Mose v Republic (Criminal Appeal 91 of 2019)
[2024] KECA 1466 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1466 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 91 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 25, 2024

BETWEEN

DANIEL OBIRIA MOSE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyamira (Maina, J.) dated 14th March, 2019 in HCCRA No. 54 of 2016)

JUDGMENT

1. The appellant, Daniel Obiria Mose, was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006 in the trial before the Principal's Magistrate's Court at Keroka in Criminal Case No. 93 of 2014. The particulars of the offence were that on the 19th day of January, 2014, at Masaba North District within Nyamira County, the appellant caused his penis to penetrate the vagina of MOM (name withheld), a child aged 15 years.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to serve twenty (20) years imprisonment as provided for by the *Sexual Offences Act*.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (E.N. Maina, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 14th March, 2019.

5. The appellant was, again, dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised seven (7) grounds in his Amended Memorandum of Appeal, which are that:

1. The prosecution age assessment was not conducted as required by the law.
2. The first appellate court failed in matters of law by failing to furnish the appellant with certified true copies of the trial proceedings.
3. The investigation officer never carried out any investigation to prove this case beyond any reasonable doubt.
4. The defilement of the complainant was not proved to warrant a conviction.
5. There was no forensic or scientific testing, including a DNA test that was conducted to prove this case against the appellant.
6. The two lower courts gravely erred in points of law by convicting the appellant on the basis of the prosecution case that had not been proved.
7. The two courts failed in law to acknowledge the unchallenged defense which was strong enough for an acquittal.

6. A summary of the evidence that emerged at the trial through three (3) prosecution witnesses, which evidence was subjected to a fresh review and scrutiny by the High Court, is as follows.

7. The (complainant), MOM, was 15 years old and a class seven pupil at Matutu Primary School, at the time of the incident. She testified as PW1. After voir doire, the trial court was satisfied that she could give sworn evidence. She testified that she knew the appellant who was a neighbour. On the material day, she went to the market with her mother to sell vegetables; but at 6.00pm, her mother returned home leaving her to sell the rest of the vegetables. At 7.30pm, her friend, Joyce, came and they headed home together. However, they met the appellant at the boda stage, who unsuccessfully tried to engage her in a conversation. Later, they went back to the market to get another friend by the name Getrude and the three girls parted ways thereafter.

8. As she walked home alone, the complainant met the appellant again. This time, he was in the company of two other men who were unknown to the complainant. The three forcefully abducted the complainant – grabbing her by her hands and feet and took her to an unknown place. They first forced her to kneel before the two accomplices forcefully made her to lie down and pulled down her panties even as she struggled. The two, then, watched as the appellant forcefully penetrated her vagina. Afterwards, the appellant told her to leave and she left that place running; and bumped into her mother and a neighbour who were looking for her.

9. The complainant reported to her mother what had happened. They reported the matter to the police; after which she was taken to hospital for medical examination. Thereafter, the police went to the appellant's house and arrested him.

10. PW2, PC Daniel Toya, was the investigating officer in the case. He testified that on the material day while he was on duty, an AP officer from Gesima took the appellant to the police station on the allegation that he had defiled PW1 who was on her way from the market. He confirmed the narrative given by PW1 herein above with the only variation being that she was abducted by two unknown men after the appellant demanded to escort her home and she refused. The two men then took her to a house where the appellant was, and the appellant defiled her. She screamed and the appellant and the two men took off when people responded. A search commenced and the appellant was apprehended and taken to the AP Camp at Gesima. He also produced PW1's birth certificate as P. Exhibit 4.

11. The last witness was Wilson Omariba, a clinical officer at Ekerenyo Hospital. He testified that he attended to PW1 on 30th January, 2014; and she had treatment notes from Keroka District Hospital and Gesima Hospital, which indicated a history of defilement by a person who was known to her. The medical examination in the treatment notes showed that she had a blouse which was stained with mud and grass. She also had bruises and tenderness on her neck and thighs; swollen and bruised knees indicative of a struggle. Additionally, she had grass stains and pieces of grass around her external genitalia; and broken hymen. It was concluded that she had been defiled. After examination, she was put on anti-retroviral drugs and referred to Ekerenyo Hospital for a follow up. PW3 produced the P3 form as P. Exhibit 1; two treatment notes as P. Exhibit 2(a) and 2(b) respectively; and two lab forms as P. Exhibit 3(a) and 3(b) respectively.

12. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charge against him, and merely testified that PW1 was a neighbour who he believed mistook him for another person.

13. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Ogada appeared for the respondent. Both parties relied on their submissions and opted not to orally highlight them.

14. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

15. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. Given the issues the appellant has raised on this second appeal, it is fruitful to address them in seriatim.

16. First, the appellant contended that the birth certificate produced in the trial court did not belong to the complainant in the case and, therefore, "raised eye brows" especially since the same was not fortified through the conduct of age assessment. Consequently, the appellant argued that it cannot be said that the age of the complainant was established beyond reasonable doubt in the circumstances. The respondent argued that the two courts below established as a fact that the age of the complainant was fifteen years; and believed that the birth certificate belonged to the complainant.

17. We have looked at the birth certificate in question. It is true that the name indicated therein has no bearing to the complainant's combination of name. The name on the birth certificate is "AK" (name withheld) while the complainant identifies herself as "MOM." However, we note two things. First, the trial court noted the anomaly and did not rely on the birth certificate to establish the age of the complainant. Second, we agree with the respondent (and the two courts below) that the age of a victim in defilement is not necessarily proved through medical-legal documents. It can be demonstrated through any admissible evidence of probative value – including oral evidence. See, for example, this Court's decision in in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR. In the present case, the age of the complainant was established through the oral evidence of the complainant and the P3 form.

18. Second, the appellant alleged that he was not furnished with witness statements and certified copies of the trial proceedings to enable him prepare his defense hearing. Instead, he was forced to make submissions. Thus, his rights under Article 50(2) of *the Constitution* were contravened. We simply note that this complaint cannot be raised on second appeal for the first time.

    Even though the appellant was represented by counsel at the High Court, this complaint was never raised. In any event, the record shows that at two times during trial and before commencement of hearing of the case (on 21st January, 2014, and 18th February, 2014), the court directed that appellant be supplied with witness statements and charge sheet. Thereafter, the hearing commenced on 20th August, 2014, and at no point does the record show, if any, that the appellant complained that he was never furnished with the witness statements as had been directed by the court.

19. On the contrary, on 9th September, 2015, when a new magistrate was taking over the case, the appellant positively informed the court that he was ready to proceed, and that the case should proceed from where it had reached – a clear indication that he had the facilities he needed for his defence.

20. Finally, it is simply unfathomable that the appellant was not supplied with certified copies of proceedings in order to conduct his first appeal at the High Court as he now complains. Our incredulity is stoked by the fact that the appellant was represented by an advocate at the High Court. The advocate filed detailed submissions on his behalf. It simply cannot be that the advocate made up all the material he presented in the submissions. In any event, it was the duty of the appellant to inform the court that he did not have a certified copy of the proceedings.

21. The next two grounds and the sixth ground can be grouped together. In the third ground, the appellant complains that the investigation officer did not carry out investigations as he never called any independent witnesses like neighbours to support his investigation; that he never visited nor took photos of the crime scene; and that he never conducted DNA test to show exactly what broke the complainant's hymen. In the fourth ground, the appellant contended that the prosecution did not prove defilement beyond reasonable doubt as the case was riddled with poor and shoddy investigations contrary to section 36(8) of the *Sexual Offences Act*. In the sixth ground, the appellant contended that the lower courts erred by convicting him on the basis of the prosecution case that was not proved beyond reasonable doubt. The appellant opined that: the P3 form bore no significant medical history with regard to defilement as the findings were normal; and PW1's testimony that she was grabbed by the appellant and two other men and thereafter defiled by the appellant as the said men watched, was not logical since there is no way the said men would have helped him carry her and watch but not also participate in what the appellant was doing.

22. In its submissions, the respondent submitted that defilement was proved beyond reasonable doubt. It was the respondent's argument that the three ingredients which are: the age of the complainant, penetration by the perpetrator and identity of the perpetrator, were all proved through the evidence of the complainant who gave a vivid account of how she was defiled and the same was corroborated by medical evidence which was conducted on her and which also indicated that she was 15 years old. Further, the complainant testified that she knew the appellant as he was her neighbour. Thus, the identity of the appellant which was by recognition was so clear that both lower courts were convinced that there was no error.

23. We agree with the respondent on this point. These three complaints are not only general but of a factual nature. Both the courts below established as a fact that the three ingredients for the offence of defilement had been proved: age; penetration; and identity of the person who caused the penetration. We note that the two lower courts comprehensively considered the prosecution evidence with regard to these ingredients of the offence and made concurrent factual findings that: the appellant was 15

years old at the time of the incident as was proved by the medical documents on record as well as the oral evidence of PW1; and penetration was proved through the evidence of PW1 which the trial court was satisfied that it was truthful and the same was further corroborated by PW3, and the medical documents on record. Furthermore, the appellant did not challenge the complainant's age during cross examination and neither did he oppose the medical documents adduced by PW3 and PW2, which showed that the complainant was 15 years old. Finally, the two courts believed PW1 regarding the evidence of identification by recognition of the appellant.

24. As a second appellate Court, we must pay homage to these concurrent findings unless they are perverse, as in no reasonable tribunal would reach those conclusions. Having perused the entire trial record, we are unable to say that the factual findings are perverse.

25. Fifth, the appellant contended that no forensic or DNA test was done in his regard to ascertain whether or not he committed the offence. According to the appellant, DNA test was needed to avoid a miscarriage of justice. For this proposition, he relied on the case of Albanus Mwanzia Mutua vs. Republic, Criminal Appeal No. 120 of 2004 (unreported), wherein it was held that it is the court's duty to enforce all the provisions of *the Constitution*; otherwise, there would be no reason for having those provisions in the first place.

26. In putting forth this complaint, the appellant misunderstands the law. There is no requirement that DNA must be availed in order to secure a conviction in a sexual offence. Sexual offences are proved by way of evidence; not just scientific or DNA evidence. See AML vs Republic 2012 eKLR and section 36 of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including DNA testing to establish the linkage between the accused person and the offence. However, that provision is not couched in mandatory terms.

27. The final complaint by the appellant is that it was an error for the trial court to convict him based on the evidence of only the complainant yet neighbours could have been called as witnesses.

28. As the High Court pointed out, section 124 of the *Evidence Act* provides that the court is empowered to convict an accused person based on the sole evidence of the victim of sexual offence as long as it is satisfied that the victim was truthful and gives reasons for so believing. Additionally, the prosecution is not required to call any particular witnesses or a multiplicity of witnesses to prove a fact. What matters is not the quantity but the quality of witnesses. Section 143 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) states:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."

29. Consequently, a thorough and conscientious review and scrutiny of all the grounds of appeal raised by the appellant yields the conclusion that his conviction was safe, and his appeal without merit. The appellant did not appeal against sentence – and it is just as well since the recent binding precedent by the Supreme Court (see Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024)) has established that courts cannot go below the statutory minimums prescribed by the *Sexual Offences Act*.

30. The upshot is that the appeal herein is without merit and we hereby dismiss it in its entirety.

31. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR