Musoji v Republic (Criminal Appeal E025 of 2023)
[2024] KEHC 8296 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 8296 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E025 OF 2023

KW KIARIE, J

MARCH 19, 2024

BETWEEN

PASCAL MAKOKHA MUSOJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. case NO. E013 of 2020 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. Pascal Makokha Musoji, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (3) [sic] of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the 13th day of December 2020 at Kasewe location in Rachuonyo East sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of BAO, a child aged fourteen years.

3. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence.

4. The appellant was in person. He raised grounds of appeal as follows:

    a. That the appellant's conviction was based on a defective charge sheet, which was not amended.

    b. That the appellant's conviction was based on a charge not prescribing the sentence.

    c. The trial magistrate failed to realise the conviction was based on a non-existing charge in the *Sexual Offences Act* No.3 of 2006.

d. That the appellant was denied his right to information disclosure before taking a plea in breach of Article 50(2) (a) (b) (c) and (s) of *constitution* of Kenya.

e. That penetration was not proved.

f. That the perpetrator was not correctly identified.

g. The trial magistrate failed to consider and believe the alibi defence.

h. That 20 years imprisonment is a minimum mandatory sentence that denies the accused the right to a fair hearing.

5. The state opposed the appeal. I was urged to dismiss the appeal for lack of merits.

6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. Section 8 (1) (3) of the *Sexual Offences Act* does not exist. The charge, to that extent, was erroneously drafted. It ought to have read:

   ...contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* ...

8. Section 382 of the *Criminal Procedure Code* provides:

   Subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

   Provided that in determining whether an error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings.

   Since the appellant clearly understood the complaint against him and fully participated in the trial, I find that he was not in any way prejudiced, and the error is curable under section 382 of the *Criminal Procedure Code*.

9. The appellant had no reason to complain that he was suffering by spending Kshs.800/= as transport to court as he did on the 22nd day of September 2021. It was he who had not availed his witness. However, I find that the learned trial magistrate was unfair in cancelling his bond suo moto without any breach of the conditions. Whenever the bond of an accused is cancelled, there must be sufficient reasons on the record to support the cancellation. In this case, there was none. The appeal will, however, not turn on this point.

10. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

    a. That there was penetration of the complainant's genitalia;

    b. That the accused was the perpetrator and

    c. The victim must be below eighteen years old.

11. This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR.

These, therefore, are the issues I will endeavour to establish whether the prosecution proved to the required standards.

12. In her evidence,BAO. (PW1) testified that she was fifteen. A copy of the Certificate of Birth that was produced as prosecution exhibit 4 indicates that she was born on the 6th day of May 2006. This means that she was fourteen years and seven months on the 13th day of December 2020. Her age, for Section 8(3) of the *Sexual Offences Act*, was therefore proved. Section 8(3) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

13. The complainant testified that she had been sent to Misambi Centre to buy foodstuff. On the way, she met with Edwin, who requested her to escort her somewhere. She obliged the request, and they went to Edwin's friend, Pascal, who was not known to her before this day. Edwin left her in Pascal's house. Later, Edwin and other Motorcycle riders went and arrested her and Pascal and took her to the Police Station. Later in her evidence, she said that Pascal had sexual intercourse with her.

14. On his part, Edwin Odipo (PW2) testified that while looking after his father's cattle, he met the complainant. He then tethered the cattle and followed her to the house of Pascal, the appellant. He left her there and went back to look after the cattle. When she took long, he went to inform her parents and assembled members of the public. They went and arrested the complainant and the appellant.

15. These two witnesses contradicted each other. Other than the contradictions in their evidence, his evidence does not make sense without explaining why PW2 followed the complainant. Equally, the evidence of the complainant does not make sense. Why would PW2 ask her to escort him to a stranger and leave her there? The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

These two witnesses have dented their credibility, and no reasonable tribunal should believe them. It would appear that the appellant may have been set up.

16. Samuel Juma (PW5), a clinical officer, adduced the medical evidence. His evidence was that the complainant was lured with money. This introduced another contradiction not testified to by the complainant. Upon his examination, he did not see any injury on the genitalia except that the hymen was broken and there was a whitish discharge. He, therefore, concluded that the minor had been defiled.

17. Broken hymen, unless bolstered by some other material evidence, cannot be the basis of a conviction. The Court of Appeal was of the same view in the case of *P. K.W v Republic* [2012] eKLR. It was observed as follows:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse.
>
> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born.

> In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with a hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The *Queen v Manuel Vincent Quintanila* [1999] AB QB 769."

The element of penetration was not proved.

18. There was insufficient evidence to enable the learned trial magistrate to conclude that there was defilement. The appellant's conviction was unsafe since there was no evidence of penetration, and the prosecution witnesses' evidence contained many contradictions.

19. From the preceding analysis of the evidence on record, I quash the conviction and set aside the sentence. The appellant is set free unless he is otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE