PME v Republic (Criminal Appeal E084 of 2022)
[2024] KEHC 951 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E084 OF 2022

TM MATHEKA, J

JANUARY 26, 2024

BETWEEN

PME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of Hon C.A. Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. E023 of 2021 delivered on 16th December 2021)

JUDGMENT

1. The appellant was charged with unlawful carnal knowledge with a woman of mental disability contrary to section 146 of the *Penal Code*. The particulars of the offence were that "on diverse dates between 2020 and 11th day of August 2021 at around 20.00 hrs in [Particulars withheld] Village in Mutulani Sub-Location in Watema Location within Makueni County, he intentionally and unlawfully had carnal knowledge of ME being aware at the time of committing the offence that ME was mentally retarded."

2. In the alternative, he was charged with Indecent Act with an adult contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that within the same period and at the same place, the appellant intentionally and unlawfully touched the vagina of ME with his penis against her will.

3. After a full trial, the appellant was convicted on the main charge and sentenced to 14 years' imprisonment.

The Appeal

4. Aggrieved the appellant filed this appeal on the following grounds;

a. That the crime was framed on him.

b. That there was no intermediary used in court.

c. That he prays for reduction of sentence if found guilty of the offence.

d. That he prays for a non-custodial sentence.

e. That he will comply with any other opinion.

5. The prosecution's case was that the complainant is a woman of limited mental capabilities and an elder sister to the appellant. They are orphans and used to live together. During the period of offence, the appellant would have sex with the complainant in the house they lived in until the complainant relocated to a toilet. The situation was discovered by PW2 when the complainant went to beg for food from her on 11th August 2021. The appellant went to PW2's house armed with a panga and hammer and demanded to leave with the complainant. PW2 raised alarm which attracted her mother in law. She reported to the chief and was directed to the police. The complainant was referred for medical checkup and the appellant was arrested and charged.

6. The prosecution called 5 witnesses to wit; the complainant (PW1), the complainant's neighbor (PW2), the woman who responded to PW2's screams (PW3), the investigating officer (PW4) and the Clinical Officer (PW5). The following exhibits were produced; Treatment notes (P. Ex 1), P3 form (P. Ex 2) and Mental Assessment Report (P. Ex 3).

7. The appellant gave an unsworn statement and said that he was not aware of the case and that he learnt about it in August 2021. That on 12th August 2021, there was a knock at his door and he was arrested. He was taken to Kola police station where his finger prints were taken. Someone dared to teach him a lesson and he didn't know why he was arrested. That his mother died in 2008 and there has never been an issue. He denied doing anything and said that he was just living with the complainant.

8. The appeal was canvassed through written submissions.

The Appellant's Submissions

9. On the ground that the case was a frame up, the appellant submitted that the complainant's testimony was that someone by the name Kavue used to give her money in order to sleep with her. That he (appellant) never gave the complainant any money hence the reason she told other people that he was assaulting her sexually. He wondered why the weapons mentioned by PW2 were never produced in court if indeed he was armed. He submitted that there was a contradiction in the doctor's evidence with regard to the complainant's age and that he did not testify about presence of semen in order to ensure defilement and penetration of the complainant.

10. With regard to the lack of an intermediary, he submitted that the complainant was mentally challenged as per the doctor's evidence yet there was no government intermediary to interpret her language.

11. He submitted that the doctor's evidence was that PW1's hymen was broken but he did not testify as to whether it was freshly broken or old.

12. On the plea for reduction of the sentence, he urged that in the event that the court confirmed the conviction, that the court considers reducing his sentence or granting a non-custodial sentence. He submitted that he is too young to finish all those years behind bars. That by the end of the sentence, he will be very much wasted to begin a family life.

13. Further, he requested the court to come up with any other sentencing option which it deems fit other than the one imposed by the trial court. That he is very remorseful for the fate which has befallen him and regrets such an act. That if at all he is released, he promises not to be against the law and to lead the life of a good Kenyan citizen.

Submissions by the Respondent

14. The State, through Prosecution Counsel Victor Kazungu, identified the following as the issues for determination;

    a. Whether the appellant had or attempted to have carnal knowledge with the complainant.

    b. Whether the complainant is an imbecile.

    c. Whether the appellant was aware of the complainant's mental retardation.

    d. Whether the sentence meted out to the appellant is safe.

    On whether the appellant attempted to have carnal knowledge with the complainant, he submitted that the complainant's evidence was that the appellant penetrated her severally and PW5 examined her and concluded that she had been penetrated. That there is no basis to disbelieve PW1 hence no need for corroboration. He submitted that the appellant knowingly exploited the complainant's mental state to cultivate an unhealthy relationship for his own sexual gratification. He relied on the case of *G O A v Republic* [2018] eKLR where the court held that;

    > "...section 124 of the *Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth."

15. As to whether the complainant was an imbecile, he submitted that all the witnesses testified that the complainant was mentally challenged. That the mental assessment report described the complainant as having had intellectual disability with difficulty in speech and thought since childhood.

16. As to whether the appellant was aware of the complainant's mental retardation, he submitted that he is the complainant's brother and therefore understands the complainant's mental disability. That the complainant's mental disability was apparent and known by PW2 and 3 due to their proximity with her.

17. As to whether the sentence is legal and safe, he submitted that the offence attracts a sentence of up to 14 years' imprisonment and the court exercised its discretion within the purview of the law. He relied on the case of *Juma Mnyaru Mwacharo vR* [2009] eKLR where the court held;

    > "I note that section 146 provides for a sentence of fourteen (14) years with hard labor. The Appellant's act was abhorrent in that he chose to take sexual advantage of a mentally challenged girl. In my view, the sentence is commensurate with the crime committed. The sentence is lawful and is neither harsh nor excessive. As such, I do uphold this sentence. .."

18. He also cited the case of *SKM v Republic* [2021] eKLR where the court held that;

    > "...The court when passing sentence gave reason that the applicant was not remorseful. The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion

I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed…"

19. I have carefully considered the grounds of appeal, the entire record and the respective submissions. The following issues arise for determination;

    a. Whether there was need for an intermediary in this case, whether failure to use the same was prejudicial to the appellant.

    b. Whether the offence was proved beyond reasonable doubt.

    c. Whether there is reason to interfere with the sentence.

Duty of Court

20 According to *Okeno v R* and the stream of authorities asserting that position it is now settled that the duty of a first appellate Court is to re -evaluate, analyse , weigh the evidence on record, akin to rehearing the case afresh only without the live presence of the parties. The court is then required to draw its own conclusions always bearing this in mind. Evidently the 1st appellate court has to depend on the evidence as recorded and use its other modes of perceptions to place itself in the trial court room, this duty is cast in the *Constitution* at Article 165 (3) (a) and (6) where, inter alia the jurisdiction of the court with respect to subordinate courts is set out;

    (3) Subject to clause (5), the High Court shall have—

        (a) unlimited original jurisdiction in criminal and civil matters;

    6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

21. In the exercise of that power in an appeal of this nature, the court is guided by the *Criminal Procedure Code* in the following terms at s. 354 of the *Code*;

    (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

        (a) in an appeal from a conviction—

            (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

            (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

            (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

        (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

Analysis & Determination

Whether there was need for an intermediary and whether the failure to use one was prejudicial to the appellant.

22. The use of intermediaries in criminal trials is provided for in the *Sexual Offences Act* (the Act) and *Constitution* . Section 31 of the *Act* provides as follows;

> "(1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is
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> a. the alleged victim in the proceedings pending before the court;
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> b. a child; or
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> c. a person with mental disabilities.
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> (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –
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> a. age
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> b. intellectual, psychological or physical impairment;
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> c. trauma;
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> d. cultural differences;
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> e. the possibility of intimidation;
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> f. race;
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> g. religion;
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> h. language;
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> i. the relationship of the witness to any party to the proceedings;
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> j. the nature of the subject matter of the evidence; or
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> k. any other factor the court considers relevant.

23. On the other hand, Article 50 (7) of *Constitution* provides as follows;

> "(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

24. The Court of Appeal had an opportunity to interrogate the provisions in the case of *M.M v Republic* [2014] eKLR where it stated as follows;

> "It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make

that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."

25. In the same case, the Court stated as follows with regard to the role of an intermediary;

> " The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."

26. It is evident from the foregoing that there are steps to the appointment of an intermediary. The first thing is for the prosecution who have the first contact with the witnesses before the witness ever steps in court to determine the vulnerability of that witness and to make the application to the court. The other partis where rhe court itself through the voire dire examination determines the vulnerability of the witness. It is my view that these positions are not mutually exclusive, because in the end the court has to appoint the intermediary.

27. In this case the court conducted a voire dire examination despite the complainant being an adult. It is not on record what led the court to conduct the voire dire examination in the first place because there is no application from the prosecution, neither does the court record the same. It is necessary for a court to record the reasons first, of deciding to conduct a voire dire examination with respect to an adult.

28. That besides the court, on 12th October 2021 records

> ' ...the complainant being an adult her level of intelligence is a bit challenged. she is not coherent enough but comes out as a person of average intelligence. She does not know her age. She will give unsworn statement'

29. In his judgment the learned trial magistrate made reference to a mental assessment report stating that the ...prosecution tendered a mental assessment report by Dr. J W Masila who opined that the "survivor has had intellectual disability with difficulty in speech and thought since childhood...". I have seen the report dated 30th August 2021 but I did not find on the record any testimony from the doctor expounding on the same. It was produced by the I.O who simply stated that he took the complainant for psychiatric examination and produced the report as P Ex 3. The report has a part with 'Other Recommendations' where the doctor states "The survivor has had intellectual disability therefor reduced competence to testify and requires assistance". The report is clear that the doctor was of the view that the complainant would need help in giving her testimony. However, that help was not given.

30. My other comment here would be the fact that it was not clear what the mental health assessment report was specifically about. The brief history of the incident to the doctor was ...A victim of rape presenting for mental evaluation...It was not clear why the prosecution had presented the complainant to the doctor. They needed to make it clear as per s. 31 & 32 of the *SOA*- whether the complainant

was vulnerable in light of those provisions. It would have been necessary to also determine the mental age of the complainant.

31. Did the failure by the court and prosecution to get the assistance the doctor had recommended prejudice the appellant? The record shows that the court decided to proceed with the unsworn statement of the complainant. The learned trial magistrate had the benefit of seeing and hearing the complainant was of the view that she had some mental disability but not to the extent that she was a vulnerable witness who needed an intermediary. Even the prosecution despite the recommendation in the mental assessment report did not have the view that vulnerable to warrant an intermediary.

32. I have read through the complainant's testimony. What jumps at you is the fact that she was well aware of what had brought her to court.

    She used adult language and though it says she testified in Kikamba there are parts of her testimony in quotes in Kiswahili where she says ...M alinitomba ...mara mbili.. alitoa mboro... and on cross examination she states ...wewe ndio ulinitomba..." She was aware that the accused was her elder brother, that at the material time he was in prison. She also told the court that one Kavue would give her money to sleep with her. He would take her to his house and sleep with her, So she was well aware what sexual intercourse was and would get into it with another person. What is not clear is whether she was capable of giving informed consent but what I can say from the record it appears to me that the complainant did not need someone to explain the questions to her or explain her answers to court. She could do it all by herself with the respect to this specific case. In fact, from the evidence she knew that the sexual intercourse with her brother was wrong. The appellant's suggestion in his submissions that his sister made up this case against him because he was not giving her money is unfortunate as it seems to suggest that he, like the alleged Kavue would have sex with the sister but since he did not pay her she brought this case against him. Such a submission ignorant of the fact that she is his sister and such a relationship whether by consent or otherwise is incestuous and unlawful. In any event being the brother and being aware of his responsibility over his sister he ought to have known better.

Whether the offence was proved beyond reasonable doubt.

33. Let me just begin by saying that I do not understand why this Section 146 of the *Penal Code* has not been removed from the *Penal Code* for being abusive and an insult the dignity of persons with mental disabilities. It states:

> " 146. Defilement of idiots or imbeciles
>
> Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."

34. I must agree with my brother Hon Gikonyo J in *Wilson Waitegei v Republic* [2021] eKLR when he stated that

> (16) Under the command of *Constitution* and humanity, I wish to state that this section should be read with such alterations and modifications in respect of; i) the manner the victims of defilement are described and addressed; and ii) the imposition of hard labour as part of sentence. See article 30 and 54 of *Constitution* below.

(17) Article 30 of *Constitution* prohibits imposition of forced labour in express mandatory manner, that: -

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(2) A person shall not be required to perform forced labour

(18) Article 54 of *Constitution* demands respect for persons with disability as follows: -

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(1) A person with any disability is entitled;

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning

(19) Parliament should however carry out appropriate amendment to the section

35. Parliament must of necessity carry out the appropriate amendments to this section or simply remove it and create a new section in the *Sexual Offence Act* to be included under s. 19.

36. Having said that it is clear from the provision, the ingredient of the offence can be distilled as;

a. That the victim is a person with mental disabilities

b. That the accused knew that the victim was a person with mental disabilities at the time of commission of offence.

c. While aware that the victim was a person with mental disabilities the accused had carnal knowledge of the victim.

37. The mental state assessment report (P. Ex 3) shows that she "had intellectual disability with difficulty in speech and thought since childhood." PW2 testified that the complainant was her neighbor and was not of sound mental capacity. The trial magistrate conducted voir dire examination of the complainant and formed the opinion that "her level of intelligence is a bit challenged"

38. Was the appellant aware that of the complainant's status? The complainant and appellant are siblings and in his defence, the appellant acknowledged that he had been living with the complainant. That kind of proximity is sufficient to conclude that he was aware of her mental status.

39. Did the appellant have carnal knowledge with the complainant? The evidence in chief by the complainant on cross examination is clear that the appellant did so.

40. In addition, PW2 Ruth Musau testified that she was a neighbour to the complainant who used to live with her brother, the appellant, as they are orphans. She told the court that the complainant used to go to her and tell her what the appellant had done to her. That other than sexual assault he also used to beat her, as was evidenced by the scars on her body. That she had resorted to sleeping in the toilet after he turned her into his wife; PW3, PW2's mother in law confirmed that the complainant told them that the appellant used to sleep with her. The I.O no 55562 PC Justus Mutune told the court that the complainant was taken to the police station where she complained of defilement. She told the police officer that her brother had been defiling her by force and had been living in fear and had begun to sleep in the toilet.

This evidence goes to support the complaint's testimony that her brother had sex with her.

Whether the sentence ought to be interfered with

41. The appellant urged the court to reduce the sentence or consider a non-custodial sentence for him. Section 146 of the *Penal Code* (*supra*) provides that anyone found guilty of the offence is liable to imprisonment for fourteen years. The sentence imposed by the trial magistrate is therefore legal.

42. Sentencing is an exercise of discretion and there are several factors which an appellate will consider before interfering. In the case of *Joseph Mureithi Kanyita v R* (2017) eKLR the Court of Appeal held that;

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

43. In this case, it is evident that the appellant was a first offender and the learned trial magistrate imposed the maximum sentence for the reason that. "The accused took advantage of his sister knowing very well that she suffered from mental disability. It is important to protect her against other people with similar intentions..."

44. I am satisfied that the conviction was safe and the same is upheld.

45. Regarding the sentence, I am alive to the principle that sentencing is the discretion of the trial court and an appellate court can only interfere in certain circumstances as was stated by the Court of Appeal, in *Peter Mbugua Kabui v Republic* [2016] eKLR;

> " The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now settled. The predecessor of this Court, in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -
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> > "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".

46. The term of 14 years' imprisonment is legal but was the maximum sentence. This was a first offender, a fact that the court ought to have taken into consideration. Despite the fact that this was a double offence

47. This was a double offence, the incest and the taking advantage of the sister who had mental disabilities. Before I make final orders on the sentence, I request for a social inquiry report on the appellant and a victim impact statement on the complainant within 14 days hereof.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY 2024

Mumbua T. Matheka

Judge

CA Nelima

Appellant Present

For State Ms. Omollo

M on the 13th February 2024 for the Reports from PACs