DMM v Republic (Criminal Appeal 66 of 2020)
[2023] KECA 810 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 810 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 66 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JULY 7, 2023

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court at Nairobi (Ajode, J.) delivered on 31st October 2012 in Criminal Appeal No. 182 of 2009)

JUDGMENT

1. The appellant, DMM was charged with the offence of defilement contrary to sections 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on August 29, 2006 in Maragua District in the former Central Province, he committed an act that caused penetration of the complainant, MNM (PW1) a girl aged 11 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty and during the trial, the prosecution called five witnesses, while the appellant made a sworn statement of defence and called no witnesses. He was convicted and sentenced to 15 years' imprisonment.

2. He was aggrieved by the conviction and sentence, and appealed to the High Court which dismissed the appeal and enhanced the sentence to life imprisonment as what the High Court stated to be the law prescribed.

3. The appellant was further aggrieved and appealed to this Court on grounds that the High Court fell into error when it affirmed the trial court's decision yet he was convicted on a defective charge sheet; that the procedure for taking plea was erroneous; that the trial was flawed as his constitutional right to information was denied; that the expert evidence of Dr. Mbura Bahati (PW3) who produced MNM' clinical notes and completed the P3 form, was contrary to section 48 of the *Evidence Act*; that the prosecution shifted the burden of proof to the appellant; that the offence was not proved to the

required standard; that crucial and essential witnesses did not testify; that the voir dire examination conducted was contrary to section 19 of the *Oaths and Statutory Declarations Act*; that the courts below disregarded his defence; that the life sentence imposed on him was harsh and excessive and that there were inconsistencies, contradictions and discrepancies in the evidence, which rendered the conviction unsafe.

4. The appellant filed written submissions, and during a virtual hearing where he appeared in person from Kamiti Maximum Prison, he adopted his submissions in their entirety. The thrust of his submissions were that, the charge sheet was defective in that he was charged with the offence of defilement under section 8 (1) and 8 (2) instead of incest under section 20 (1) of the *Sexual Offences Act*; that after the plea was taken, the record did not show that pursuant to the court's directives he was supplied with all the relevant documents necessary to conduct his trial, including the P3 form; that no medical evidence connected him to the offence. The appellant further contended that the case was not proved to the required standard since penetration was not established, particularly since, there was no medical evidence.

5. It was the appellant's further complaint that MNM's mother and grandmother were not called to testify and that the courts below disregarded his defence; that there were glaring gaps in the evidence that cast doubt on the prosecution's case. It was also his contention that the voir dire evidence was not taken in accordance with section 19 of the *Oaths and Statutory Declarations Act*.

6. Turning to the enhancement of the 15 years sentence to a life sentence by the High Court, the appellant complained that the prosecution did not serve him with a notice of enhancement of sentence prior to the hearing of the appeal, and therefore the High Court ought not to have enhanced the sentence.

7. Finally, the appellant asserted that the prosecution's case was marred by contradictions and discrepancies in the evidence pertaining to MNM's age, and also because on the one hand, MNM stated that she did not scream, but on the other that she claimed to have screamed, but there was nobody to help her; that her maternal aunt, PW2 had stated that she took all the children with her and then later stated that she did not carry all of them to her house at the same time.

8. For its part, the respondent also filed written submissions which Miss. Ngalyuka, learned prosecution counsel for the State adopted in entirety. Opposing the appeal, it was submitted that the necessary ingredients for the offence of defilement were established; that there was sufficient evidence of penetration; that PW3, the doctor who treated the victim found that there was penetration owing to the presence of spermatozoa. The doctor concluded that MNM had been sexually penetrated. MNM also testified that the appellant had defiled her on other occasions before and also on the material day inside their house.

9. Further, that the appellant was well known to the victim as he was her father. Her testimony was that her father defiled her on occasions when he had disagreed with his wife and chased her away. She was finally rescued by her aunt, PW2.

10. With regard to MNM's age, it was also submitted that there was sufficient proof that MNM's age was within the age bracket specified by section 8(2) of the *Sexual Offences Act*; that age can be proved through the oral testimony of a child, if the child is of sufficient intelligence. The case of Mwalango Chichoro Mwanjembe vs Republic [2016] eKLR was cited to support this proposition; that the trial court upon conducting a voir dire examination on MNM found her to be intelligent.

11. On whether the conviction was based on a defective charge sheet, it was submitted that the record showed that the appellant was the father to MNM hence could have been charged with the offence of incest; that this notwithstanding, failure to charge the appellant with incest did not occasion any

prejudice to him. Counsel submitted that in the case of CKM vs Republic [2019] eKLR which addressed a similar situation, the court was of the view that the ingredients of the charge are the same, and that failure to charge the appellant with incest did not weaken the prosecution case or render the charge sheet defective.

12. As to whether the 1st appellate court discharged its duty as required, it was submitted that the 1st appellate court analyzed the evidence afresh and drew its own conclusion that indeed MNM was defiled by her father. The two courts below were in agreement that the ingredients necessary for the offence of defilement were proved. That the 1st appellate court discharged its duty as required and independently arrived at its own conclusions that the offence of defilement was established beyond reasonable doubt.

13. This being a second appeal, the duty of this Court was set out in the case of Kaingo vs Republic, (1982) KLR 213 at p. 219 thus;

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)".

14. Hence, in view of the above guidance, the issues for consideration are;

    i. Whether the charge sheet was defective;

    ii. Whether the voir dire examination was properly conducted;

    iii. Whether the appellant was not subjected to a fair trial for failure to have been supplied with the trial documents;

    iv. Whether the offence of defilement was proved;

    v. Whether crucial and essentials witnesses failed to testify;

    vi. Whether there were contradictions and discrepancies in the prosecution's case;

    vii. Whether the courts below erroneously disregarded the appellant's defence; and

    viii. Whether the High Court rightly enhanced the sentence.

15. Before proceeding to address the complaints raised, we have gone through the record and found that the exhibits pertaining to the case in the trial court are missing and cannot be traced. As a consequence, this being a Court of record, for the purposes of the judgment, we shall rely on the proceedings as recorded in the trial court and in the High Court and the judgments of the two courts below.

16. We begin with the alleged defective charge sheet, the appellant's contention is that he was charged with an offence contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, but ought to have been charged with incest under section 20 of the Act in view of the fact that he was MNM's father.

17. When the issue was raised in the High Court, the court concluded that;

> " ... whereas the appellant could have been charged under section 20 (1) of the *Sexual Offences Act* which specifically deals with sexual assault by male persons in incestuous relationships, there was nothing to preclude him from being charged under Section 8(1) and (2) of the

Sexual Offences Act, as he was, both sections were applicable in this case, and carried the same punishment."

18. We agree and would further add that, the appellant has not shown what prejudice he suffered on account of the offence having been brought under section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* instead of section 20 in respect of incest. Both offences require similar ingredients to be established which as we will interrogate below were matters determined by both the trial and the High Court. With the result, this ground lacks merit, and is dismissed.

19. As to whether the voir dire examination was properly conducted, the appellant faults the trial process for the reason that after the voir dire examination, the trial court ordered that MNM give unsworn testimony, but when the trial commenced, she was sworn and gave her evidence. The appellant argued that the trial magistrate having ordered that she give unsworn evidence, such evidence required to be corroborated.

20. The record shows that indeed MNM was sworn. As to whether this was prejudicial to the appellant, in our view, that was not established. This is because with respect to evidence of a child in sexual offences cases, section 124 of the *Evidence Act* is clear that corroboration in such cases is not mandatory and the trial court can convict on the evidence of the child victim if for reasons to be recorded it believes that the child is speaking the truth.

21. This court in the case of *Stephen Nguli Mulili vs Republic* [2014] eKLR expressed itself thus on the issue;

> "...with regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

22. The trial court having found her to be an honest witness, was entitled to convict the appellant on the basis of her evidence in terms of section 124, whether she was sworn or unsworn. This complaint is baseless and is accordingly dismissed.

23. Regarding the appellant's complaint that he was not supplied with the trial documents, we have gone through the record and observe that this issue was not at any time raised before the two courts below. There is nothing in the proceedings that discloses that the appellant brought to the attention of the two courts that he had not been supplied with the trial documents. There having been no record of such complaint since the appellant did not raise it, we find this issue to be unfounded, and accordingly dismiss it.

24. Turning to whether the offence was proved to the required standard, in order to determine this issue, we consider it essential to briefly outline the prosecution's case. MNM, a girl aged 11 years was at home alone with the appellant, her father on the morning of the 29th of August 2006 when the appellant called her to his bedroom, pulled her onto the bed, removed her panties and defiled her. She stated that she felt pain, and when she first reported the incident to her grandmother, it was dismissed as lies. PW2 was MNM's maternal aunt. She had gone to the appellant's home to check on the children. Upon receiving a report from MNM that her father had defiled her, she escorted MNM to the hospital, whereupon she was redirected to Kandara police station to report the matter. Thereafter they were escorted to Thika Hospital where MNM was examined and treated. Dr. Bahati (PW3), completed the P3 form on her behalf. The appellant was then arrested and charged with the offence.

25. MNM's aunt (PW 2) confirmed that she visited the appellant's home to check on the children on the material day, because their mother had been chased away by the appellant. MNM immediately reported to PW 2 that she had been defiled, whereupon PW 2 took her to the police and to the hospital for treatment. She also testified that MNM's mother was mentally retarded. For his part, Dr. Bahati, of Thika Hospital presented the P3 form that stated that MNM was 10 years old. The doctor observed that the medical examination showed that MNM had discharge and some scratches on her vulva; that her hymen was open and she had contracted trichomonas vaginalis, which is a sexually transmitted disease. She also had spermatozoa and pus cells. He formed the opinion that she had been defiled and produced a P3 form on her behalf.

26. PC Shepard Njeru, (PW 5), was stationed at Kandara Police Station and received the complaint that MNM who was 10 years old had been defiled by the appellant. He referred MNM and PW2 to Thika Hospital where a P3 form was completed showing that MNM had been defiled. The appellant was arrested after one month and charged with the offence.

27. In his defence, the appellant stated that he went with his daughter to cut firewood, and thereafter he passed through the shops. When he returned home, he found MNM's aunt, (PW2) who passed by their home. When she was leaving, she wanted to go with the children. He was shocked and asked why she had come for the children. They haggled over the issue and she subsequently left with MNM. Thereafter, he was charged. He further stated, that the charges he faced were due to the marital difficulties that he had with his wife.

28. For the prosecution to prove its case to the standard prescribed, requires that the key ingredients for the offence of defilement be proved. Namely; the complainant's age, the appellant's identity and whether there was penetration.

24. As concerns her age, the proceedings do not disclose that the appel9ant challenged MNM's age as being 11 years at the time of the incident. And since the two courts below found her age to have been established as a matter of fact, in view of the concurrent findings, we have no reason to interfere with the conclusions reached in respect of her age.

30. On the appellant's identity, this too was not controverted, since the appellant confirmed that MNM was indeed his daughter.

31. On the question of penetration, once again the two courts below were satisfied that penetration was proved. MNM's evidence was that the appellant had defiled her in his bed on the morning that she reported the incident to her grandmother and to PW2. The medical report showed that she had discharge, and some scratches on her vulva; that her hymen was open and she had contracted trichomonas vaginalis which is a sexually transmitted disease. She also had spermatozoa and pus cells. The doctor concluded that she had been defiled. Since both MNM's evidence and the medical report were clear that MNM was sexually assaulted, as were the two court below, we too are satisfied that penetration was proved to the required standard. We are also satisfied that the P3 form produced by Dr. Bahati complied with the requirements of section 48 of the *Evidence Act*.

32. Regarding the appellant's complaint that his defence was disregarded by the courts below, it was his case that he went to cut a tree with his daughter, and had passed through the shop, where he learnt that he was wanted elsewhere.

33. A reanalysis of his defence, does not in any way show that it dislodged the prosecution's case. We have considered the judgments of the trial court and the High Court, and find that they took into account the appellant's defence, and arrived at a similar conclusion. This ground is also dismissed.

34. With regard to the appellant's allegations that there were contradictions and discrepancies in the evidence of PW1 and PW2, this court in the case of *John Nyaga Njuki & others vs Republic* [2002] eKLR stated that:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

35. In the instant case, we have reexamined the evidence, against the overwhelming facts of the prosecution's case and find the inconsistences to be minor and inconsequential. This ground is accordingly lacking in merit.

36. On the complaint that MNM's mother and grandmother ought to have been called as witnesses but did not testify, it is true that neither were called to testify. In the case of MNM's mother, the record discloses that she was mentally challenged, a fact that the appellant did not controvert. Needless to say, section 143 of the *Evidence Act* is explicit that;

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

37. The failure to call these persons as witnesses did not prejudice the appellant in any way, since neither of them witnessed the offence. Their testimony would not therefore have added any value to the prosecution's case. This ground is without merit.

38. Finally, on the complaint that the custodial sentence imposed on the appellant was irregularly enhanced from 15 years to life imprisonment because, the respondent in the High Court failed to file and serve the requisite notice of enhancement of sentence on the appellant. In enhancing the appellant's sentence, the High Court stated thus;

> "On sentencing, the appellant was upon conviction, condemned to serve 15 years' imprisonment. Section 8 (2) under which he was convicted provides in mandatory terms that upon conviction, a person shall be sentenced to imprisonment for life. Mr. Mulati the learned state counsel did issue notice of intention to seek for enhancement of sentence before the appeal was argued. I did explain the options available to the appellant in view of the notice. The appellant indicated that he understood the import of the sad notice, but wish to exercise his right to be heard on appeal. Having therefore determined that the evidence on record was sufficient to sustain conviction and that the appeal was properly entered against him, I must do that which must be done by substituting. The proper sentence as provided for by the law."

39. Our consideration of the record discloses that on September 19, 2012Mr. Mulati the State Counsel in the High Court sought to enhance the sentence thus;

> "I am seeking leave of court (sic) of court to issue notice to the appellant that I...to ask the court to enhance sentence to life. He was charged under section 88 (sic) (1) and (2) (sic)

SOA was convicted and sentenced to 15 years imprisonment. That sentence is unlawful and should his appeal fail I will be asking the court to substitute the proper sentence which is life imprisonment.

Court- The importance of the state counsel's application is explained to the appellant who is then asked to respond.

Appellant: I still wish to proceed with my appeal, even having understood that should the appeal fail I could be sentenced to life imprisonment instead of 15 years."

40. This court has had occasion to address the question of enhancement of the sentence, and the tenets of the law that require to be followed by courts in order to do so.

41. In the case of *JJW vs Republic* [2013] eKLR it was held that;

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. 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. 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." (emphasis ours)

42. Further, in the case of *EGK vs Republic*, [2018] eKLR this court observed;

> " Be that as it may, we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the *Criminal Procedure Code*. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the *Sexual Offences Act* is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. (emphasis ours)

43. In the instant case, the appellant's complaint is not that he did not receive a warning. His complaint is that he was not served with a notice of enhancement of sentence. As we have indicated earlier, the entire record of the trial court was devoid of the exhibits. But the proceedings specify that Mr. Mulati lodged a notice of enhancement. More importantly however, the learned judge categorically stated, "... Mr. Mulati the learned state counsel did issue notice of intention to seek for enhancement of sentence before the appeal was argued. I did explain the options available to the appellant in view of the notice".

44. We are not certain whether the notice the learned judge was referring to was oral or a filed notice, and in view of the missing exhibits, it is also possible that the notice is also missing. What is however clear is that the judge warned the appellant of the consequences of the notice issued by the prosecution prior to the appeal being heard and in the event that his appeal did not succeed, and he acknowledged the consequences, and stated that he preferred to proceed with the appeal nevertheless.

45. We find that we are unable to fault the procedure to enhance the appellant's sentence adopted by the learned judge, and consequently, we are satisfied that the sentence was lawfully enhanced from 15 years' imprisonment to life sentence for the offence of defilement of a child who was aged 11 years, and we dismiss this ground as well.

46. In sum, the appeal lacks merit and is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR