Muanda v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 15966 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E021 OF 2023

JN KAMAU, J

DECEMBER 16, 2024

BETWEEN

JAMES MUANDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. M. Gituma (RM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No 68 of 2020 on 18th November 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon M.M Gituma (RM), on the charge of defilement and sentenced to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgment, on 14th August 2023, he lodged the Appeal herein. His Petition of Appeal was dated 29th December 2021. He set out five (5) grounds of appeal.

4. His Written Submissions were dated 22nd February 2024 and filed on 9th April 2024 while those of the Respondent were dated 23rd August 2024 and filed on 27th August 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Right from the onset, this court noted that the Appellant indicated that he would submit on the issue of sentence only. It appeared as if he had abandoned the grounds of appeal that were challenging his conviction. However, he had not specifically indicated his intention to withdraw the said Grounds of Appeal. In the interest of justice and for completeness of record, this court determined his Appeal on both conviction and sentence.

8. Having looked at the Grounds of Appeal herein and parties' Written Submissions therefore, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Appellant's right to fair trial was infringed upon;

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court dealt with the said issues under the following distinct and separate heads.

I. Right To Fair Trial

10. Ground of Appeal No (2) of the Petition of Appeal was dealt with under this head.

11. The Appellant claimed that he was not given ample time to defend himself. As he and the Respondent did not submit on this issue, it was difficult to decipher what his argument was.

12. Notably, Article 50(2)(c) of *the Constitution* of Kenya, 2010 provides that:-

> " Every accused person has the right to have adequate time and facilities to prepare a defence."

13. A perusal of the proceedings of 19th July 2021 showed that the Trial Court delivered its Ruling on a case to answer and the Appellant indicated that he would be giving unsworn statement and would not call any witness. The case was fixed for defence hearing on 16th September 2021. When the same came up for hearing on the said date, he indicated to the court that he was ready to proceed with his defence case. He had about one (1) month and twenty seven (27) days to prepare for his defence case.

14. There was nothing in the proceedings of the lower court to suggest that he was not ready for his defence. If he had not been furnished with documents that the Prosecution relied on in order to prepare for his defence, he ought to have informed the Trial Court before the trial commenced. He did not do so. This court was thus satisfied that he had been given adequate time to prepare for the trial.

15. In the absence of proof of his assertions that his right to fair trial had been infringed upon and/or violated, this court was therefore not persuaded that it should find that the trial was rendered a nullity necessitating a retrial, if at all.

16. In the premises foregoing, Ground of Appeal No (2) was not merited and the same be and is hereby dismissed

II. Proof Of Prosecution's Case

17. Grounds of Appeal Nos (3) and (4) of the Petition of Appeal were dealt with under this head as they were all related.

18. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

19. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

20. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

21. The Appellant did not submit on this issue. On its part, the Respondent submitted that the Complainant, SM, (hereinafter referred to as "PW 1") testified that she was thirteen (13) years old. It pointed out that although there was no proof of a birth certificate, No 101xxx PC Hellen Okumu (hereinafter referred to as "PW 5") produced a baptismal card indicating that PW 1 was born on 12th December 2007 and was therefore approximately twelve (12) years old at the time of the incident. It asserted that the Appellant did not dispute the said evidence.

22. It placed reliance on the case of Fappyton Mutuku Ngui vs Republic (eKLR citation not given) where it was held that conclusive proof of age in cases under *sexual offences Act* did not necessarily mean certificate but that other modes of proof of age could be used in other cases.

23. In the case of Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

24. PW 1 testified that she was twelve (12) years of age at the time of the incident. Her mother, JA (hereinafter referred to as "PW 3") confirmed that she was born on 12th December 2007 as per the Baptismal card that was tendered in evidence by PW 5.

25. The offence was committed on diverse dates between 7th and 8th November 2020. PW 1 whose age was proven by the Baptismal Card was about twelve (12) years old at the time the offence was committed. The Appellant did not challenge the production of the aforesaid Baptismal card and/or rebut this evidence by adducing evidence to the contrary.

26. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about twelve (12) years old and was therefore a child at the material time.

B. Identification

27. The Respondent submitted that the time PW 1 spent at the Appellant's house was enough for her to have recognised him. It pointed out she positively identified him as the perpetrator.

28. She testified that on the material date of 7th November 2020, she was escorting her cousin Jane who was going to the market to sell vegetables, when they met the Appellant at the market. He told her to go to his house. Since it was the first time that they met, she refused to do so. He gave her Kshs 20/= and forced her to go to his house.

29. She told the Trial Court that they arrived at his house at around 7.00 pm and he told her to sit down. He went to his bed and asked her to join him. She joined him on the bed and he removed his clothes and her sweater, dress and panty and laid on her.

30. She complained that she was in pain but he told her to stop disturbing him. She went back to his house the following day for fear of going back home and he defiled her again.

31. PW 3 testified that PW 1 told her that she was wearing a cap belonging to the Appellant who she was staying with.

32. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

33. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> 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 (emphasis)."

34. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

35. The incident took place at night. However, PW 1 and the Appellant initially met during daytime. PW 1 stated that she knew him through her family. She testified that he defiled her on two (2) consecutive days. PW 3 told the Trial Court that she knew who the Appellant was when PW 1 mentioned his name. Both PW 1 and PW 3 positively identified him by pointing at him in the dock during trial.

36. There could not therefore have been any possibility of a mistaken identity because PW 1, PW 3 and the Appellant herein were not strangers. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

37. The Respondent contended that the evidence of PW 1 and that of the Clinical Officer, Paul Muturi (hereinafter referred to as "PW 4") proved the ingredient of penetration.

38. Bob Njeri (hereinafter referred to as "PW 2") was the Assistant Chief. He testified that on 9th November 2020, he was called by his colleague Okili who informed him that PW 1 had been found after disappearing. When they went to interview her at her home, she stated that she was at the Appellant's home. As she was not walking well, PW 2 presumed that she had been defiled. He asked her parents to take her to hospital to find out if she had been defiled. He arrested the Appellant the following day at around 11.00am and took him to Luanda Police Station.

39. PW 3 testified that her mother called her on 1st November 2020 and told her that PW 1 had not returned home. She called her again on 8th November 2020 and informed her that PW 1's friends had told her that PW 1 was staying with the Appellant. On 9th November 2020, PW 3 went to her brother's house within their compound and she found PW 1 wearing a cap which she said belonged to the Appellant. She stated that PW 1 told her that she was defiled by the Appellant who gave her Kshs 20/= and that he had promised to give her Kshs 800/=.

40. PW 4 confirmed that PW 1 was defiled when he examined her. He observed that she had a broken hymen with vaginal and cervical lacerations. He pointed out that the probable weapon was a penis. He produced the Post Rape Care (PRC) Form and P3 Form. PW 5 reiterated the evidence of all the witnesses.

41. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2 and PW 3 and by the scientific evidence that was tendered by PW 4 which confirmed recent penetration.

42. The Appellant's defence was simply a denial as he testified that he was framed. His evidence was not watertight enough to displace the Prosecution's inference of guilt on his part.

43. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.

44. In the premises foregoing, Grounds of Appeal Nos (3) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. Sentencing

45. Grounds of Appeal Nos (1) and (5) were dealt with under this head.

46. The Appellant placed reliance on the case of Edwin Wachira & 9 Others Petition No 97 of 2021 (eKLR citation not given) which cited with approval the Court of Appeal case of Eliud Waweru Wambui vs Republic [2019]eKLR wherein the court rallied for legislative amendment of the *Sexual Offences Act* by opining that it was unreasonable to assume that teenagers and maturing adults in the sense employed by English House of Lords in Gillick vs West Norfolk and Wisbeck Area Health Authority (1985) 3 All ER 402 did not engage in and often sought sexual activities with their eyes fully open.

47. He submitted that for instance, in England, only sex with persons less than the age of sixteen (16) years was criminalised and that the sentences were less stiff compared to those in Kenya. In this regard, he relied on the book, Archbold Criminal Pleading *Evidence Act* and Practice (2002) p1720 but did not highlight the part that he was relying upon.

48. He argued that Kenyan prisons were full of men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent had been held to be immaterial because they were under the age of eighteen (18) years.

49. He pointed out that he was only twenty (20) years old at the time of committing the offence but that the same was by consent which explained why PW 1 went back for it the following day. He pleaded with court to consider that he was a first offender and that if he was incarcerated without any prospect of release and without his sentence reviewed, there was risk of never atoning for his offence. He urged the court to reduce his sentence to a least prescribed one preferably the time he had already served. He also prayed that his sentence be made to run from the time of his arrest.

50. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

51. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.

52. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

53. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

54. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

55. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

56. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

57. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

58. The said Section 333(2) of the Criminal Procedure Code stipulates that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

59. Further, the Judiciary Sentencing Policy Guidelines provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

60. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

61. The Appellant was arrested on 10th November 2020. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 20th December 2021. He therefore spent one (1) year, one (1) month and nine (9) days in custody before he was sentenced.

62. A perusal of the proceedings showed that the Trial Court did not consider the said period while sentencing the Appellant. This period therefore ought to be taken into consideration while computing his sentence.

Disposition

63. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 29th December 2021 and lodged on 14th August 2023 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

64. It is hereby directed that the period between 10th November 2020 and 19th December 2021 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

65. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE