DM v Republic (Criminal Appeal 2'B' of 2016)
[2023] KECA 987 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 987 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 2'B' OF 2016

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 28, 2023

BETWEEN

DM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Naivasha (C. Meoli, J.) delivered on 14th July, 2016 in HC. CR. A. No. 67 of 2015)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on May 14, 2014, in Narok South District, the appellant willfully and unlawfully caused the penetration of his penis into the vagina of FM, a child of 7 years.

2. FM testified as PW1. She said that the appellant was a neighbor of theirs, at Quarry, where she lived with her parents. It was her evidence that on the material day, she was playing within their compound, when the appellant grabbed her, as she was running past his house.

3. He took her into his grass-thatched house, and put her on his bed. After the appellant removed the clothes of PW1, as well as his own clothes;

> ' He inserted his penis into me. I felt pain. (Child points to a diagram of anterior view of female figure. She points at where the female genitalia is drawn; that is where she felt pain): the diagram is MFI-1.
>
> I screamed. A lady called Ann came to my rescue. She is our neighbour. The accused let me go. The lady took me to her house. She examined me.'

4. PW2, PM is the mother of the complainant. She testified that the appellant had been a neighbor, next door, for about one year.

5. On the material date, when PW2 returned home, from her place of work at the quarry, she found her daughter in the house of Ann. When PW2 examined the complainant, she saw bruises on her vagina.

6. As the complainant had told the mother about what had transpired to her, PW2 took PW1 to the hospital, where she was examined.

7. PW3, AL, testified that she knew the appellant, as he was her neighbour. According to PW1, PW2 and PW3, the appellant was known by the name George, in the neighbourhood. On the material day, PW3 heard a child crying inside the appellant's house. She therefore knocked on the appellant's house. When the appellant opened the door, PW3 found both the appellant and PW1 inside the said house.

8. After PW1 had left the house, and PW3 inquired from her about what had transpired, the complainant told PW3 that the appellant had done 'tabia mbaya' to her. When the complainant's mother got back home, PW3 informed her about what had transpired. During cross-examination, PW3 said that she did not find the appellant having sex with the complainant. PW3 only heard the child crying, inside the appellant's house.

9. PW4, Benjamin Tom, was a Clinical Officer who was based at Ololulunga Hospital. He testified that he was familiar with the handwriting as well as the signature of Beatrice Mwangi, as the two of them had worked together at Ololulunga Hospital for a period of one year. The record of the proceedings shows that the appellant told the court that he had no objection to PW4 producing the P3 Form which had been signed by Beatrice Mwangi.

10. PW4 testified that the complainant had visited the Ololulunga hospital with a history of defilement by somebody who was known to her. The records showed that the complainant's labia majora and labia minora were inflamed and swollen. PW4 further testified thus;

> ' Hymen was intact and no laceration. She was tested for sexually transmitted diseases. It was negative. Urinalysis showed spermatozoa present.'

During cross-examination, PW4 stated as follows:

> ' The patient had history of defilement. She had spermatozoa around her vagina. There was ejaculation outside the vagina. It was attempted defilement.'

11. PW5, PC Rose Kamau was based at Ololulunga Police Station. On the material day, PW1 was escorted to Ololulunga Police Post, by members of the public, who also escorted the appellant to the same Police Post. PW5 issued the P3 Form to the complainant, after being informed that the child had been defiled. During cross-examination PW5 said that she knew the appellant by the name David Marita.

12. PW6 CPL Ken Otieno was the In-Charge of the Crime Section at the Ololulunga Police Post. He testified that the complainant was taken for age assessment.

13. The prosecution made an application for leave to have PW6 produce the report on the age assessment, as an exhibit. The record of the proceedings shows that at the said time, the Investigating Officer (PW5) was not available; and it was for that reason that the prosecution asked that it be allowed to produce the report through PW6.

14. The appellant told the trial court that he had no objection to the application. In the light of the appellant's consent, the age assessment report was produced in evidence, by PW6. The said report indicated that the complainant was 7 years old.

15. After PW6 testified, the prosecution closed its case.

16. The learned trial Magistrate evaluated the evidence on record and made a finding that the appellant had a case to answer.

17. In his defence, the appellant gave an unsworn testimony, but did not call any other witness.

18. He said that he hails from Matongo, in Nyamira, and that he is a businessman. He sold bananas from Nyamira to Narok.

19. On the material date, the appellant confirms that he was at Ololulunga Market, where he found some people who told him that they were looking for him. The said people, who he met on the road, took his money amounting to Kshs 2,500/-. He therefore went to Ololulunga Police Post, presumably to report about the theft of his money.

20. When the appellant got to the Police Post, he found a woman and a girl, whom he had never met before.

21. In a nutshell, the appellant did not have any knowledge about the case for which he had been charged.

22. After giving consideration to all the evidence, the trial court noted, in its judgment that;

> ' The question of whether she (the complainant) was penetrated. The medical report says that her hymen was intact. Its (sic) only the outer lips of her genitalia that were inflamed. In my view what happened in this case was attempted penetration. The evidence on record discloses an offence under Section 8(1) of the Act.
>
> I proceed to make a finding that the prosecution has proved beyond reasonable doubt, an offence of attempted defilement.'

23. After the conviction, the appellant was given an opportunity for mitigation. He reiterated his lack of any knowledge about the case. He also said that he has little children, and that his wife does not work.

24. The learned trial Magistrate sentenced the appellant to 15 years imprisonment.

25. The appellant lodged an appeal at the High Court challenging both the conviction and the sentence.

26. We have looked at the record of proceedings, and note that the appellant largely challenged the sentence. But he also alluded to the defect in the charge sheet, in which it was not cited that he was also known as George.

27. The learned High Court Judge held that it was a misdirection for the trial Magistrate to conclude that because the complainant's hymen was not breached, there was no evidence of penetration.

28. Citing the provisions of Section 2 of the *Sexual Offences Act*, the High Court emphasised that in sexual offences, the slightest penetration of a female sexual organ by a male sex organ, is sufficient to constitute the offence. As a consequence, the High Court went ahead to make the following conclusion;

> ' 22. I do therefore quash the conviction for the lesser offence of attempted defilement, and substitute therefore a conviction for the proved offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

> Similarly, the sentence of 15 years imprisonment is hereby set aside. The minimum penalty imposed by Section 8(2) of the *Sexual Offences Act* is life imprisonment. The appellant is accordingly sentenced to life imprisonment. The appeal therefore stands dismissed.'

29. By the stroke of the pen, the High Court gifted the appellant with a sentence of life imprisonment, when the appellant had complained that a sentence of 15 years imprisonment was harsh. In the circumstances, we do appreciate the fact that the gist of the submissions made by the appellant was with regard to the legality of the enhancement of the sentence.

30. In the case of *JJW vs Republic [2013] eKLR* the Court of Appeal acknowledged that pursuant to Section 354(3)(ii) and (iii) of the *Criminal Procedure Code*, the High Court has powers to enhance or to alter the nature of the sentence, when it is hearing an appeal from the trial court. Nonetheless, the Court of Appeal emphasised that;

> ' The court, in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross-appeal in which it seeks enhancement of the sentence, and that cross-appeal is served upon the appellant in good time to enable him prepare for that eventuality.
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> The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced, or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.'

31. In this case there was neither a cross-appeal by the prosecution, nor a notice that there was a possibility that the sentence could be enhanced. Accordingly, we find that when the learned Judge enhanced the sentence without any prior notice to the appellant, and without a cross-appeal, the said decision was made without giving an opportunity to the appellant, to try and persuade the court against the enhancement.

32. On his part, the respondent submitted that the learned Judge of the High Court did not enhance the sentence; the High Court is said to have taken action to correct an illegal sentence.

33. Having given due consideration to the submissions, the legal authorities cited and the relevant law, we find that there are 3 issues that require determination;

    a. Were the ingredients of the offence of defilement proved?

    b. Was the High Court right to convict the appellant for the offence of defilement?

    c. Did the sentence handed down by the High Court constitute an enhancement of the original sentence or was it merely a correction of an illegal sentence?

    Pursuant to the provisions of Section 2 of the *Sexual Offences Act*;

    > ' Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

34. The complainant testified that the appellant 'inserted his penis into' her. As a result of the said insertion, PW1 felt pain, causing her to scream.

35. When summarising the testimony of the complainant, the learned trial Magistrate noted that the appellant had 'inserted his penis into her'. The trial court further noted thus;

> ' According to P3 Form, the child had bruises on her labia majora and minora. They were inflamed and swollen. That her hymen was intact and no laceration seen.'

36. As the complainant's hymen remained intact, the trial court expressed the view that the offence committed was an attempted defilement. It would appear that the trial court was convinced that in every case of defilement, the hymen of the complainant has to be broken. The evidence adduced showed that;

> ' Its (sic) only the outer lips of her genitalia that were inflamed.'

37. Even assuming that that was an accurate summary of the evidence, we still have to ask if it was insufficient to prove penetration.

> ' Labia minora' is defined as the smaller lips. The labia minora are a pair of small cutaneous folds that begins at the clitoris and extends downward. The anterior folds of the labia minora encircle the clitoris forming the clitoral hood and the frenulum of the clitoris.'

38. From the said definition, it does appear that labia minora cannot be deemed only as the outer lips of the female genitalia. Meanwhile, 'Labia majora are a prominent pair of cutaneous skin folds that will form the lateral longitudinal borders of the vulva clefts. The labia majora forms the folds that cover the labia minora, clitoris, vulva, vestibule, vestibular bulbs, Bartholin's glands, skene's glands, urethra and the vaginal opening.'

Even assuming that the labia majora were the 'outer lips of the genitalia', it must be borne in mind that;

> ' In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.' See Erick Onyango Ondeng' vs Republic, Nai Criminal Appeal No 5 of 2013.

39. We reiterate those words, and hold that the evidence adduced at the trial was sufficient to prove penetration. Accordingly, the learned trial Magistrate erred when he held that there had only been an attempted defilement.

40. However, was the High Court right to have quashed the original conviction; and to have substituted it with a conviction for defilement? The appellant before the High Court asked the said court to quash his conviction altogether. He was of the view that the prosecution had failed to prove the offence of attempted defilement.

41. The respondent did not file a cross-appeal.

42. In those circumstances, we hold the view that there was no issue which was raised before the High Court, requiring it to determine whether or not the evidence on record was sufficient to prove the offence of defilement. Therefore, by determining a question which was not before it, the High Court acted in excess of its jurisdiction.

43. The effect of substituting the original conviction, of attempted defilement, with one of defilement was that the appellant was condemned without being accorded an opportunity to put forward his case.

44. It is to be noted that the High Court did not make a finding that the sentence which was handed down by the trial court was illegal. Indeed, as the trial court had convicted the appellant for attempted defilement, the appellant was, pursuant to Section 9(1) of the *Sexual Offences Act*, liable to imprisonment for a term of not less than 10 years. Therefore, the sentence which was imposed by the trial court was thus lawful, for the offence in respect to which the appellant was convicted.

45. It would have been improper, and unlawful for the trial court to hand down the sentence prescribed by Section 8(2) of the *Sexual Offences Act*, when the appellant had been convicted under Section 9(1) of the said statute.

46. In the case of *Josea Kibet Koech vs Republic, Criminal Appeal No 126 of 2009*, the Court of Appeal held as follows;

> ' The learned Judge may be entitled to condemn the manner the offence was committed, but as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction.'

47. A similar view was expressed in *HOW vs Republic, Criminal Appeal No 326 of 2010*; *JOA vs Republic, Criminal Appeal No 25 of 2011*; *Charles Muriuki Mwangi vs Republic, Criminal Appeal No 24 of 2014*; and in *Sammy Omboke & Tom Okumu Ogutu vs Republic, Criminal Appeal No 133 of 2016*.

48. Guided by those decisions, we hold that the High Court lacked jurisdiction to enhance the sentence, as the appellant had not been given a Notice of enhancement of the sentence, prior to the hearing of his appeal; and because the respondent did not lodge a cross-appeal.

49. In the result, we allow the appeal against sentence, and reinstate the term of imprisonment for 15 years, which was imposed by the learned trial Magistrate.

50. Finally, we have taken note of the fact that the appellant was in custody all through the trial. By dint of the provisions of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period when the appellant remained in custody, whilst he was still on trial. The records show that he was arrested on May 15, 2014. The trial went on until May 8, 2015, when the appellant was convicted and sentenced.

51. Accordingly, we direct that when the period of the actual sentence is being computed, the prison authorities will deduct therefrom the period which the appellant remained in custody, at a time when he was still on trial.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR