Makenzi v Republic (Criminal Appeal 34 of 2019)
[2019] KEHC 1014 (KLR) (11 December 2019) (Judgment)

Josephat Muleke v Republic [2019] eKLR

Neutral citation: [2019] KEHC 1014 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 34 OF 2019

WM MUSYOKA, J

DECEMBER 11, 2019

BETWEEN

JAMES KAYANDA MAKENZI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Vihiga Senior Resident Magistrate's Court Criminal Case No. 45 of 2017 (Hon. Jacinta A. Owiti, PM) of 27th July 2018)

JUDGMENT

1. The appellant was convicted by Hon. Jacinta A. Owiti, Principal Magistrate, of defilement contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to twenty-five years imprisonment. The particulars of the charge against him were that on 16th November 2017 at [particulars withheld] Village, Madzuu Sub-Location, Vihiga County, he intentionally caused his penis to penetrate the vagina of P M, a child aged thirteen 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.* 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 and unlawfully committed an indecent act with the same child.

3. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called five (5) witnesses.

4. EM was the first to take the witness stand, as PW1. She was the aunt of the complainant. She testified to being called and informed that the complainant had been defiled by the appellant, who was their neighbour. She said that the child was born in 2003. PW2, PM, the complainant, gave a sworn

statement and was cross-examined by the appellant. She testified that the appellant broke into their house on the material day at 9.00 PM, while she and her cousins were asleep, and defiled her, at the house and outside, by inserting his penis into her vagina. She informed a M that night about what had happened to her, and the next morning reported to the local Assistant Chief. She was escorted to the Vihiga police station, and thereafter to the Vihiga county referral hospital. She described the appellant as a neighbour. DO (PW3) was another minor, who gave a sworn statement, saying that she was sleeping in the same house with PW2, when the appellant broke into the house and got in. She stated that she heard appellant tell PW2 to keep quiet or he would cut her. He later took PW2 out of the house, and PW2n came back after some while. They raised alarm at dawn, PW2 then went out and informed a neighbour. She said she saw the appellant for the first time that night, but identified him at the dock.

5. Reuben Amuyunzu (PW4) was the Assistant Chief to whom a report was made of the incident by PW2. She was said to have mentioned the appellant as the perpetrator. He said that knew the appellant and he lived three hundred metres from the house where PW2 was defiled. Sammy Chelule testified as PW5. He was the clinical officer who treated PW2. He stated that she reported that she had been defiled by a person she knew, who tore her pants and forcefully inserted his penis into her vagina. He examined her about eight hours after the event, and he found that her hymen was torn and fresh, reddish, the labia minora was bruised. There was tear on the vagina. He described her as emotional and traumatized at the time of examination. Police Corporal Jackton Owino (PW6) was the police officer who investigated the matter.

6. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He merely denied the offence. He said that he was not medically examined to connect him with the offence. She described PW1 as a neighbour and like a mother to him in the clan, and said that she had employed him severally previously to carry out manual duties at her home. He said that PW2 knew him very well.

7. After reviewing the evidence, the trial court convicted the appellant of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

8. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He largely averred that the trial court had not complied with section 48 of the Evidence Act, Cap 80, Laws of Kenya, the court failed to note that the case was shoddily investigated, the identification was not positive, and that his sworn testimony was not considered.

9. I am sitting as a first appellate court, I have re-evaluated all the evidence on record. I have 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 decision of the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 has consistently been cited on this issue. In its pertinent part, it is stated 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 October 22, 2019. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, made oral submissions.

11. The appellant's written submissions raised six matters. Firstly, he argued that his rights under Article 50 of the Constitution had been violated. He submitted that he was not given the state evidence in advance of the hearings. Secondly, he argued that the age of PW2 was not proved. He submitted that the birth immunization card placed on record was probably a forgery. Thirdly, he argued that there was no medical correspondency between him and PW2. He submitted that he was not submitted to medical examination to connect him with the alleged defilement. Fourthly, he argued that the evidence was contradictory, particularly that given by PW2 and PW3, on the events of that eventful night. Fifthly, he argued that the case was not established beyond reasonable doubt. He submitted that the fact that he was not subjected to medical examination undermined the prosecution's case. Sixthly, he argued that the sentence imposed upon him was excessive. He submitted that the minimum penalty for defiling children within the age bracken in which PW2 was alleged to be within was twenty years.

12. On her part, Ms. Omondi submitted that all the ingredients of the offence of defilement were proved. She stated that the evidence placed on record put the minor in the age between thirteen and fourteen years. On identification of the appellant as perpetrator, she submitted that he was known by PW2. They were neighbours. It was more a case of recognition than identification. On penetration, she pointed at the medical evidence. On disclosure of prosecution evidence in advance of the hearing, she submitted that the appellant had indicated to the court that he was ready to proceed when the matter came up for hearing, and argued that he would not have been ready to proceed if he did not know the charges that he faced. He also cross-examined extensively.

13. The appellant raised four grounds of appeal, but at the hearing he argued six grounds set out in his written submissions. I shall first of all deal with the grounds of appeal in the petition of appeal and later address the grounds argued in his written submissions.

14. He argued in his petition that section 48 of the *Evidence Act* was not complied with. Section 48 states as follows:

> " 48. Opinions of experts
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> 1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specifically skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprints or other impressions.
>
> 2. Such persons are called experts."

15. Section 48 relates to opinions on foreign law or science or art or handwriting and related impressions. I have gone through the record before me and I have not come across any incident where either an issue of foreign law or science or art or handwriting has arisen to require the calling of an expert in any of those fields to give an opinion thereon. A report was presented by medical personnel on examination that they had conducted on the victim of the crime. Such examination did not require the calling of experts to present the report. Section 48 applies only to certain unique and unusual things such a foreign law, complex sciences or art or handwritings. An examination of a victim of a sexual offence to confirm whether or not there had been recent sexual activity is not a complexity that would require the use of experts. The said provision did not apply in the circumstances of the instant case, and there was no need for the court to advert to it.

16. Secondly, he argued that the court failed to note that the investigations were shoddily done. Let me state that the role of a trial court in criminal matters is not to carry out an audit of the investigations behind a prosecution. The court is only interested in the evidence that is placed before it by the prosecution though the witnesses presented. Whether investigations were poorly or shoddily done should be of no concern to the trial court. The trial court should not expend its energy trying to resolve whether or not the investigations were properly done or not. The court, on occasion, may make comments on a criminal investigation, in the course of the judgment, but such comments are nothing more than mere asides.

17. Thirdly, is the argument that he was not positively identified by the victim of the crime. The evidence on record is that the appellant and the victim were well acquainted with each other. The victim, PW2, lived with her aunt, PW1, who was her guardian. Both described the appellant as a neighbour. PW1 described him as a grandson in the clan. PW4 said that the appellant's home was some three hundred metres from that of PW1. The appellant himself confirmed the fact in his sworn statement. He stated that PW2 knew him very well. He confirmed that he knew PW1, who he said was like a mother to him within the clan. He said that she used to employ him on occasion to perform various manual duties at her home. That clearly shows that he had interacted with PW2 well enough for her to be able to identify him even in unfavourable circumstances. He knew the home well, well enough to know when to sneak in when PW1 was away to assault minors in her house, and well enough to know through which crevices of her house he could creep in.

18. PW2 testified that when she heard commotion as the appellant sneaked into the house, she went to the kitchen to investigate. She had a torch, she flashed its light on the appellant and he ordered her to switch it off. He defiled her twice, once within the house, and for a second time when he took her outside. The movement from the kitchen to the sitting room where he defiled her, and to the outside, provided, no doubt, adequate opportunity for her to identify him, more so considering that when he was defiling her his face was literally on hers. That was a case of even recognition and not identification. These are persons who knew each other well. It is trite law that recognition is superior to identification. The argument that he was not positively identified cannot possibly hold any water.

19. His final argument as per the petition was that his defence was not considered. His principal defence was a denial and the argument that he was not medically examined to connect him to the offence. I have gone through the judgment. There is a recital at page 2 of the judgment of his testimony, to the effect that he denied the offence to the extent that there was no medical evidence to connect him with the commission of the offence. At page 4, the trial court juxtaposed that testimony as against the testimony of PW2. The court noted that in his cross-examination, he had conceded that that they were neighbours. Secondly, the court also stated that PW2 eloquently rendered herself concerning the events of that evening, where she placed the appellant at the scene, after she recognized him when she shone a spotlight on him. That, in the opinion of the trial court, controverted his denial that he was not involved in the offence. The trial court, further cited section 124 of the Evidence Act, to support its conclusion that it had found PW2 truthful enough to act on the basis of her testimony without having to look for corroboration. There cannot, therefore, be any foundation in the appellant's argument or submission that his testimony was not considered. It was considered, tested against the testimony of PW2 and dismissed for lacking weight.

20. Let me now turn to the arguments that the appellant makes in his written submissions.

21. The first one was that his constitutional rights were violated. He specifically cited the right which relates to disclosure in advance of the state evidence. I have gone through the record. I have noted that on the day plea was taken, on November 20, 2017, the trial court did order that the appellant be issued with

witness statements. There is no reference thereafter to the witness statements. However, I do note that when the matter came up for hearing on March 22, 2018, the appellant indicated to the court that he was ready to proceed with the hearing. I am prepared to make the presumption that if he had not been furnished with the state evidence he would have raised it with the court ahead of the hearing. I note too that he extensively cross-examined the crucial witnesses, PW2 and PW3, the persons at the scene at the material time. I am not persuaded that he was prejudiced in any manner.

22. The second issue was on the age of PW2. There are two sets of charge sheets. The initial charges were in 2017, and in them the age of PW2 was put at twelve. The charges were later amended in 2018, to describe her age as thirteen. When PW1, the child's guardian testified, she put her age at fourteen. When PW2 testified she did not appear to have been questioned about her age, but the court in the minutes of her testimony, which was given on March 22, 2018, estimated her to be thirteen. PW1 was a guardian. She explained that the child's father, who was her own brother, had left the child under her care and lived in Nairobi, while the whereabouts of the child's mother were not indicated. It would be understandable if PW1 was not clear on the age of PW2. She later put in evidence, upon being recalled, an immunization document, which put her age at thirteen as at date of the incident. I am, therefore, satisfied that she was thirteen years of age at the material time.

23. The third issue raised in the written submissions is about the appellant not being medically examined to connect him with the offence. The matter of medical evidence for the purpose of sexual offences is provided for in section 36 of the *Sexual Offences Act*. The said provision states as follows:

> " 36. Evidence of medical, forensic and scientific nature
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> (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.
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> (2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.
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> (3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.
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> (4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.
>
> (5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.
>
> (6) An appropriate sample or samples taken in terms of subsection (5)—
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> a. shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the

purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

b. in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both."

24. Section 36 of the *Sexual Offences Act* is in permissive terms. It gives the court discretion to direct the taking of samples for forensics. There is, therefore, no obligation on the part of the trial court to direct that such samples be taken, since such directions could only be made at the discretion of the court in circumstances where the court deems it fit.

25. There are several court decisions where section 36 was considered. In *George Muchika Lumbasi v Republic* [2016] eKLR, it was stated that section 36 of the *Sexual Offences Act* does not make medical examination mandatory, except where the court thinks it is appropriate in the circumstances of the case to subject an accused person to such examination. In *Evans Wamalwa Simiyu v Republic* [2016] eKLR and *Edwin Maiyo Kandie vs. Republic* [2019] eKLR the court stated similarly.

26. The law has been settled that, despite section 36 of the Sexual Offences Act, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences such as rape and defilement. That position was stated by the Court of Appeal in *Fappyton Mutuku Ngui v Republic* [2014] eKLR, where it was said that medical evidence was usually not necessary. A similar position was taken in *AML v Republic* [2012] eKLR, Kassim Ali vs. Republic [2006] eKLR, and *George Muchika Lumbasi v Republic* (supra), *Robert Mutungi Muumbi v Republic* [2015] eKLR and *Williamson Sowa Mbwanga vs. Republic* [2016] eKLR, among others.

27. It follows, therefore, that the fact that the appellant was not medically examined to link him to the crime was not fatal to the prosecution's case. As stated elsewhere, PW2 gave an eloquent statement on what transpired, which the trial court believed, and, which, I must state, was, alone, sufficient to found a conviction upon.

28. The other issue touched on inconsistencies in the evidence of the state witnesses. I have gone through the record and noted that the inconsistencies alluded to by the appellant. They relate to the testimonies of PW2 and PW3. I believe the same were minor and did not go to the core of the matter. It was said in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, that 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. It was said in *Richard Munene v Republic* [2018] eKLR, that not every inconsistency or contradiction is material.

29. The other issue raised was as to whether the prosecution had proved its case to the required standard. The offence of defilement is established to the extent that the state proves the age of the complainant, the fact of penetration and identification of the appellant as the perpetrator of the crime. What needs to be proved for the purposes of defilement was stated in *Dominic Kibet Mwareng v Republic* [2013] eKLR in the following terms that -

'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'

30. In this case, there is sufficient material to demonstrate that the victim of the crime was a minor aged thirteen at the time of the assault, her sexual organ was penetrated and the person whose sexual organ penetrated hers was the appellant. That was all the prosecution needed to prove, and I am persuaded that that was established beyond any reasonable doubt.

31. The final point made in his written submissions is that the sentence imposed was excessive. The offence the appellant was charged with is defined in section 8(1) of the *Sexual Offences Act*, while the sentence is stated in section 8(3) of the same Act, which states as follows:

> " 8. Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ...
>
> (3) 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."

32. Upon conviction, the appellant was sentenced, on 20th August 2018, to serve twenty-five years imprisonment. A look at section 8(3) of the *Sexual Offences Act* would reveal that the minimum sentence available for the offence defined in that provision is twenty years. The sentence imposed was, therefore, within the range provided for for that offence. To that extent, therefore, there is no merit in his argument about excessive sentence.

33. The recent developments in jurisprudence on minimum and maximum sentences would require me to intervene further. According to the Court of Appeal and the Supreme Court, the trial court does have discretion to impose such sentences as it considers appropriate in the given circumstances without being straitjacketed to minimums.

34. The provisions of the *Sexual Offences Act* were enacted with a view to protect underage girls from predators who prey on them, whether it is alleged that the immature girls had consented to the sexual acts in question or not. In law an underage person is deemed to be incapable to consenting to

sexual activity, and any purported consent to such activity should be a matter of little consequence. Countenancing such consents is to adulterate the protection that the law is supposed to provide.

35. From the material before me, the age of the appellant not disclosed. The charge documents indicate that he is an adult. The Probation Officer's report on record, dated 13th August 2018, describes him as an adult who had been married twice, and had a 14 year old son as at the date of the report. He is, therefore, a mature individual, who ought to be cognizant of the fact that sexual connection with an immature female is prohibited. Indeed, having a child of relatively the same age with PW2, it would be expected that he would know better. It should be expected that he would be in the forefront is protecting immature children from exploitation by persons of his age bracket. A deterrent sentence is no doubt called for. Even though, the higher courts have pronounced against minimum sentences and allowed the lower courts to consider re-sentencing in cases where sentencing was done with the minimums in mind, in this particular case I am not persuaded that I need to disturb the sentence that the trial court imposed, for the reasons that I have given above.

36. In the end, I find as follows:

    a. That the appeal on both conviction and sentence is without merit and is hereby dismissed;

    b. That the conviction is hereby upheld and the sentence confirmed; and

    c. That there is a right of appeal to the Court of Appeal within fourteen (14) days.

37. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE