Mandera v Republic (Criminal Appeal E027 of 2024)
[2024] KEHC 14476 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E027 OF 2024

LM NJUGUNA, J

NOVEMBER 20, 2024

BETWEEN

DENNIS WABWIRE MANDERA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii, PM in the Magistrate's Court at Siakago Sexual Offence Case No. E010 of 2023 delivered on 19th December 2023)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* Number 3 of 2006. Particulars are that on 13th January 2023 at [Particulars withheld] area in Mbeere North sub-county within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EMN, a child aged 14 years.

2. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 13th January 2023 at Mbeere North sub-county within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of EMN a child aged 14 years.

3. At the trial, the appellant pleaded 'not guilty' to the charge and after the full hearing, he was convicted and sentenced to 15 years imprisonment.

4. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 09th February 2024 seeking the following orders:

    a. This appeal be allowed;

b. The conviction be quashed and sentence be set aside; and

c. The appellant be set at liberty.

5. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

a. By convicting the appellant on charges that were not proved beyond reasonable doubt as provided in the law;

b. By convicting the appellant herein on evidence that was full of contradictions;

c. By failing to consider that the sentence meted out to the appellant is excessive and unconstitutional; and

d. By failing to observe that the *Sexual Offences Act* is discriminative as it targets the male child only.

6. At the trial, PW1 was the victim who testified that on the 13/1/2023 the appellant was at his place of work at Siakago Primary School when he called her and took her to his house, leaving her there until evening. That when he returned from work, he asked her to remove her clothes and he inserted his penis into her vagina. That she stayed at the appellant's place for 2 days before he sent her away to her sister's place. That her sister did not want to see her and asked her to go back home but she returned to the appellant's house where the appellant asked one Murugi to take her and stay with her for a while. That she returned to the appellant's house another time and they had sex again before she was arrested by the police while in the company of her sister. That she was taken to hospital but she was not given any medicine. She produced her birth certificate showing that she was born in on 26/3/2008. On cross-examination, she stated that she stayed at the appellant's house for 2 days and returned for one more day before the police arrested her.

7. PW2 was AW, PW1's sister who stated that PW1 had visited her on 12th January 2023 but on 16th January 2023, she left and she escorted her up to the river but she did not know where PW1 went afterwards. That on 26th January, 2023, they reported her disappearance to the chief who referred them to Siakago police station.

8. PW3 was FN, PW1's sister who stated that PW2 called to tell her that PW1 had left her place but she had not arrived home. That they started looking for her and on 30th January 2023, one Murugi called to tell her that she had seen PW1 at a petrol station where she went and found her. That PW1 told her that she met a boy while on her way home and she went with him to his place but she did not say what had happened. That they escorted PW1 to hospital where she was examined and tested.

9. PW4 was NM, PW1's mother, who stated that on 12/1/2023, PW2 left school and went to visit her sister Asenath (PW2) and on the 16th January 2024, PW2 gave PW1 fare to go back home but she did not reach home. That she called PW3 and they started looking for her until PW3 found her after receiving a call from a certain lady. That they went to the police station once they found her, they did not know where she had been for the period she was missing.

10. PW5 was PC Leah Maringa of Siakago Police Station who stated that PW4 reported that PW1 was missing. PW2 later reported that she had information that PW1 had been seen with a petrol station attendant and that is where she was found. That PW1 was escorted to hospital by PC Monica and it was discovered that she had been defiled. That the appellant was arrested in connection with the offence.

11. PW6 was Eliud Fundi Nyaga of Ishiara District Hospital who produced the P3, PRC form and medical notes for the victim. He observed that upon examination of her genitals, he noticed that there was a

white discharge and the hymen was missing. That there were no spermatozoa cells present and STI and pregnancy tests were negative.

12. At the close of the prosecution's case, the trial court put the appellant to his defense. He gave sworn evidence as DW1 stating that PW1 is unknown to her and that he was new at the place she claimed to have met him. On cross-examination, he stated that PW1 could have mistaken him for someone else and that he does not own a house where she allegedly stayed for 2 days.

13. This appeal was canvassed by way of written submissions.

14. It was the appellant's submission that the prosecution evidence was full of contradictions thus it should be considered as lies. He relied on section 163 of the *Evidence Act* and the cases of John Baraza v. Republic Cr. Appeal No. 22 of 2005 and Bunkrish Pandya v. Republic (20) [1983 E.A.C.A. He argued that DNA evidence was not produced connecting him with the crime. That he was residing at his boss' house and there is no way he could bring PW1 to that house. That this is a case of mistaken identity since he had just started working at the petrol station and was yet to collect his first salary. He urged the court to set aside the findings of the trial court.

15. The respondent submitted that the elements of the offence were proved beyond reasonable doubt and it relied on the provisions of section 8(3) of the *Sexual Offences Act* and the case of DS v. Republic (2022) eKLR and Edwin Nyambogo Onsongo v Republic (2016) eKLR. It relied on the provisions of section 2 of the *Sexual Offences Act* for the meaning of 'penetration' and section 124 of the *Evidence Act*. It was its argument that per section 109 of the *Evidence Act*, onus was on the appellant to prove his allegation that he was mistakenly identified by the victim. That the trial court exercised its discretion and departed from the mandatory prescribed sentence, which should be upheld by the court.

16. The issues for determination are as follows:

    a. Whether the offence was proved beyond reasonable doubt; and

    b. Whether the sentence meted out to the appellant is harsh and excessive.

17. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

18. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the *sexual Offences Act* provides the elements of the offence as follows:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;

    c. The perpetrator was positively identified.

19. The age of the victim herein was determined through her birth certificate produced as evidence and it shows that she was born on 26th March 2008. As at the time of the incident, she was a minor within the meaning of a child under the *Children Act*. This is sufficient proof of the complainant's age. In the case of *Alfayo Gombe Okello v. Republic Cr App No 203 of 2009* (Kisumu), the court stated as follows;

> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

20. On the element of penetration, PW1 testified that the appellant had sex with her, not once but twice on different dates. PW6 also testified that the victim had a broken hymen. PW1 testified that the appellant took her to his house and left her there then he returned to work. That in the evening when he returned, he had sex with her. That the following day, the appellant gave her breakfast and brought her milk at some point during the day and then he went back to work and that evening, he did not have sex with her. That the following day, he told her to go home and she went to PW2's house but she sent her away and so PW1 returned to the appellant's house where she found Murugi.

21. PW1 stated that, that night, the appellant and Murugi slept at the appellant's boss's house while she slept at the appellant's house. That the following morning, Murugi took PW1 to a house she was living in near Siakago Primary School. That after 2 weeks, Murugi chased her from her house and she returned to the appellant's house where he had sex with her again before the police and her family found her. From the evidence, there is enough proof of penetration.

22. From this same evidence, PW1 testified that she met the appellant, Dennis, at Siakago Primary School where he was working. PW3 testified that she received a phone call from Murugi telling her that the victim was at a petrol station where the appellant worked. The appellant in his submissions stated that the evidence was contradictory, but in my view, the contradiction is not fatal to the case (see the case of Richard Munene v Republic [2018] eKLR). In fact, he submitted that he denies the offence because he had been newly employed at the petrol station and he lived at his boss's house. His defense did not do much to controvert the prosecution's case and it was a mere denial. In my view, the appellant was properly identified as the perpetrator. The complainant met the appellant the first time and stayed with him in his house for two days and on another occasion, she had plenty of time with him sufficient to identify him without a doubt.

23. The trial magistrate stated that he was satisfied that given the time PW1 spent with her assailant, this could not be held as a case of mistaken identity since it was a matter of days. In addition, the proviso at section 124 of the *Evidence Act* provides that the testimony of the victim in a sexual offence is sufficient to identify the assailant and no corroboration is needed to that effect. It states:

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

24. The appellant argued that the trial court did not consider his defense. From the judgment of the trial court, the trial magistrate considered the appellant's defense which amounted to a mere denial of the facts. I think that the defense offered was considered and factored into the judgment of the trial court.

25. The final issue is whether sentence meted out to the appellant is excessive in the circumstances. The sentence prescribed under section 8(3) of the *Sexual Offences Act* is not less than 20 years imprisonment. The supreme court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> "(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

26. Bearing this in mind, I note that the trial court gave its reasons for departing from the statutory prescribed sentence in the circumstances. He sentenced the appellant to 15 years, which this court does not wish to interfere with.

27. For the foregoing reasons, I find that the appeal herein lacks merit and the same is hereby dismissed. The findings of the trial court on conviction and sentence are hereby upheld.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE