Njuguna v Republic (Criminal Appeal E031 of 2022)
[2024] KEHC 861 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 861 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E031 OF 2022

CW GITHUA, J

JANUARY 30, 2024

BETWEEN

BENSON MUGO NJUGUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Benson Mugo Njuguna, was convicted of the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006 (hereinafter the SOA).

   The particulars were that on the 26th and 27th January, 2020 in Murang'a County, the appellant unlawfully caused his penis to penetrate the vagina of J.M.K , a child aged 15 years.

2. Upon conviction, the appellant was sentenced to serve 15 years imprisonment.

   He was dissatisfied with his conviction and sentence hence this appeal.

3. In his petition of appeal dated 3rd August 2022 presented by his then advocates Messrs. Njoroge Mwaura & Company Advocates, the appellant advanced six grounds of appeal which were mainly replicated.

   In a nutshell, he complained that the learned trial magistrate erred in law and fact by convicting him on the basis of scanty, contradictory and uncorroborated evidence which was insufficient to prove the offence of defilement beyond any reasonable doubt; that he was wrongly convicted as the learned trial magistrate relied on exaggerated and extraneous information which was wrongly admitted in evidence and she also disregarded the evidence presented in his defence.

4. In prosecution of the appeal, both parties relied entirely on their written submissions. The appellant appears to have changed his advocates after his petition of appeal was filed since his submissions were filed by a different firm of advocates Messrs. Gichuki Kimere & Company Advocates on 4th April 2023.

The respondent's submissions were filed on 19th September 2023 by learned Prosecution Counsel Ms. Winfred Nzuki.

5. Briefly, the prosecution case in the lower court was that on the 26th January, 2020, PW2 MWK left her daughter (the victim) with some money to buy books before she left for church together with her husband. On her return home later in the day, she did not find her daughter and as she did not return even on the following day, she reported her disappearance to the police.

6. According to the victim who testified as PW1, on 26th January 2020, she left her home at around 3 p.m. and went to Maragua to buy some books. After purchasing the books, she boarded Mugo's bodaboda, a person she had seen about twice previously. He was supposed to take her home but instead, he took a different route and ended up in Kenol. Mugo, who she identified in court as the appellant took her to a lodging house and after checking out a few rooms, he settled on one. They went to the room and while there, he removed all her clothes then had sex with her against her will.

7. PW1 recalled that after sexually assaulting her, the appellant took her to another hotel still at Kenol to have a meal. She did not want anything but the appellant ordered for tea and cake which he ate after which they went back to the same lodging. While there, she called her brother but the appellant threatened to kill her if she told anyone where she was. He started smoking some unknown substance and later that night, he defiled her again.

8. In the morning, he had sex with her before ordering her to take all her belongings. He then led her to where his motorcycle was parked outside a Supermarket and together they rode all the way to the Milimani Law Courts in Nairobi.

   The appellant entered a certain courtroom while she remained outside waiting for him. After he was through with his court business, he joined her, took her to a hotel before they rode back to the same lodging in Kenol. She remained in the lodging with the appellant till 31st January 2020 when she left and went to her brother's home as she feared going back home to face her parents alone.

9. According to PW2, on 31st January, 2020 she received a call from her daughter in law who told her that she was with PW1 who appeared very stressed. Accompanied by police officers from Kiangare police post, she picked PW1 from her daughter in law's home and took her to Igekeru Police station where she reported the matter. When making her report, PW1 gave the police the appellant's mobile number but when called, the appellant did not pick up the call. PW1 was then instructed to contact him and organize a meeting which she did. The appellant was arrested later that night in a tea plantation at the place he had agreed to meet PW1 when they chatted on phone earlier in the day not knowing that the meeting was a trap for his arrest. His arrest was witnessed by PW2.

10. The trial court's record show that in the course of investigations, PW1 was examined on 1st February,2020 by PW3 Mr. John Ndereba, a clinical officer at Maragua Hospital. PW3 recalled that upon examining PW1, he noted that her hymen was broken and her vagina had a whitish discharge which on being tested revealed an infection which was treated.

    He concluded that PW1 had been defiled. He produced treatment notes form Maragua Hospital as P Exhibit 2, the P3 form which he completed as P Exhibit 3 and a Laboratory Requisition Form as P Exhibit 4.

11. When placed on his defence, the appellant gave a sworn statement and did not call witnesses.

    He denied having committed the offence as alleged claiming that the charge was a fabrication as he did not know PW1 prior to his trial and he was not at Igikiro when the offence was allegedly committed. He also denied that he was a bodaboda rider/operator and claimed that he was a lorry driver.

12. On being cross examined, the appellant contradicted himself by claiming that he was at home attending to a patient when he was arrested but on further cross examination, he stated that he was at Sabasaba on a road at the time he was arrested.

13. As the first appellate court, I am enjoined to subject the evidence presented before the trial court to a fresh and exhaustive analysis to arrive at my own independent decision regarding whether or not the appellant was properly convicted and sentenced.

    It is important to note at this juncture that it is settled law that an appellate court will not interfere with a trial court's decision unless it is satisfied that the trial court misdirected itself on findings of fact or the law.

14. Having carefully evaluated the evidence on record alongside the grounds of appeal and the written submissions filed by the parties, I find that the key issue arising for my determination is whether the prosecution proved the charge of defilement against the appellant beyond reasonable doubt. Put differently, the question that I am called upon to answer in this appeal is whether the appellant was properly convicted given the evidence on record.

15. It is trite that for the offence of defilement to be established, the prosecution must prove beyond any reasonable doubt the offence's three essential ingredients which are the following;

    i. Age of the victim – that the victim was a minor.

    ii. Penetration

    iii. Positive identification of the accused person as the culprit.

16. Starting with the age of the victim, in her evidence, PW1 stated that she was 15 years old on the dates the offence was committed. She produced as P Exhibit 1 a copy of her birth certificate which shows that she was born on 11th July,2004. PW2, her mother corroborated this evidence. This means that at the material time, PW1 was slightly over 15 years old. It is also noteworthy that her age as stated in the charge sheet was not disputed by the appellant.

    I therefore find that the prosecution proved without doubt the age of the victim as alleged in the charge sheet.

17. Regarding penetration, PW1's evidence was clear and straightforward. She narrated how the appellant tricked her on 26th January,2020 by taking her to a lodging at Kenol instead of giving her a ride back home which was her expectation. She remained in the lodging with the appellant for about four days during which period he repeatedly defiled her.

    When she was examined by PW3 a day after she parted company with the appellant, her hymen was broken and she had a whitish discharge in her vagina which led PW3 to conclude that she had been involved in sexual intercourse.

    Given the above evidence, I am satisfied that the prosecution proved the element of penetration to the standard required by the law.

18. Turning now to the crux of this appeal which is whether the appellant was positively identified as the culprit, I agree with the appellant's submissions that where the prosecution case is based on the evidence of identification of an accused person by a single witness, such evidence must be evaluated with a lot caution to ensure that it was watertight and left no possibility of error before it could be made the basis for a conviction. See: *Wamunga V Republic* 1989 eKLR 424; *Kiarie V. Republic* [1984] eKLR 739;

19. In his submissions, the appellant argued that he was not positively identified as the culprit for three main reasons: First, he submitted that PW1 was not a reliable witness since her evidence was contradictory. Secondly, no evidence was tendered directly linking him to the offence given that the receipt allegedly issued to him after he hired the lodging in which the offence was committed was not produced in evidence and thirdly, he was not medically tested to confirm that he had an infection similar to the one noted on PW1 when she was examined on 1st February,2020.

20. On its part, the respondent submitted that the prosecution had proved beyond reasonable doubt that the appellant was PW1's assailant since he was positively identified by PW1 as such and he was thus correctly convicted.

21. When convicting the appellant, the learned trial magistrate expressed herself as follows on the issue of identification;

> " The minor in this case positively identified Mugo as her assailant.
>
> A person she knew, she boarded his motor cycle whose registration number she did not know and ended up in Kenol in a hotel and back to the lodge, then to Milimani Law Courts and back to Kenol. She spent a lot of time there with Mugo and was able to positively identify him..... The reason why this court is amenable to believe the minor is because she was very convincing in her testimony, she knew who her assailant was and positively identified him and even when Mugo cross examined the minor, the issue of identity was not contended. Mugo did not impugn the minor on her identification of him,....."

22. After my own independent appraisal of the evidence on record, I find that the learned trial magistrate in her judgement properly addressed her mind to all the ingredients of the offence of defilement and carefully interrogated the evidence of PW1 related to identification of her assailant before concluding that PW1's identification of the appellant as the perpetrator was positive, reliable and unassailable.

23. I must say that I find no reason to fault the learned trial magistrate in her above finding given that PW1 was consistent in her evidence that she had spent the better part of the afternoon of 26th January 2020 in the company of the appellant and they did not only spend the night together in the course of which the appellant defiled her but they continued staying together in the same lodging till 31st January when they parted company. PW1's narration of events between 26th to 31st January was not challenged by the appellant during cross – examination. And contrary to the appellant's submissions, I did not find any material contradictions in PW1's evidence. Her credibility therefore remained unscathed.

    Her evidence leaves no doubt that she spent a lot of time seeing, watching and interacting with the appellant during the day and night for over four days which provided a very conducive environment for a safe, positive and correct identification of the appellant as her assailant. In my view, there was no room for mistaken identity in this case.

24. That said, I agree with the appellant's submissions that the prosecution ought to have availed the telephone communication between him and the victim which allegedly led to his arrest. The omission to avail such evidence though undesirable did not however deal a fatal blow to the prosecution's case since his arrest following the said communication was witnessed by PW2. Although PW2 was PW1,s mother, she confirmed in her evidence that she did not know the appellant prior to the date he was arrested and she had no reason to give false evidence against him. The appellant did not allude to any.

25. The appellant also took issue with the prosecution's failure to have a DNA sample taken from him for analysis to confirm that he had an infection similar to the one found with PW1 and that failure

to adduce such evidence meant that there was no evidence directly linking him to the commission of the offence.

26. With due respect, I find no substance in this submission because subjecting an accused person to DNA analysis or to medical examination to prove whether or not he or she had committed an offence is not a mandatory requirement of the law. Even if such evidence was availed, it would be just one piece of evidence which would have to be considered alongside other evidence produced by the prosecution to determine whether or not the accused had committed the offence in question as alleged.

27. Another issue raised by the appellant in his submissions is that the trial court erred by disregarding his alibi defence and for basing his conviction on PW1's uncorroborated testimony.

A reading of the trial courts judgement shows clearly that the leaned trial magistrate interrogated and considered the appellant's defence but rejected it finding that it was unworthy of belief when considered alongside the unshaken evidence of PW1. I agree with the learned trial magistrate in this finding given that as noted earlier, the appellant materially contradicted himself in his defence regarding the circumstances surrounding his arrest which casted serious doubts on his credibility given that it was not humanly possible to be in two places at the same time.

When compared to the rest of the evidence on record, his defence appears to have been an afterthought.

28. In any event, the appellant's alibi in which he claimed that he was not at igikiro when the offence was committed cannot stand since the evidence shows that the offence was committed at a lodging in Kenol Township not at igikiro.

29. Lastly, the appellant complained that he was wrongly convicted on the uncorroborated evidence of PW1. This complaint is to say the least misconceived in the light of the Proviso to Section 124 of the *Evidence Act* which empowers a trial court in sexual offences involving minors to enter a conviction on the sole uncorroborated evidence of a minor victim if it believed that the minor was telling the truth and recorded it's reasons for such belief.

In this case, there is no doubt that the learned trial magistrate found PW1 to be a truthful witness and she recorded her reasons for believing and accepting her testimony.

30. For all the foregoing reasons, I have come to the conclusion that the prosecution in this case adduced sufficient evidence to prove the charge of defilement against the appellant beyond any reasonable doubt. It is thus my finding that the appellant was properly convicted. His appeal against conviction is accordingly dismissed.

31. On sentence, although the appellant did not make any submissions challenging his sentence, as correctly pointed out by the prosecution, Section 8 (3) of the *Sexual Offences Act* prescribes a mandatory minimum sentence of 20 years imprisonment. The learned trial magistrate after weighing all relevant factors sentenced the appellant to serve a sentence of 15 years imprisonment.

32. Although the sentence imposed on the appellant is less than the sentence prescribed by the law for the offence for which he was convicted, I am not persuaded to interfere with it for two main reasons. First, the prosecution did not file a cross – appeal challenging legality of the sentence and secondly, there is recent jurisprudence from the High court and the Court of Appeal declaring the minimum mandatory sentences stipulated in the *Sexual Offences Act* to be unconstitutional for depriving courts of their discretion to impose appropriate sentences taking into account the unique circumstances of each individual case- See: *Edwin Wachira & 8 Others V Republic* Constitutional & Judicial Review (Mbsa) Petition No 97 of 2021 ; *Philip Mueke Maingi & 4 others V DPP & Another* (Machakos)

Petition No. E017 of 2021; *Joshua Gichuki Mwangi V Republic* (Nyeri) Criminal Appeal no 84 of 2015 .

For the above reasons, I will not disturb the sentence imposed by the trial court and it is hereby affirmed.

33. The upshot of this judgement is that the appellant's appeal is dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF JANUARY, 2024.

C.W GITHUA

JUDGE

In the presence of :

Ms. Kimere for the Appellant.

The appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo Court assistant.