Mayero v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 18151 (KLR) (Crim) (6 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E015 OF 2022

K KIMONDO, J

JUNE 6, 2023

BETWEEN

KASSIM OTIENO MAYERO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment in S. O. Case No. 2693 of 2015 at the Chief Magistrates Court Makadara by M. Kivuti, Senior Resident Magistrate, dated 21st January 2022)

JUDGMENT

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* (hereafter the Act). He was sentenced to imprisonment for 20 years.

2. The particulars were that on September 1, 2015 in [Particulars Withheld] within Nairobi county he "intentionally and unlawfully attempted to cause" his penis to penetrate the vagina of ALA [Particulars Withheld] a child aged 14 years.

3. The appeal was lodged out of time but with leave of the court. Pursuant to further leave on March 10, 2022, the appellant filed amended grounds on March 23, 2022. There are fourteen amended grounds but which can be condensed into three: Firstly, that the evidence tendered was contradictory, inconsistent and insufficient to found the charge; secondly, that the defence tendered by the appellant was not taken into account; and, thirdly, that the sentence was draconian.

4. The appellant relied on submissions dated April 26, 2022 together with a list of precedents. In a synopsis, he contends that on the totality of the evidence, the prosecution failed to prove the charge to the required standard. He also submitted that the charge sheet was defective and that the appellant did not get a fair trial. Learned counsel prayed that the conviction and sentence be quashed.

5. The appeal is contested by the respondent through grounds of opposition dated March 24, 2022 and written submissions dated April 28, 2022. In a nutshell, the state submitted that all the elements of the offence were established beyond any reasonable doubt. I was implored to dismiss the appeal.

6. On April 27, 2023, I heard further arguments from both learned counsel for the appellant and the respondent.

7. 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] EA 32, *Kiilu & another v Republic* [2005] 1 KLR 174.

8. At the time the trial opened, the victim was aged 15 years. Although the trial court conducted a detailed *voir dire* examination, it was superfluous as the complainant was not a child of tender years. Perhaps it did so out of an abundance of caution. The learned trial magistrate was satisfied that the child was intelligent; understood the duty of telling the truth; and, comprehended the nature of an oath. She thus led sworn evidence.

9. I am equally satisfied that the age of the child was established. According to the birth certificate (exhibit 3), she was born on June 9, 2001. At the time of the incident, she was thus 14 years old.

10. The next key questions relate to identification and whether there was penetration. The complainant had known the appellant for only two days. He was living in a house upstairs. She first visited his house with her friend when they found him in the company of another boy watching a movie. The appellant had travelled from upcountry and gave them some sugarcane. The following day, they went back to the house to complete watching the movie. The appellant told the complainant that he loved her; she replied that she would think about it.

11. The next day, she was quarreled by her mother (PW3) for wearing a short skirt. The appellant comforted her and asked her to move into his house. The complainant said they had intercourse but that the appellant used a condom. She said she did not bleed. When someone knocked on the door, she hid. It turned out to be her mother and a neighbour. Her mother found her hiding under the bed dressed only in a panty. She slapped her on the face. She also claimed the neighbour slapped her.

12. According to PW3, it was about 8:30 pm. and she was worried about the whereabouts of the complainant. Upon enquiries from a number of people, she was directed by the "garbage man" to the appellant's house. When he opened the door, he showed her a bag containing PW1's clothes but he feigned ignorance of her whereabouts. PW3 insisted that he must produce the complainant. That is when she and the neighbor found her hiding under the bed. The neighbours wanted to beat him up but they decided instead to lock him up in the house and summoned the police.

13. When the police turned up, they re-arrested the appellant and advised PW3 to take her daughter to hospital for examination. PW3 had not met the appellant before.

14. From the above evidence, the complainant and appellant were not strangers. The appellant was arrested inside the house where he and the appellant had a rendezvous. The complainant was found hiding under his bed wearing only a panty. I thus readily find that the appellant was positively identified. *Wamunga v Republic* [1989] KLR 424.

15. 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] EA 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant. For starters, the complainant was emphatic that when they had sex, she and the appellant were naked; and, that he used a condom.

16. According to the clinical officer, Dorcas Kerubo (PW2), who testified on behalf of her colleague, Purity Kajuju, the examination was conducted on the day of the incident. She said the "external genitalia were normal and no discharge was noted". But PW1 had a fresh bruise on the inner labia walls and the hymen had a fresh tear at 3 and 9 o'clock positions. This is confirmed in the post rape care form and medical form (exhibits 1 (a) & (b)). In cross-examination, she said a high vaginal swab showed there was spermatozoa but pregnancy was negative.

17. According to Dr Joseph Maundu (PW4) and the relevant P3 form (exhibit 4) there were bruises on the inner labia walls and tears on the hymen at 3 and 9 o'clock positions. He also examined the appellant and found no injuries on his penis (exhibit 5).

18. I find the doctor's evidence to be consistent with that of the clinical officer (PW2) and the report by Medicins San Frontiers (exhibit 1a) and post rape care form (exhibit 1b). When I juxtapose it against the evidence of the complainant, I am satisfied that partial or full penetration was proved. I am well guided by section 2 of the Act which defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

19. I agree with the leaned counsel for the appellant that there were some inconsistencies in the evidence. Of course, PW1 had voluntary coitus. The fact that she did not bleed does not of itself negate penetration. Whereas she said the appellant used a condom, PW2 said that a high vaginal swab showed there were spermatozoa. PW1 may not have been entirely candid, but penetration was corroborated by clear medical evidence. It is not lost on me either that the complainant was examined the same night.

20. I have reached the conclusion that the inconsistencies in the evidence of PW1 and PW2 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.

21. I have then studied the defence. The appellant denied defiling the complainant. He denied that he knew the complainant prior to his arrest. He said that on September 1, 2015, he got home from work at 8:45 pm. At about 9:00 pm, he heard people knocking on his door. One woman pulled him out and slapped him. Two police officers then came and arrested him and took him into the police station. He challenged the production of the birth certificate or the reports by PW2. He also said that besides PW3, no other member of the public was called to confirm the allegations by the complainant.

22. Regarding production of exhibits, I find that PW3 was competent to produce PW1's birth certificate. Regarding the testimony of PW2, the witness explained the absence of her colleague Kajuju. She accordingly laid a reasonable basis under the *Evidence Act*; and, being a clinical officer herself, she became entitled to testify on exhibits 1a & b.

23. It is not lost on me either that the appellant did not object to the production of the documents by the said witnesses but first raised the issue in his defence. But in the event I am wrong on that finding, I do find that there was sufficient corroborating evidence from Dr Maundu (PW4) who examined both the complainant and the appellant and produced their respective P3 Forms (exhibits 4 & 5).

24. It is true that besides the complainant and her mother, the other witnesses who went into the appellant's house or directed PW3 to it were not called. It is of course a gap but I find that it did not dent the prosecution's case. The material evidence here is on the element of penetration of the minor or identification of the appellant. I have found that all ingredients of defilement were proved beyond reasonable doubt. Furthermore, and as conceded by the appellant's counsel, under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact.

25. Learned counsel for the appellant submitted before me that the appellant's defence was not considered. That is not true. The learned trial magistrate at page 6 of the typed judgment went into a lengthy analysis of that defence. However, she reached the conclusion that the appellant received a fair trial; that PW1's evidence was reliable and was backed up by medical evidence; and, that it is the appellant who penetrated her. I concur in that finding for the reasons I gave earlier.

26. There are three additional issues raised in the appellant's submissions. Firstly, that the charge sheet was defective as the particulars did not support the charge. My view is that the offence was clearly stated and the particulars which I set out at paragraph 2 of this judgment were sufficient. I agree that there was an error in the particulars referring to "attempted defilement". But the statement of the charge was clearly for the offence of defilement. The evidence disclosed that offence. Furthermore, the inaccuracy in the particulars is curable under section 382 of the *Criminal Procedure Code*.

27. The second further issue raised in the submissions is that the appellant was not supplied in advance with witness statements. The third issue raised is that he was not advised about his right to legal counsel. Those twin issues revolve around the question of whether the appellant was given a fair trial. Article 50 (2) (c) (g) (h) (j) and (p) of the *Constitution* provides that every accused person has the right to have adequate time and facilities to prepare a defence; to choose, and be represented by an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access that evidence; and, to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

28. Ground 9 of the petition blames the trial court for not advising the appellant that he was entitled to legal counsel. I find that the nature of the charge did not entitle him to pro bono counsel from the state. He was granted bail and remained at liberty to instruct counsel. True, the record does not indicate that the right to counsel was explained to him but I find that that alone did not cause substantial injustice.

29. Regarding witness statements, I note that on the date of the plea on September 4, 2015, the court ordered that the appellant be supplied with that evidence. The trial was adjourned on a number of occasions until March 13, 2016 when PW1 took to the stand. The record shows the accused was ready to proceed. The assumption can only be that he had the witness statements. His submission that he was not supplied with the statements in advance is thus not borne out fully by the record.

30. The appellant was present at all the hearings and cross-examined all five witnesses at length. I find no evidence on the record to show that the trial court was biased or that the burden of proof was shifted to him. The trial magistrate explained to the appellant his rights under section 211 of the *Criminal Procedure Code* and he gave sworn testimony. I found earlier that it is not true that his defence was disregarded. I also find, in all the circumstances of this case, that the defence was bogus.

31. In the end I am unable to say that that there was violation of article 50 of the *Constitution*. In view of my earlier re-evaluation of the evidence, I find that the conviction was safe. The appeal against conviction is accordingly dismissed.

32. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. Under section 8 (3) of the *Sexual Offences Act*, the minimum sentence was twenty years. The trial court considered the appellant's mitigation and that he was a first offender.

33. 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.

34. I accordingly set aside the sentence of twenty years. I substitute it with a sentence of 10 (ten) years in jail. The sentence shall run from October 21, 2022, the date of his original conviction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Mr. Nyarango for the appellant instructed by Nyarango & Company Advocates.

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

Mr. E. Ombuna, Court Assistant.