Mang'eli v Republic (Criminal Appeal 103 of 2020)
[2023] KECA 1438 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1438 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 103 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

NOVEMBER 24, 2023

BETWEEN

CHARLES MUSAU MANG'ELI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Machakos (D. K. Kemei, J.) delivered on 29th January 2020 in HCCA No.44 of 2019)

JUDGMENT

1. The appellant, Charles Musau Mang'eli, was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that, on October 4, 2017 in Athi River District within Machakos County, he intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of CMM (PW2), a child aged 6 years.

2. An alternative count was also preferred where he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* where the particulars were that on the same day, he intentionally and unlawfully touched the vagina of PW2.

3. The appellant pleaded not guilty and at the hearing, the prosecution called 4 witnesses. Upon considering the evidence, the trial court found the appellant guilty and convicted him of the offence of defilement of a child and sentenced him to serve life imprisonment.

4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court against the decision. Upon considering the appeal, the High Court upheld the conviction and substituted the sentence of life imprisonment with 30 years' imprisonment.

5. The appellant was once again aggrieved by the decision and has filed this appeal on the grounds that the learned Judge: failed to analyze the evidence on record before the trial court in its entirety; failed to find that the prosecution did not prove its case beyond doubt; failed to find that, CMM (PW2) was not a credible witness and her evidence, in terms of section 124 of the *Evidence Act*, required corroboration; failed to find that section 214 of the *Criminal Procedure Code*had been violated; failed to find that the lower court had erroneously relied on hearsay evidence and that the sentence imposed was manifestly harsh and excessive.

6. The appellant filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel for the appellant Mr. Nandwa relied on the submissions. In highlighting them, counsel submitted that the learned judge failed to analyse the evidence that was on record; that CMM (PW2) was not a credible witness as it was apparent that she was protecting her boyfriend. Counsel further submitted that her character and the behaviour did not satisfy the criteria of section 124 (a) of the *Evidence Act* on account of the inconsistencies in her testimony which she gave under duress.

7. Counsel further submitted that the requirements of section 214 of the *Criminal Procedure Code*were violated in that, just before it closed its case, the prosecution applied for leave to amend the charge sheet to correct a spelling error, which the trial court allowed; that the amendment of the complainant's name from S with 'S' to C with 'C' resulted in two different persons, and that despite this, the appellant was not called upon to plead afresh on the amended charge sheet.

8. Counsel finally asserted that the sentence was excessively high and prayed that the same be set aside.

9. In response, learned counsel for the State Miss. Matiru informed the Court that a notice of intention to enhance the sentence was filed on October 5, 2022. Counsel went on to submit that the appellant was properly convicted and the life sentence imposed by the lower court ought to be reinstated. It was further submitted that the evidence of PW 2 was coherent and voluntary, and though she was very young, she was clear as to the person who had defiled her. On the amendment of the charge sheet to reflect C, it was asserted that it did not prejudice the appellant in any way and there was no doubt as to whom the name in the charge sheet was with reference to.

10. Regarding the evidence of Cpl. Florence Ngomoli, (PW 4), the Investigating Officer, it was submitted that the evidence was properly admitted since it sought to ascertain whether indeed the appellant had been at the micro finance meeting. Counsel concluded by stating that, the sentence was not harsh or excessive and that the life sentence imposed was lawful should be reinstated.

11. This being a second appeal, the mandate of this Court is limited by section 361(1) (a) of the Criminal Procedure Code, to considering issues of law only as opposed to factual matters that were considered by the first court and re-evaluated on appeal by the first appellate court, or where concurrent findings of fact have been reached by the two courts below, unless, it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere with the decisions. See *David Njoroge vs Republic* [2011] eKLR and *Chemagong vs Republic* [1984] KLR 213

12. In view of the mandate of this Court, the issues that are for determination are;

    i. whether the provisions of section 214 of the *Criminal Procedure Code*were violated;

    ii. whether the offence of defilement was established beyond reasonable doubt;

iii. whether the trial court was entitled to rely on CMM's evidence as a credible witness;

iv. whether the trial court wrongly relied on hearsay evidence;

v. whether the High Court properly re-evaluated the evidence; and

vi. whether the sentence was harsh and excessive.

13. To enable us contextualise the issues for determination, it is of necessity that we briefly outline the facts as were presented before the trial Court.

14. On the 4th October 2017, CMM (PW2) came home from school to find the house locked. So she went to her aunt's house to secure her bag. She removed her school dress and changed into a sweater and tights and went to play. As she was playing, the appellant called and ordered her to enter into a shop. He then grabbed her, removed her clothes, laid her on a bench that was in the shop and defiled her.

15. When he finished, the appellant wiped himself with her sweater and sent her back outside to play. Her sister later came with the house keys and they went home together. She reported the assault to her mother much later, after she was beaten, and threatened with contracting HIV/AIDS.

16. When PW1, (her mother) came home on October 4, 2017 CMM (PW2) told her that she had pimples on her private parts. She examined her and did not notice anything out of the ordinary. It was not until the October 7, 2017 that PW 1 noticed that she was wearing a stained jumper. On close examination, she saw that it was blood stained in the inside with other stains on the outside. She then examined the child's private parts and saw that they were swollen. The next day, it was only after she had beaten her that CMM (PW2) told her that she had been defiled. She also learnt that CMM (PW2) had contracted a sexually transmitted disease.

17. Peter Ngatia Wawi, (PW 3), an emergency clinician of Nairobi Women Hospital examined CMM (PW2) on the October 7, 2017 found that her outer genitalia was normal, but her vagina had a foul smelling clear discharge. The hymen was partially broken, and the anus was normal. A diagnosis of rena- vaginal penetration was made. She was sent to the laboratory for tests. A urine sample showed leucocytes and pus cells. Hepatitis and HIV tests were negative. She was given PEP against HIV and an anti-Hepatitis vaccine.

18. Cpl. Florence Ngomoli, the investigating officer received CMM (PW2) accompanied by her mother at the police station on October 7, 2017. They reported that she had been defiled on October 4, 2017; CMM (PW2) identified the appellant who was a scrap metal dealer, as the perpetrator, though the appellant stated that he was at a micro finance meeting at the time of the assault. Her investigations revealed that meetings for Misoni Microfinance were held at Slaughter area from 2.00 p.m. but did not go beyond 3.00 p.m. She also found that students left school at 3.00 p.m. and that the school was 20 minutes away from the CMM (PW2's) home.

19. In his defence, the appellant gave sworn evidence. He stated that on October 4, 2017, he went for a microfinance meeting and was there until 5.00 p.m. He reached his house at 7.00 p.m. He only became aware of the case when he was arrested.

20. Rose Kamene, (DW2), is the Chairlady of Tumaini Athi, the microfinance company of which the appellant is a member. She stated that she was with the appellant in a meeting of the microfinance on 4th October 2017 until 5.00 p.m. She tendered a copy of the minutes of the meeting.

21. Abdul Ali, DW3, the appellant's neighbour at work stated that on October 4, 2017, the appellant did not go to work, but he saw him on October 5, 2017.

22. Returning to the 1st issue for determination being whether section 214 of the *Criminal Procedure Code* was contravened, the appellant contends that before the prosecution case was closed, it applied to amend the charge sheet which was allowed. The amendment was to change the spelling of CMM (PW2's) name from S as captured in the charge sheet to C. The appellant's complaint is that he was not called upon to plead afresh on amended charge sheet, and that the amendment of her name from 'S' to 'C' meant that the offence was with reference to a different person which was prejudicial to him.

23. Indeed, the record shows that on September 21, 2018 after PW4 testified, the prosecution made an application to rectify CMM (PW2) name from Synthia to Cynthia. Counsel for the appellant did not oppose the application. The Court allowed the application and the amendment was made. The appellant was not called upon to take plea on the amended charge sheet.

24. In the case of *Erick Mbulele vs Republic* [2018] eKLR, this Court held;

> " On the ground that the charge sheet was amended close to end of the trial contrary to Section 214 of the *CPC*, we note from the record that the prosecution applied to amend the charge to correct the name of the complainant both in the main charge and in the alternative charge. The record also indicates that the appellant expressly stated that he had no objection to the correction whereupon the court amended the names accordingly.
>
> We find that the amended charge did not introduce any new matter into the main charge that would have necessitated recalling of witnesses. The amended charge did not prejudice the appellant as it was merely a correction of a typographical error and did not go into the substance of the charge".

24. We adopt the above observations and add that, in this case the amendment of 'S' to 'C' of the CMM (PW2's) name was a typographical error that did not alter any element of the charge. Neither did it result in the introduction of a new complainant. It was a minor amendment of her name, that was an inconsequential change that did not warrant the reopening of the trial for the appellant to take plea and recall the witnesses. We can find no prejudice that was occasioned to the appellant by this amendment. This ground is without merit and therefore fails.

25. As to whether the offence was proved to the required standard, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients. They are; the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) and (2) of the *Sexual Offences Act* which stipulates;

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".

26. As concerns her age, CMM's age, was not disputed. Both CMM (PW2) and her mother, PW1 confirmed that she was 6 years old at the time of the incident. Her age was corroborated by the clinical officer, the treatment notes, the P3 Form, Post Care Rape Form from Nairobi Women's Hospital, and the Birth Notification adduced in court. Her age was therefore satisfactorily proved.

27. Was penetration proved? The appellant has argued that because the medical report stated that her hymen was partially broken, that penetration was not proved.

On the question of penetration, the trial court held;

> " Post Rape Care form and P3 Form support a finding that there was penetration of her genital organ. There is an indication that the hymen was partially broken. According to the P3 Form, the vaginal wall was also inflamed. The child gave a lucid narration on how the act was committed from the beginning to the end, and she did not strike me as an incredible witness. This leads me to a finding that she was defiled".

28. For its part, the High Court stated that the P3 Form and the PRC form as well as the evidence of the medical officer was indicative of partial penetration.

29. Section 2 of the *Sexual Offences Act* defines "penetration" as, "...The partial or complete insertion of the genital organ of a person into the genital organs of another person." Clearly the law recognises that penetration can be partial and or complete insertion.

30. In so far as partial penetration is concerned, this Court in the case of *Mutali Nyamwea vs Republic* [2019] eKLR observed that;

> "... for the offence of defilement to be proved, the prosecution evidence must show that the appellant inserted his penis into the vagina of the child. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purposes of penetration as the said insertion need not be complete."

30. And in the case of *Erick Onyango Ondeng vs Republic* [2014] eKLR this Court stated thus;

> " We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence."

31. CMM's (PW2's) evidence was that when she came home from school, the house was locked, so she went to her aunt's house to change her clothes and then she went to play. As she was playing, the appellant called and ordered her to enter into a shop. He then grabbed her, removed her clothes, laid her on some form that was in the shop and defiled her. The P3 Form and the PRC form showed that there was penetration since her hymen was partially broken. A urine sample taken also showed leucocytes and pus cells. Her vagina had a foul smelling clear discharge. With this evidence, there cannot be any doubt that penetration, partial or otherwise, was in this case proved. In view of the concurrent findings of fact by the two courts below, we have no basis on which to interfere with the conclusions reached.

32. As to whether he was properly identified, PW2, CMM stated that the appellant was the person who repairs cooking pans near her home, which the appellant confirmed. She also identified him by name. Clearly this was a case of identification through recognition. But this notwithstanding, in his defence the appellant claimed that he was attending a micro finance meeting, and not at the scene at the time of the alleged assault.

33. Concerning the appellant's alibi the trial court stated thus;

> " I have looked at the copy of the minutes of the group's meetings against the evidence given by DW2. I note that whereas she stated that the meeting should start at 2.00 pm and take about 2 to three hours, this was not accurate In undated minutes for a meeting that took place before 4th October 2017, the meeting ended at 3.30 pm. On 25th of October 2017, it ended at 3.00 pm. On 1st November 2017, meeting ended at 3.00 pm. On 7th November

> 2017, there is an over writing on time but appears to be 3.00 pm. It means that it is only on 4th October 2017 that the meeting allegedly ended at 5.00 pm. I also note that there are days when time for ending the meeting was not shown. I cannot rule out the possibility that the minutes were made or manipulated for this case. When I weigh this evidence against the complainant's oral testimony, I find it incredible. In whole, I have no reason to disregard the evidence of the child on identity of the accused person. She had absolutely no cause to singled (sic) him out and falsely accuse him of defilement."

34. In other words, what the trial court was saying was that, when CMM's evidence was placed alongside the appellant's defence that attempted to explain his whereabouts on the afternoon in question, it was unmistakably a case of the appellant's word against the child's word. But having weighed out the entire prosecution evidence against his defence and alibi, the trial court was satisfied that CMM's evidence was credible, believable and cogent, was not dislodged by the appellant's defence at all. And in so finding, the court was permitted to rely on section 124 of the *Evidence Act* to admit her evidence on his identification, and conclude that indeed, the appellant was the person who defiled her.

35. Deliberating on a similar concern in the case of *Stephen Nguli Mulili vs Republic* [2014] eKLR, the court opined that;

> " ...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."

36. Once again, both the trial court and the High Court having concluded that CMM's (PW2's) evidence was truthful that it was the appellant who was responsible for defiling her, we uphold the concurrent finding since our own independent evaluation of the evidence gives us no reason to depart from it.

37. On whether the trial court relied on evidence of a person who did not testify, the record shows that the trial court was interrogating the evidence of Rose Kamene (DW3) who produced several minutes of the micro finance meetings to show when the meetings usually commenced and when they ended, and not the evidence of Cpl. Florence Ngomoli. The court concluded that the meeting on 4th October 2017 would not have gone beyond 3.00 p.m, and therefore the appellant could not claim to have been at the meeting at p.m. as it would have already ended. The question that hearsay evidence was relied upon is unfounded and fails.

38. We now turn to the complaint that the High Court failed to properly evaluate the evidence and to arrive at its own independent conclusion. We have re-analysed the evidence against the judgment of the High Court, and are satisfied that in accordance with its duty, the court properly re-examined the record afresh and came to its own conclusion. The learned judge not only considered the various facts of the prosecution's evidence, but also went on to weigh them out against the appellant's defence, and consequently upheld the trial court's decision that the appellant was responsible for commission of a most heinous crime against the 6 year old child. This ground is unfounded and we dismiss it as such.

39. Given the totality of the evidence that was before the trial court, as well as the High court, we too are satisfied that the offence was proved to the required standard and squarely pointed to the appellant as the perpetrator. As such, the appeal against conviction has no merit and is dismissed.

39A. Finally, with regard to the sentence, the appellant on the one hand complains that it was harsh and excessive. On the other, Miss Matiru seeks to reinstate the sentence of life imprisonment prescribed by section 8(2) of the Act that was imposed by the trial court.

40. In this case, the appellant was charged with defilement under section 8(1) as read with section 8 (2) of the *Sexual Offences Act* which offence in the case of a child under 11 years old carries a sentence of life imprisonment. The trial court sentenced the appellant to life imprisonment as prescribed by law. On appeal, the High Court set aside the life sentence and reduced it to 30 years imprisonment.

41. On whether the sentence was excessive, section 361(1) (a) of the *Criminal Procedure Code* provides that,

> "...severity of sentence is a matter of fact"

Therefore, this is a matter that is outside the scope of this second appeal.

42. Further, notwithstanding Mr. Nandwa's assertions that the life sentence is illegal, and that we should decline to entertain the notice of enhancement, the respondent filed a notice of enhancement of sentence as required by law. Section 8(1) as read with section 8(2) of the *Sexual Offences Act* provides for a life sentence for an offender who defiles a child aged 11 years or less. The child here was aged 6 years. It was wrong for the High Court to set aside the sentence imposed by the trial Court where the law provided that a sentence of life imprisonment be imposed.

43. We set aside the sentence of 30 years, and reinstate it instead with the sentence of life imposed by the trial court.

44. In sum, the appeal against conviction and sentence is dismissed, save that the sentence of 30 years' imprisonment is set aside, and instead, the life sentence imposed by the trial court is reinstated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER,2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR