her familiarity with him.

45. She further testified that, as she walked alone, on her way back home, she met the Appellant who held her right hand and took her to a maize plantation. When the complainant refused to remove her panty, the Appellant removed it and made her lie on the ground on her back.

46. While pointing at the position between her front thighs, PW1 testified that the Appellant then inserted his organ inside her private part, which she described as one she uses to urinate.

47. PW1 stated that she felt pain in her private part, cried and that is when one MS, PW4, came and found her and the Appellant. At that time, the Appellant was standing and the complainant was in the process of wearing her panty.

48. It was PW1's evidence that MS told one ML what had happened who subsequently went to the complainants' home and told the complainant's mother what had transpired.

49. It was then that the complainant opened-up to her mother on what had happened. She testified that her mother then took her to the Police at Kiminini and subsequently to the Doctor.

50. It was her evidence that as she was examined she felt pain in her private part and was thereafter given medicine.

51. PW2's evidence, the complainant's mother, was largely corroborative of the complainant's testimony.

52. It was her evidence that a lady by the name LYD was informed by one RSE of the incident. Upon confirming it with RSE, she, PW2, reported the matter to her two brothers-in-law who went to the Appellant's home, arrested him with another young man.

53. It was her evidence that the two young men were brought to her home where the complainant identified the Appellant as the one who had taken her to the maize plantation.

54. PW2 testified that the Appellant was taken to Kiminini Police Station and the following day, she took the complainant to Kitale District Hospital where she was examined.

55. She testified that she from the Hospital, she took the complainant to Kitale Police Station where she was issued with a P3 form.

56. During cross examination, the Appellant sought to find fault in his conviction based on the inconsistencies in respect of when PW2 received information of defilement and when she reported and recorded a statement with the Police.

57. It was his case that while PW2 recorded her statement on 1st July 2016 she claimed to have received information of the defilement from LYD on 2nd July 2016.

58. During cross examination, PW2, explained the inconsistencies stating that she received the report on 2nd July 2016. She further gave evidence that PC Feliciti, who recorded her statement indicated the date of 1st July 2016 instead of 2nd July 2016.

59. The inconsistency must be weighed against the impact it has on occurrence or non-occurrence of the fact of defilement.

60. The inconsistency in the sequence of events, as asserted by the Appellant as the first ground of appeal, does not cast any doubt in the eyes of this Court as to the occurrence of defilement.

61. If the Appellant's contention pointed out varied witnesses' evidence on when the incident happened, as opposed to when it was reported, doubt, may have been created in the eyes of this Court as to the credibility of the witnesses' testimony.

62. This Court is, therefore, satisfied that the discrepancy on when the incident was reported and statements recorded does not occasion any miscarriage of justice on the Appellant since the occurrence of the offence of defilement on 30th of June 2016 is not disturbed in any way.

63. Having so found, this Court will now in turn, look at the ingredients that, if proved, constitute the offence of defilement.

Age of the Complainant:

64. The age of the complainant was assessed by PW3, Dr. Rachael Munyira, a Dentist at Kitale County Referral Hospital.

65. She produced an Age Assessment Form dated 5th July 2016. I have had a keen look at it. The clinical examination and estimated age, even in the absence of radiographic examination, indicated that the complainant's dental formation was that of a seven-year-old child.

66. In her evidence, PW2, the complainant's mother, testified that her daughter was 8 years old.

67. From the foregoing, and in absence of any evidence by the Appellant challenging the age of the Complainant, this Court finds that at the time of commission of the offence, the complainant was proved to be between the age 7 and 8 years. She was, hence, a child of tender years in law.

Proof of Penetration:

68. Penetration in all its forms, whether complete or partial, is essential for the offence of defilement to be established.

69. The Court has perused the Medical Examination Report which indicates that the Complainant had normal external genitalia, a hyperaemic vagina and that the hymen was torn.

70. It also indicated that the labia were normal and that the cervix could not be accessed and there was neither discharge nor infection.

71. In the conclusive remarks, the Doctor made the observation that the complainant was a young girl, not very straight forward, but the hymen appeared raptured.

72. In his evidence, PW6, Peter Masake, a Clinical officer who attended the complainant and produced treatment notes, testified that when she saw the Complainant, he found her genitalia to be normal but her hymen was perforated.

73. It was his evidence that laboratory results indicated that the Complainant was HIV negative, had no syphilis and urinalysis showed normal activity.

74. PW6 indicated that the Complainant was young and could not express herself fluently.

75. During cross-examination, PW6 testified that the complainant's vagina was hyperaemic, an inflammation that can be caused by an infection or injury.

76. It further was his evidence that he could not access the complainant's cervix because he did not have a speculum.

77. Section 2 of *Sexual Offences Act* defines 'penetration' as follows: -

> " partial or complete insertion of a genital organ of a person into the genital organ of another person."

78. The significance of a raptured or broken hymen in sexual offences was aptly discussed by the Court of Appeal in *PKW -vs- Republic* [2012] eKLR, when it observed as follows: -

> ..... Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.

79. The evidence presented before the Trial Court by the clinical officer indicated that the Complainant's hymen was torn. He, however, did give an indication as to the age of the tear.

80. Whereas the foregoing tends to tilt the standard of proof in the Appellant's favour, the fact that the said officer saw that the complainant's vagina was hyperaemic was, in keeping with the dictates of Section 2 of the *Sexual Offences Act*, irrefutable evidence that there had been an aggressive contact, partial or complete, of the Complainant's genitalia.

81. The Court of Appeal finding in *Mark Oiruri Mose -vs- Republic* (2013) eKLR appears to align with the circumstances of this Appeal. In the case, it was observed;

> .... Many times, the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. 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 organ.

82. It is, therefore, this Court's finding that the element of penetration, was proved beyond reasonable doubt.

Identity of the Perpetrator:

83. With respect identification of the perpetrator, the Appellant was known to the Complainant. He was their neighbour. When PW2's bothers-in-law arrested and brought him alongside another male, the complainant identified the Appellant as the perpetrator.

84. Further to the foregoing, PW4, RSE, a neighbour of the Complainant, well known to her, found the Appellant pants down with the Complainant in the maize plantation.

85. It is, therefore, beyond any reasonable doubt that the Appellant was positively identified as the perpetrator.

86. In the end, This Court finds that the totality of the Appellant's case did not in any way disturb the credibility of the evidence in respect of the elements that constitute the offence of defilement.

87. Having said so, the Court now turn to the question whether the Respondent shifted the burden of proof to the Appellant during trial.

88. Having intently kept track of the evidential burden of proof in the entire proceedings before the trial Court, this Court finds that at no point did the prosecution assert the occurrence or non-occurrence of a fact in issue and left it for the Appellant herein to prove or disprove.

89. In any case, the Appellant failed, in his submissions to identify the instances where the State shifted the burden of proof to him during trial.

90. In the premises, the Court is persuaded that the ground does not hold and hereby dismiss it.

91. The totality of the appeal insofar as the conviction by the trial goes is within the law and this Court has no reason to upset it. The appeal on conviction is hereby dismissed.

Sentence:

92. On sentencing, the Appellant contended in the Petition of appeal that the life sentence imposed was harsh.

93. In the written submissions, the State agreed that the trial Court did not consider pre-sentence report before handing the Appellant life sentence.

94. The Court has painstakingly perused the trial Court proceedings. Concededly, it does not contain the Pre-Sentence report. Some crucial mitigating factors were, therefore, not considered. However, the record has it that the trial Court called for one, but, it seems it was never availed.

95. This Court takes the position that even though sentencing remains discretionary on the Court and that the Court is not obliged to call for a Pre-sentence report, such a report, depending on the circumstances of a case, may greatly aid the Court in meeting the aims of sentencing. (See the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR).

96. The *Probation of Offenders Act* as amended by Act Number 18 of 2018 defines 'pre-sentence inquiry reports' as follows: -

> Pre-sentence inquiry reports" means 'the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.

97. The significance of pre-sentence report, as can be discerned from TheProbation and After Care Guidelines for Social Investigations and Pre-sentence Reports, cannot be gainsaid. It serves the following purpose;

> Pre-sentence reports provide advisory information to the Courts with a view to the court making sentencing verdicts, including decisions on alternative measures to imprisonment.
>
> The investigations are conducted with the aim of collating verifiable information and for writing various assessment reports including pre-sentence reports.
>
> In sentencing decision making, social investigations help in:
>
> • Formulating plausible theoretical explanations of the criminal behaviour of an offender
>
> • Understanding the personality of the offender beyond the crime committed

• Developing a basis for intervention/rehabilitation

• Identifying resources required to effect change Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitation

• Gain knowledge of the culture and resources available in the local communities

• Propose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence.

98. In Consolidated Petition No. 97, 88 of 2021 and 90 of 2021 and 57 of 2021, *Adan Maka Thulu -vs- Director of Public Prosecutions* and, *Kazungu Kalama Jojwa -vs- The Director of Public Prosecutions*, the Court spoke to sentencing in the following manner:

> .... As was held in *Poonoo -vs- Republic*, SCA 38 of 2010, sentencing an offender is not the mechanical application of letters and numbers in a formulaic table. It is the human deliberation of what is just punishment.
>
> ...the fifth principle is that a citizen ..... has a right to put in plea on mitigation to show that the imposition of the .....sentence is not warranted in his case. If the Court in considering all the facts and circumstances of the case comes to the conclusion that indeed is the case, the court would be perfectly entitled to read down the sentence .....

99. From the foregoing, this Court finds that, this was a case calling for the consideration of pre-sentence report before sentencing.

100. Further, the Court rendered a life sentence. In keeping with the ratio decidendi in the decision by my Learned brother Mativo, J (as he then was) in *A O O & 6 others v Attorney General & another* [2017] eKLR among other decisions, on the need for Courts to impose determinate sentences, it is desirable that the sentence in this case be definite.

101. It is, therefore, the finding of this Court that the appeal on sentence succeeds. The life sentence is hereby set aside and the Appellant shall be re-sentenced by the trial Court on receipt of a Pre-Sentence Report.

Disposition:

102. In the circumstances, the following final orders hereby issue:

a. The appeal on conviction is without merit and is hereby dismissed.

b. The appeal on sentencing succeeds and is hereby allowed.

c. It is hereby ordered that the file be remanded to the trial Court for re-sentencing.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF JUNE, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Nyamu, Learned Counsel for the Appellant.

Miss. Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants.