REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRA/E023/2024

EUTICUS MUTUMA VS THE REPUBLIC

JUDGMENT

(An appeal against the conviction in judgment at Chief Magistrate's Court at Shanzu (Hon. D. Odhiambo (SPM) in Criminal Case No. E080 of 2022 delivered on 12th April 2024)

J

The Charges

1. The Appellant was charged with the following two counts:

   i. **Count 1-Sexual assault contrary to section 5 (1) (a) (i) of the Sexual Offences Act CAP 63A**

      Particulars are that on 31st October 2019 June 2022 at Ushindi area in Likoni sub-county within Mombasa County intentionally and unlawfully caused his finger to penetrate the vagina of E.I a child aged 6 years.

   ii. **Alternative count-Committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act CAP 63**

      Particulars are that on 31st October 2019 June 2022 at Ushindi area in Likoni sub-county within Mombasa County intentionally and unlawfully touched the vagina of E.I a child aged 6 years.

2. The prosecution called 5 witnesses leading to the closure of the prosecution's case on 15th November 2023. On 29th November 2023 the court ruled and placed the appellant on his defence according to section 211 of the CPC. Thereafter the appellant called two witnesses and closed his case on 23rd February 2024 and judgment was delivered on 30th April 2024 where the appellant was convicted for count 1 and sentenced to 10 years imprisonment to run from the date of arrest.

3. The appellant having being aggrieved and dissatisfied by the conviction of the trial court; the appeal has now preferred seven grounds of appeal vide his petition dated 22nd April 2024. The grounds can be summarised into the following:

    a) **The learned magistrate erred in law and fact in failing to consider the medical history of the appellant which portrays mental disability and has been a psychiatric patient since 2015 and has been unable to comprehend the charge and proceedings.**

    b) **The learned magistrate erred in law and fact by ignoring the accused and his witness' evidence and that the accused person was never identified at the dock by the victim.**

    c) **The learned magistrate erred in law and fact by failing to find that the evidence of the victim and her mother were contradicting.**

    d) **The learned magistrate erred in law and fact in failing to find that the doctor had not interrogated the history of the injuries.**

<u>The Law</u>

4. Section 5 (1) of the Sexual Offences Act which provides for Count 1 that:

"Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person;

…….

is guilty of an offence termed sexual assault."

The sentencing provision is in section 8 (2) of the Sexual Offences Act provides that:

"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

Summary of the evidence

5. PW 1 was the village elder who was taken to where the appellant had been sat down by a crowd and the victim's mother. He identified the appellant at the dock and stated that he interrogated the appellant who denied the allegations which prompted him to thereafter take him to the area police station.

6. PW 2 was the victim who gave unsworn testimony and stated that the appellant summoned while pointing at him and further stated that he inserted his fingers into her vagina and she pointed to the same. She demonstrated how the appellant pushed her panty to the side and explained that her friends were away although there was a house nearby which had people inside. She then told the court that after the act she informed her sister who called their mother and that when the mob was gathered, she identified the appellant to the same. On cross examination she testified that the appellant summoned her to an alley.

7. PW 3 is the victim's mother who produced the birth certificate of the victim and recalled that on 31st October 2019, the victim came crying to her and reported that a man had touched her vagina and when she demanded to know which man, the victim led her to an alley between two houses and identified the appellant. She confronted the appellant but he denied and she summoned PW1 and still the appellant denied. She also described the appellant's trousers being wet in the groin area.

   On the same day they took the victim to Likoni Health Centre where a treatment book was opened and later on in the same day went to the above police station. On 27th November 2019 they went back to the hospital as previously the doctors were on strike where the doctor examined the victim and filled a PRC form dated 28th November 2019 and a P3 form of even date. She also testified that the victim never played in the alleys and had never told her that she has been sexually assaulted before.

8. PW 4 was the clinical officer at Likoni Sub-County Hospital who produced the treatment notes of 31st October 2019. He testified that one Karen an officer in the hospital who referred her to hm on 1st November 2019. She examined him and found a white discharge and noticed that the hymen was broken with a healing scar. He later filled the PRC form based on his findings which were recorded and the treatment notes. He also filled the P3 form based on his earlier findings recorded in the PRC form. In further cross examination he testified that a healing scar is an injury for seven hours and even informed the court that the victim had an STI but did not test for it.

9. PW 5 was the investigating officer and she testified that she received the PRC form on 2nd November 2019 and she established that there was no relationship between the appellant and the victim. She reiterated the testimony of PW 2 on the events leading to the sexual assault.

10. DW 1 the appellant testified that she was taking care of his mother's business when the victim came to him and told him that she is hungry but he did not have any money to buy food. Later on, he was beaten by a mob who were saying **"mimi ni chizi"** and that he had defiled the child.

11. DW 2 the appellant's mother testified that she went home to get lunch when a neighbour called her and told her to rush back to the shop where she found the appellant being beaten on allegation that he had touched a child's private part. She added that she had a squabble with neighbours to her shop. She was adamant that the appellant had a mental illness.

The duty of the court

12. The role of this court being the first appellant court is now settled as was held in ***Okeno V Republic (1977) EA 32*** that this court is duty bound to revisit the evidence tendered before the trail court afresh, evaluate it analyses it and come to its own conclusion on the matter but laws bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them giving evidence and give allowance for that.

Further in *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."

13. The **issue for determination** is whether the state proved its case beyond reasonable doubt?

14. The court of appeal in **Thomas Mwambu Wenyi v Republic [2017] KECA 756 (**KLR) held as follows:

"The correct position in law with regard to the discharge or otherwise of the

burden of proof in criminal trials is that enunciated by the predecessor of the court in Sekitoleko versus Uganda [1976] EA53 that:

"As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else"

See also Ajwang versus Republic [1983] KLR337 for the proposition that the burden of proving the ingredients of an offence is entirely on the prosecution and the accused cannot be called upon to prove his innocence."

15. The trial court relied on the court of appeal case of *John Irungu v Republic (2016) eKLR* which held that the ingredients of sexual assault are proof of penetration and positive identification of the assailant. This was reiterated in ***David Odanga Wanyama*** *v R [2022] eKLR*, where the court held:

"The essential elements of the offence of sexual assault are proof of penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose."

16. The age and penetration are not chllenged but neverless I find the same were proved by way of both the oral evidence and the documentary evidence. The redness in the vaginal canal was caused by friction which was caused by some penetration. There wwas nno evidence of any infection.

17. It is therefore on identification where this court will dwell onbearing in mind the only witness to the actual offence was the victim .

18. A voire dire was conducted and the victim identified the appellant at the dock. This dispels the ground by the appellant that he was not identified at the dock.

19. When it comes to testimony of a minor, section 124 of the Evidence Act provides as follows:

"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."

18. To elaborate on the unsworn testimony of the victim, this court refers to *John Gitau Njoroge v Republic [2018] KEHC 1299 (KLR)* where the court held as follows:

"It is trite that Sexual offences can be proved beyond reasonable doubt by the state based on the testimony of the single witness with no requirement of corroboration expressly stated in Section 124 of the Evidence Act. This Section governs aspects of corroboration in sexual offenses owing to the nature and discreet circumstances under which service take place pertinent introduced a proviso to Section 124 to enable the trial court commit an accused person on the single identifying witnesses. This means that once the trial court is satisfied that the child testimony implicating the accused is cogent and credible there will be no need for corroboration. The case of Mukunga v Republic 2002 2 EA 482 revolutionized the element of corroboration in sexual offences in Kenya where the court held as follows:

"The requirement for corroboration in sexual offences affecting adult woman and girls is unconstitutional to the extent that the requirement is against them to a woman or girls and is an infringement of Section 82 of the constitution of Kenya (read Article 27 of our current constitution of freedom from discretion and equality before the law)Decisions which held that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with Section 82 (read Article 27 of the constitution 2010).

The duty of the trial court is to provide reasons and the basis of convicting the accused on uncorroborated evidence of the victim of sexual assault. The legal principle on this issue was succinctly state in the case of Chila v republic 1967 EA 722-723 as follows:

"The judge should warn himself of the danger of relying on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, that the conviction will honestly be set aside unless court is satisfied that there has been no failure of justice"

19. The argument in the petition is that the testimony of the victim and the mother

are contradicting. No submissions were filed to elaborate on the alleged contradiction and the court will not embark on an adventure of conjecture.

20. Be that as it may, the testimony of both the victim and the mother compliment each other. The victim testified that she was lured to an alley by the appellant where he proceeded to push off her panty and he and inserted his fingers into her vagina. She went crying and informed her mother who confronted the appellant and thereafter asked the village elder (PW 1) to also confirm the same. They went to the hospital where the examination confirmed the penetration. the sequence of events flowed well and the court does not see any contradiction.

21. The appellant denied committing the offence. I have however already found that the totality of the testimony by the victim's evidence was corroborated by the events that followed thereafter which were well described by the mother and the village elder. The testimony of both the appellant and his witness did not raise any evidence or doubt as he narrated his own version of events on the material day . The mother to the appellant tried to suggest that the squabbles between her and neighbours to her shop , brought up these trumped up charges. This court is however convinced that the appellant was indeed the offender .

20. At this juncture the appeal should have been over but the appellant raised a very important issue which the court will now address. He claims that he is mentally ill and was not able to perceive the charge. The court reminds itself of section 382 of the Criminal Procedure Code provides that:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. The isssue of insanity is not being brought upfor the first time, as it was brought up in the trial court as on 13th June 2022 when the court ordered that the appellant be remanded to Mathari hospital for 3 months after perusing the mental assessment report dated 14th February 2022. A ruling followed on 20th September 2022 as the order was not complied with and the trial court further ordered that the appellant should still be remanded in Mathari hospital for 3 months. Prior to that the court noticed that the appellant was did not

appearmentally stable and ordered a mental assessment report. The court has meticulously perused the proceedings and is guided by article 162 of the Criminal Procedure Code which the court finds was followed flawlessly

22. The court refers to *Republic -vs- Musya Ngolo Lewis (2021) eKLR*, where Nzioka J. stated on mental evaluation that:

"...In my considered opinion, it serves the purpose of; inter alia, determining whether, the accused is mentally fit to understand, or appreciate the charges and/or information and then stand trial. Indeed, the insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted..."She further stated as follows: -

"Indeed, the insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted. (See Blackstone, Commentaries on the Laws of England, Clarendon Press, Oxford, 1769, Vol IV, P 250. The justifications for the requirement that, the accused be fit to stand trial may be divided into four:

a) **A recognition that it is fundamentally unfair to try an unfit accused;**

b) **A recognition that it is inhumane to subject an unfit accused to trial and punishment;**

c) **A perception that, a trial of an unfit accused is comparable to trial of an accused in absentia, (Allen, Kesevarajah & Moses (1993) 66 A Crim R 376,397. 10 See Vernia),**

d) **A procedure the legal system repudiates; and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment. 32.It follows that, there is need to establish the mental status of an accused person before plea is taken and therefore as much as it may be a matter of practice, it is morally right and in the interest of justice and the accused to do so".**

She also further stated: -

"In the absence of express provisions of the law, the choice as to whether an accused person would be subjected to a compulsory mental assessment before plea lay with the accused. There was no legal bar to the accused who wished to undertake the examination."

23. In *Charles Mwangi Muraya V Republic [2001] eKLR* the court held*:* -

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"We have previously, quoted verbatim section 162(1) CPC in this judgment.

The words of the section, to our minds, are clear and unmistakable. They place a duty on the Court, to invoke the section, at the time, in the trial or committal proceedings, when the issue of unsoundness of the accused's mind arises. That is the stage at which, the Court should carry out an inquiry into the issue. We stress the use of the word "shall" in the section which, to our mind, places a mandatory obligation on the Court to carry out the inquiry at the time at which the issue arises in the trial or committal proceedings. We are satisfied that the section does not allow the Court to defer the inquiry until the judgment because, at that stage, it will be too late to carry out an inquiry and, even if the inquiry is carried out, its results would be inconsequential to the trial, should, for example, the accused be found to have been mentally unfit to stand trial.

We are fortified in our view by section 162(2) CPC which we quoted earlier in this judgment. It is obvious, that sub-sections (1) and (2) of section 162 of the CPC, must be taken together. The inquiry is carried out in terms of sub-section (1). If the inquiry indicates that the accused person is capable of making his defence, then the Court adjourns further proceedings and the steps set out in the sub-sections 3, 4 and 5 of section 162 of the CPC are then taken. It is a fundamental requirement in criminal trials that an accused person should understand, follow and fully participate in his trial. Section 162 CPC as a whole, is a safeguard meant to achieve that fundamental requirement. That is the reason why the section makes it mandatory for an inquiry to be done immediately when the issue arises, and if, upon inquiry, there is evidence of unsoundness of mind, further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial."

24. On 1st August 2023, under section 163 of the Criminal Procedure Code, the court allowed the appellant to conduct this defence on the strength of the medical report dated 9th January 2023 by Dr. Olando. The appellant was found fit to plead as per the medical report by Dr. C.M Mwangome dated 10th June 2020. He then proceeded to prefer a cogent defence and it would appear that the accused person raises this defence of insanity when it is suitable for him. He did not raise it at the begining of the trial and he was able to follow the case and even cross examine the witnesses.

conclution

25. The trial court had an ample opportunity to observe the appellant and after

obtaining the medical evaluation allowed the hearing to go on.

26. The appellant and his mother were also singing to different tunes as whereas the appellant raised the issue of mental instability, the mother was claiming business rivalry. In as much as it was not upon the appellant to prove his innocence, a party who goes on a fishing expedition and hauls up multiple defences which are contraditory in nature , does not improve their case.

27. The court finds that prosecution case was proved beyond reasonalble doubt and none of the grounds of the appeal has been proved,

28. Therefore the appeal has no merit and it is thus dismissed.

29. It is so ordered.

Dated, signed, and **delivered** in **Open Court/Online** through **MS TEAMS**, this ...5TH..... day of ...MARCH..... 2026.

HON. LADY JUSTICE W. K. MICHENI

JUDGE

In the presence of:

The Appellant in person

Mr. Sirima for the state

Bebora court assistant

Bebora Court Assistant

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
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