Muema v Republic (Criminal Appeal E088 of 2022) [2023] KEHC 22993 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEHC 22993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E088 OF 2022

TM MATHEKA, J

OCTOBER 3, 2023

BETWEEN

ROBERT MULEI MUEMA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence of Hon G. Sagero (SRM) in Makueni Senior Resident Magistrate's Court Criminal Case No. E343 of 2021 delivered on 28th April 2022)

JUDGMENT

1. The appellant was charged with committing an Unnatural offence contrary to section 102(a) of the *Penal Code*. It was alleged that on the 17th day of October 2021 at around 2030 hours in Mbooni East Sub-County within Makueni County, the appellant intentionally and unlawfully had carnal knowledge of PKM a boy aged 13 years against the order of nature.
2. In the alternative he was charged with committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The allegation was that on the 17th day of October 2021 at around 2030 hours in Mbooni East Sub-County within Makueni County, the appellant intentionally and unlawfully did indecent act by touching private parts anus of PKM a boy aged 13 years.
3. After a full trial, the learned trial magistrate convicted and sentenced him to 10 years' imprisonment on the main charge.
4. Aggrieved by that decision, the appellant filed this appeal and listed 3 grounds as follows;
    a. That I am in dispute with the conviction and sentence imposed on me.
    b. The prosecution did not prove their case beyond reasonable doubt.

c. The Honourable magistrate overlooked the inconsistencies of the witnesses which were uncorroborated.

5. The appeal was canvassed through written submissions.

The Appellants' Submissions

6. The appellant submits that the complainant's evidence was inconsistent and that PW2 was an incredible witness who gave hearsay evidence.

7. He submits that whenever an accused person pleads guilty, the rights under Article 50 of the *Constitution* should be explained so that he/she can confirm the consequences. He contends that the offence was not established beyond reasonable doubt.

8. He submits that the trial magistrate did not apply the law in section 124 of the *Evidence Act* and he did not say why he conclusively believed the complainant. He contends that a combination of that failure and the numerous inconsistencies made the case unbelievable.

9. He submits that the burden of proof was shifted to him contrary to the general rule that the burden lies with the prosecution throughout.

Submissions by the Respondent

10. The State, through Prosecution Counsel Victor Kazungu, has identified the following as the issues for determination;

    a. Whether there was penetration

    b. Whether the appellant was properly identified.

    c. Whether there were notable inconsistencies in the testimonies of the witness.

    d. Whether the sentence meted out to the appellant is safe.

    e. On issue (a), Whether there was penetration he submits that the evidence of PW 1 and PW 5 established that indeed there was penetration. That under section 124 of the *Evidence Act*, the evidence of the complainant needs no corroboration and the trial court directed itself properly by believing the complainant's evidence. He relies on *G O A – v- Republic* [2018] eKLR where the court held as follows:

    > " …Section 124 of the *Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth…"

11. On issue (b), Whether the appellant was properly identified he submits that the Appellant was known to the victim and in his defence, he admitted that he knew the complainant to be a child of his neighbor.

12. On issue (c), Whether there were notable inconsistencies in the testimonies of the witness he submits that the Appellant has selected a few sentences and construed them in isolation in a fishing expedition

for inconsistencies which do not exist. He relies on *Ali Mohamed Ibrahim – v- Republic* [2017] eKLR where the court held as follows:

> " …The appellant has indeed in this case picked out sentences and considered them in isolation in attempt to prove inconsistencies. There is otherwise no inconsistencies or discrepancies in the prosecution's evidence. The prosecution's evidence was clear and consistent…"

13. It is also his submission that in the past, our courts have held that even in instances where inconsistencies are identified in the evidence; they ought to be significant and sufficient to paint a picture of untruthfulness for the court to reject such evidence. He relies on the Ugandan case of *Twehangane Alfred – v- Uganda*, Crim. App. No 139 of 2001, [2003] UGCA which was cited in *Erick Onyango Ondeng' – v- Republic* [2014] eKLR as follows:

> " …With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case…"

f. On issue (d), Whether the sentence meted out to the appellant is safe he submits that the sentence meted out to the Appellant is legal, proper and safe as the offence of unnatural offence attracts a maximum sentence of 21 years. He relies on *Wilson Wafula Simiyu – v- Republic* [2018] eKLR where the court held as follows:

> " …The Appellant, Wilson Wafula Simiyu was charged with committing an unnatural offence contrary to Section 162(a) of the Penal Code…the offence carries a maximum imprisonment of twenty-one (21) years. In the present case, the Appellant was sentenced to serve eighteen (18) years imprisonment. The sentence is therefore legal. The appeal against sentence lacks merit and is hereby dismissed…"

14. He has also cited *SKM – v- Republic* [2021] eKLR where the court held that;

> " …The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed…"

15. Upon considering the grounds of appeal, the entire record and the respective submissions, the following issues arise for determination;

    a. Whether the appellant was accorded a fair trial.

    b. Whether there were inconsistencies in the prosecution's case.

    c. Whether the offence was proved beyond reasonable doubt

    d. Whether the sentence was harsh and excessive.

16. As a first appellate Court, guided by the line of authorities from *Okeno v Republic* [1972] EA 32 at 36 where the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " 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 v. R*., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R*., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post*, [1958] E. A. 424."

17. I am required to re- examine the evidence on record, make my own findings and draw my own conclusions giving always keeping in mind that unlike the trial Court I never saw or heard the witnesses testify.

The Evidence

18. PW 1 was PKM, the complainant. He testified that the appellant was known to him as Robert Mulei and he had a hotel where he sold mutura (food). On 17/10/2021 at 8.00pm he was in the market as his mother had sent him and his brother to buy salt and cooking oil. They bought the items and on their way back, her aunt (PW3) requested him to wait for her so that they could go home together.

19. He went to the appellant's hotel to watch TV and after everyone had left, the appellant did bad things to him. The appellant used his thing for urinating to enter his area for long call. He put his thing into his (PKM's) anus. He felt pain and screamed. People arrived and knocked on the door. They found him (PKM) covered with a sack. The appellant was taken to the police station.

20. It was also his evidence that the appellant had sodomized him many times before and asked him not to divulge the information. He used to give PKM Kshs 50/=. He started having difficulty in controlling his long call.

21. PW 2 was PMN, the complainant's mother. She testified that PKM was born on 10/10/2008, was 13 years old and in class 6. She produced the certificate of birth as P.Exh 1. That on the material night, she sent PW 1 and his brother to buy oil. Nyumba kumi people told her that PW 1 was at the appellant's hotel and she proceeded there. PW 1 failed to disclose what he had done after being asked by his mother but after being threatened by the crowd, he said that the appellant had undressed him after promising him Ksh 50/=. They were taken to Wote hospital where PW 1 was examined.

22. PW 3 was CWD. She testified that PW 1 was her nephew. She was operating a hotel in the market. On the material night, she saw PW 1 and asked him to accompany her home but when she closed the hotel , she did not see him. She started looking for PW 1 with Paul Mutinda and others. They found him inside Robert's hotel and the door had been shut without a lock. They saw PW 1 lying on the floor and covered with a sack. PW 1 said that Robert had asked him to stay there and guard the hotel. She identified Robert as the person in the dock and the person who was with the child.

23. On cross examination, she said that her hotel and that of Robert are 20 meters apart.

24. PW 4 was PC Jane Nduko Mutie, the investigating officer. She testified that on 28/10/2021 at 2.00hours, the appellant was taken to Kalawa police station on suspicion of defiling a child. The victim

was also there. They arrested the accused and took the boy to Wote hospital. He was treated and put on medication. She investigated and found that the action took place at the hotel owned by the accused.

25. PW 5 was Stella Nthambi, a Clinical Officer at Makueni County referral hospital. On 18/10/2021, PKM was taken to her under the escort of a police officer. She said she examined him two days post the incident. He told her he had been sodomised since 2020 and the last time was 17th October 2021 at 8pm He alleged to have been sodomized by a person well known to him. She did investigations of Anal swab, PITC-HIV, VTRL tests, hepatitis test and urinalysis. The anus was not intact and no bruises were noted. Urinalysis had nothing suggestive, VTRL and hepatitis were negative. There were moderate red blood cells in the anal swab but no spermatozoa. The HIV test was negative. She produced the lab results, P3 form and PRC form as P. Exh 2, 3 and 4 respectively.

26. On cross examination, she said there was penetration because the anus was not intact and there were red cells in the anal canal.

27. PW 6 was Paul Musembi Nyamai. He testified that on the material night he was in the company on Mutindo Munyuri, Domitilla Mule and Caro Ndeti. They were preparing to go home. Caro asked her nephew to wait for her. They saw the appellant and thought he was going home. Caro closed her hotel but could not find the nephew. They left her looking for him. They changed their minds and went back to look for the child.

28. Caro told them that there was some noise in the appellant's hotel. The village elder called the appellant to ask him about the movements in his hotel. The appellant emerged from the hotel. They asked him how he had returned yet he had gone home earlier. He said he had returned to watch over his TV and that he was alone in the hotel. They entered and saw PW 1 lying on the floor. They looked for a vehicle, took the appellant to the police station and the child to the hospital. They took the child to the hospital as they suspected that something wrong had been done.

29. On cross examination, he said that he had differed with the appellant at some point and they ended up in the police station. That the appellant had abused him. He denied having a grudge against the appellant. He denied having a relationship with Caro and said that he only went to her hotel to take tea

30. The prosecution closed it's case at that juncture and the learned trial magistrate ruled that a *prima facie* case had been established. Consequently, the appellant was placed on his defence whereupon he elected to give sworn evidence and to call one witnesses.

31. The Appellant testified that his home was [Particulars Withheld] village and he was engaged in hotel work at [Particulars Withheld] market. [Particulars Withheld] market was known to him and the fare from there to [Particulars Withheld]was kshs 100/= using a motor bike. On the material night at 8.00pm, he was at the hotel in [Particulars Withheld] and he started to pack his goods in order to take them home because people had been stealing from the hotel. He went for the first trip and returned.

32. He remembered a book he had left at the counter and went to look for it. He heard noise behind the hotel and thought it was the people who had been stealing from him. The door had been shut by the wind. He got out and found people he knew including; Paul Kalonzo, Muindi, Pomidila Wayua and CWD. CWD had a hotel near his. He said that he had issues with Paul Musembi who had assaulted him and he reported the matter to the police. Musembi was his brother in law but they were not in good terms.

33. Those people asked him what he was doing there as they thought he had gone home and he told them that he had returned to pick his goods. He was asked whether he was alone and he said yes. Paul entered with a torch and spotted a boy hiding inside the sacks. Paul asked where the boy had come from and the people accused him (appellant) of having slept with him. He knew the boy as he was a neighbor's

child. The people called the boy's mother and neighbors. The people stayed outside up to midnight while he was alone in the hotel. At 1.00am, he was taken to the police station together with the boy. The boy was asked what had happened and he refused to say but later on, he said that he had been defiled by the appellant. He denied the offence.

34. On cross examination, he agreed that he had a hotel at [Particulars Withheld] market and it had a TV inside. That Children and elderly people used to watch it. He agreed that he knew PK and even the school where he studied as it was near his home. He also said that PK used to frequent his hotel to watch TV. He said that on the material night, PK did not go to his hotel but he was found there. That there were other children watching TV and it was likely that P.K remained behind. He denied having locked the door and sodomizing the boy. He could not tell whether the people who found PK were the ones who had told him to hide there. He said that he had problems with the people who entered the hotel as they were not happy when he bought the TV. He however said that he had no issue with PK and PK had no issue with him. That PK was told what to say.

35. Upon considering the evidence on record, the submissions by both the state and the appellant and the authorities cited the issues to be determined are whether the appellant got a fair trial, whether the charge was proved as required by law and whether the sentence is harsh.

Whether the Appellant's trial was fair

36. The appellant submitted about his rights under Article 50 of the *Constitution*. He made reference to the sentiments of the Probation Officer's Report as they were captured in the sentencing ruling of the learned trail magistrate where he stated

" I have looked at the Probation Officer's Report and more especially the fact that the accused admits to have sexually abused the victim twice and taking into account of the gravity of the offence. I sentence the accused to serve 10 years in jail on the main charge "

37. The report indicated that during the interview the appellant admitted to have committed the acts of sodomy twice with the victim while under the influence of drugs and alcohol. That he sought for forgiveness and leniency as the sole bread winner of the family.

38. It is on the basis of this that the appellant argued that the learned trial l court did not avail him a fair trial as there is the procedure set out I Aden v Republic on the procedure for taking plea. That the learned trial magistrate by taking into consideration that he admitted the offence during the interview denied him his right to a fair trial.

39. Evidently the Pre-sentence report came at the close of the trial. The court had already found the appellant guilty of the offence of sodomy and was seeking the evidence to speak to the sentence. Hence it cannot be said that the sentiments expressed by the learned trail magistrate affected his trail. The court had already formed the view that the appellant was guilty of the offence as charged, The accused was already convicted and the only pending thins was the sentence.

40. Other that the appellant's views, the Report appears to have captured the sentiments of all those involved including the views of the community and the immediate family of the appellant. My only concern with the report is the inclusion of unsubstituted stories about the appellant's alleged previous similar offence. This is serious as the allegations paint the appellant as a serial offender and it would have been useful to place before the court the evidence (OB Extract for example).

41. From the foregoing it is my view that the appellant's right to a fair trial was not violated or infringed. If anything it looks like the appellant having been convicted may have chosen to tell the officer the truth in search of leniency.

42. The record shows that the appellant initially pleaded guilty to the principle and alternative charges and the trial magistrate warned him about the seriousness of the offence and its sentence. He however disputed the facts and a plea of not guilty was entered.

43. The record also shows that he was furnished with the charge sheet and witness statements in open court on the day the plea was taken (19/10/2021) and a hearing date was set for 15/11/2021. That was approximately one month and it was sufficient for him to prepare his defence while ensuring that his trial was expeditious. He was also granted bond of Kshs 200,000/= plus one surety of similar amount and his trial was public.

44. Further, the record also shows that he was represented by Advocate Kioko. It is therefore clear that his trial was fair as all the relevant procedures were followed.

Whether there were inconsistencies in the prosecution's case.

45. The appellant averred that there was an inconsistency as to whether PW 1 was dressed or not. He wondered how the offence could have occurred when the two of them were totally dressed. Having looked at the evidence, the narrative is that the appellant undressed PW 1 and committed the act then the appellant went to attend to the people who had knocked the door. By the time the people got into the hotel and found PW 1, he had already dressed. In fact, his evidence was that, 'I dressed after the accused finished the act.' The testimony of the complainant was consistent even under cross examination as to how the incident happened.

46. I did observe that initially the complainant was reluctant to tell his mother what had happened. According to her testimony the boy was taken aside by the crowd who threatened to beat him if he did not tell them what happened. It is then that he disclosed what had been done to him. This would not be an inconsistency or discrepancy but an issue of credibility of the evidence by the complainant. That will be dealt with in the next issue.

Whether the offence was proved beyond reasonable doubt

47. Section 162 of the *Penal Code* provides as follows;

    162. Unnatural offences

    Any person who-(a) has carnal knowledge of any person against the order of nature; ... is guilty of a felony and is liable to imprisonment for fourteen years:...provided that in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for 21 years if- the offence was committed without the consent of the person who was carnally known; or

    the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

48. The charge against the appellant was that he unlawfully and intentionally had carnal knowledge of the complainant. There was nothing in the particulars of the charge to show that the other ingredients were required to be established. The only ingredient to be established here was that the appellant had carnal knowledge of the complainant against the order of nature.

49. The prosecution was required to prove penetration of the victim against the order of nature. 'against the order of nature' has the common understanding of non vaginal penetration, meaning anal penetration

50. PW 1 described how the appellant inserted his organ for urinating into his area for long call and that he felt pain and that it was his scream that alerted the people who came to his rescue. He also said that the appellant had sodomized several times before and he would give him kshs 50/= after doing it. The clinical officer who examined him found that the anus was not intact. He formed the opinion that there was penile penetration My only concern was that the appellant was not examined despite the fact that he was arrested on the same night. Police Officers who do this must of necessity be aware that the suspect is a scene of crime himself and the examining medical officers need to carry out the requisite forensic examination on the suspect so that the court can have the benefit of the additional forensic evidence.

51. The record also shows that the appellant took issue with PW 1's evidence to the effect that he did not bleed after the act. According to section 162 of the Penal Code, bleeding is not an ingredient of the offence and there was no medical evidence before the court to show that bleeding must occur whenever anal penetration is done

52. In this case the evidence of the prosecution witnesses was consistent and corroborative. The sequence of events on the material night was actually corroborated by the appellant in his defence. The only point of departure in the accused defence was that he could not tell how PW 1 ended up in his hotel. The complainant explained how he ended up in the hotel. He went in to watch TV with other boys who left one by one leaving him alone. That evidence was not challenged under cross examination. There was nothing to show that his differences with PW 6 could have caused him to lie against him as PW 3 was also at the crime scene and there is nothing to show that there was bad blood between her and the appellant.

53. The totality of the evidence shows that the prosecution established that the complainant's anus was penetrated

54. Who did it? the evidence shows that the appellant and PW 1 were known to each other. The appellant confirmed that PW 1 would watch TV at his hotel. The appellant also confirmed that he knew PW 1 was a neighbor's child as well as the school he attended as it was near his home.

55. There was also the evidence of PW 3 and 5. They were among the people who found the appellant and PW 1 in the hotel on the material night. PW 5 and PW 3 who had a hotel near the appellant's hotel. These were people who knew each other well. Further, the appellant himself admitted that he was found with PW 1 in the hotel on the material night. He mentioned PW 3 and 5 as being among the people who found him. Evidently the appellant was positively identified.

Whether the sentence is harsh and unreasonable

56. The law prescribes 14 years' imprisonment maximum. The learned trial magistrate after considering the mitigation and the pre-sentence report gave him 10 years' imprisonment. I recognize the discretion of the learned trail magistrate in meting out a sentence and this court can only interfere if the sentence illegal or unreasonable in the circumstance of the case. It is my view that considering the seriousness of the offence vis a vis the mitigation by the appellant, the pre -sentence report, and the fact that the appellant was remorseful, the sentence was reasonable, except that the 10 years imprisonment is to be served from the date of arrest.

57. I find the appeal to be without merit.

58. Appeal dismissed

59. Right of Appeal within 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD OCTOBER 2023

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Appellant Present

Mr. Tanui for state