Mulama v Republic (Criminal Appeal 36 of 2015)
[2019] KEHC 10403 (KLR) (7 February 2019) (Judgment)

Samuel Mulama v Republic [2019] eKLR

Neutral citation: [2019] KEHC 10403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 36 OF 2015

WM MUSYOKA, J

FEBRUARY 7, 2019

BETWEEN

SAMUEL MULAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 137 of 2014 of Senior Principal Magistrate's Court at Mumias)

JUDGMENT

1. The appellant was convicted by Hon. SK Ng'etich, Senior Resident Magistrate, of defilement contrary to Section 8(1)(4), of the *Sexual Offences Act* No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge were that on 16th February 2014 at about 6.00 PM at [particulars withheld] Village, Matungu Location in Kakamega County, he intentionally caused his penis to penetrate the vagina of JA, a child aged sixteen (16) years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally caused his penis to come into contact with the vagina of JA, a child aged sixteen (16) years.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

4. GKT, testified as PW1. She was the guardian of the complainant, PW2. She explained how she had sent PW2 to the shops at about 6.00 on the material day. PW2 reported back at 7.30 PM with a story that she had been taken to a sugarcane plantation by the appellant who forced her to have sex with him. She

examined her genitalia and found what appeared to be sperms on her underwear and on her thighs. She reported the matter to the police and PW2 was taken to hospital. PW2, JAN, the complainant, narrated how she was sent by PW1 to shops. On the way back the appellant caught up with her while riding as a passenger on a motorcycle. He asked the rider of the motorcycle to give a lift to PW2. Before they got to their destination, he asked the rider to stop and the pair alighted. She was then dragged by the appellant to a sugarcane plantation and defiled. AA (PW3), was a cousin of PW2. She stated that she had seen PW2 riding on the same motorcycle with the appellant, which information she relayed to PW1. When PW2 eventually got home she explained what had happened, and named the appellant as the perpetrator.

5. Corporal Morris Otieno (PW4) was the police officer involved in the matter. He received the first report, and thereafter took the complainant for medical examination. He also received the appellant who had been arrested by administration police officers, and he later charged him. PW5 was APC Muirigi Peter. He was the administration police officer who received the report of the incident and counselled PW1 to take PW2 to hospital. He later arrested the appellant and handed him over to the regular police. George Watila (PW6) was the clinical officer who attended to the complainant and filled the Police Form 3 which was put in evidence. He concluded that the complainant had been defiled. He stated that she had blood stained underpants, and upon examining her he found her labia minora and majora tender and bruised, her hymen was recently torn and there was whitish fluid on her external orifice. Laboratory analysis revealed evidence of moderate epithelial cells and spermatozoa.

6. The court found that the appellant had a case to answer and put him on his defence. He gave an unsworn statement. He denied committing the offence. He said he was arrested at his home and was not informed the reason for his arrest.

7. After reviewing the evidence, the trial court convicted appellant of the main charge of defilement contrary to section 8(1) (4), of the *Sexual Offences Act*, and sentenced him to fifteen (15) years imprisonment.

8. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal, being that trial court convicted on the basis of uncorroborated and fabricated evidence, he was not scientifically tested to ascertain whether indeed he was the one who committed the offence, his defence was not considered which would have exonerated him, the charge was defective, and the trial court did not consider that the name 'mummy' did not refer to him.

9. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno v Republic* (1972) EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> " An appellant 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

10. The appeal was canvassed on 9th October, 2018. The appellant relied on written submissions that he had placed before me, whilst Mr. Juma, Prosecution Counsel, stated that he relied on the records of the trial court.

11. In his written submissions, the appellant urged several issues. He submits that the charge was defective to the extent that it was framed as brought under section 8(1) (4), instead of section 8(1) as read with subsection (4). Secondly, he submits that his constitutional rights were violated to extent that he was not supplied with the evidence of the prosecution in advance, and that the trial commenced while he was unwell. Thirdly, he argued that the language that was used by PW5 was not recorded. Fourthly, he urged that there were inconsistencies and contradictions in the evidence presented by the prosecution, and pointed out several aspects of it.

12. On whether the evidence of PW1 was corroborated, I wish to point out that sexual offences happen in secrecy, where only the complainant and the perpetrator or perpetrators are present. There would be no eyewitnesses. It is because of that that the law requires corroboration of the evidence of the victim, to eliminate the possibility of fabrication of evidence, given that the cases really amount to the victim's word as against that of the accused. In the instant case I find that there was corroboration in the evidence of PW1, PW3, PW4 and PW5. PW6, the clinical officer, attended to PW2 and concluded that she had been defiled given the observations that he made – her labia majora and minora were tender and bruised, her vagina had evidence of recent sexual activity, she had recently lost her virginity and there was presence of epithelial cells and spermatozoa in her vagina.

13. On the issue of his not being tested scientifically to confirm whether or not he was the one who penetrated the genitalia of PW2, I would state that in offences of a sexual nature a court can convict on the evidence of the prosecution witnesses without requiring forensic proof that the accused person had had sexual contact with the victim. The evidence placed before the trial court clearly pointed to contact of a sexual nature between the appellant and PW2.

14. He submits that the police did shoddy investigations as the grounds where the incident occurred was not visited by the investigation officer. Whereas I do concede that it might have been prudent to visit the scene, I find that the prosecution had sufficient evidence in its hands, and a visit to the scene would not have made much of a difference.

15. On the issue that his defence was not considered, I have perused the record of the trial court. I note that the trial court recited the unsworn testimony of the appellant. That would suggest that the trial court did consider the defence. Indeed, the trial court recorded that the appellant merely denied committing. Moreover, his statement was unsworn, and was not tested through cross-examination. There was no way the same could displace the sworn testimonies of the prosecution witnesses. I do not think anything turns on this. On the inconsistencies pointed out. I have carefully considered them and I find that they were minor and did not affect the eventual outcome, and did not prejudice the appellant.

16. On whether the charge was defective, I do note that section 8(1) creates the offence of defilement, while section 8(4) prescribes the penalty for defilement where the victim was in the age bracket that PW2 was said to be in. The information stated in the charge no doubt conveyed the right information to the appellant. Perhaps the drafters of the charge could have been more elegant in draftsmanship, and I agree that the proper way of stating the provisions ought to have been 'section 8(1) as read with section 8(4).' However, I do not think that the appellant was prejudiced in any way. On the issue of the nickname 'mummy' or 'mammy,' I am not convinced that much turns on this given that the prosecution witnesses knew the appellant before the incident as their neighbour and his identification was not dependent only on his nickname.

17. On the constitutional issue of not being supplied with the information on which the charges were founded in advance, I do note from the record that the appellant had on 13th May 2014 asked to be supplied with witness statements, and on 28th May 2014 he confirmed that he had been supplied with the witness statements. There cannot be any merit in his claim that there was violation of the Constitution in that regard. On the second issue, that the trial was commenced hurriedly when he was sick, I do note that the appellant had stated that he was not ready to proceed that day as he had malaria, but the court declined. Of course, he did not avail any documents to support his claim, but the trial court ought, nevertheless, to have allowed his request. I do not find, though, that he was prejudiced, for PW1 testified only partially and was stood down. No other witness testified. PW1 took the stage once again at the resumed hearing and the appellant had opportunity to cross-examine her. His other concern is with the language used by PW5, the record does not indicate it. I have perused through the record, and noted that whereas the trial court did note down the language used by all the other witnesses, it did not do so with PW5. The appellant has not complained that PW5 used a language that he was unfamiliar with, and he does not state that the language used prejudiced him. Moreover, the record does not indicate whether he raised any issue with it during trial. I am not persuaded that the failure to state the language used by PW5 was fatal to the prosecution's case.

18. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Mumias CMCCRC No. 137 of 2014 was safe. I shall accordingly confirm the said conviction and uphold the sentence imposed. The appeal herein is hereby dismissed. The appellant has a right to challenge this judgement at the Court of Appeal.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31ST DAY OF JANUARY, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7TH DAY OF FEBRUARY 2019

J. NJAGI

JUDGE