Juma v Republic (Criminal Appeal 15 of 2023)
[2024] KEHC 16949 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16949 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 15 OF 2023

F WANGARI, J

MARCH 15, 2024

BETWEEN

KASSIM KOMBO JUMA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. C.K Auka Resident Magistrate in Kwale SPMCSO No. 103 of 2019 dated 14th April 2022.

2. The Appellant was charged with 2 counts of defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars of the offence were that on 20th September 2019 at Diani Location of Kwale County intentionally he unlawfully caused his penis to penetrate the vagina of TAO, a child aged 14 years.

4. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded. The Trial Court considered the case and rendered the Judgement on 14th April 2022. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to 20 years imprisonment.

5. The Appellant, aggrieved, lodged this Appeal. The Appeal is substantially on the ground that the Trial Court erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt. Also, that the Trial Court did not consider mitigation by the Appellant before meting out the sentence that was excessive.

Evidence

6. At trial, PW1, the complainant's mother testified that the complainant was 14 years old and produced the birth certificate. It was her case that they were neighbors with the Appellant and when the Complainant was missing at home at about 8.00 p.m, they noticed and upon follow up found the complainant in the house of the Appellant.

7. It was her case that the complainant informed them that that the Appellant had forced her to have sex and that the medical report confirmed this fact.

8. PW2 was the minor. It was her case that she was going to the latrine at around 8.00 p.m on 20th September 2019 when the Appellant called her. She told the court that she used to fetch water at the Appellant's home at a cost and when he called her, she understood that he wanted to ask for the money for the water they had fetched. However, that the Appellant forced her into his house and defiled her.

9. PW3 was one BOO. It was his case that the complainant was his cousin and when they realized the complainant was not home, his aunt, the complainant's mother requested him to find out where the complainant was. They went and found her in the Appellant's house.

10. PW4 was the Medical Officer. He confirmed that there was a discharge from the vagina and the hymen was absent. He produced the P3 Form and treatment book.

11. PW5 testified that she was the Police Officer. She testified that the results of the investigations pointed to the Appellant as offender and they arrested him.

12. The Appellant also testified. It was his case that indeed the Complainant had brought him the money for the water that they had fetched. He was outside his house with the complainant and before he took the money, the complainant's mother and cousins arrived and alleged that he had defiled the minor.

Submissions

13. Directions were given for parties to file submissions. The Appellant filed submissions on 18th January 2024. It was submitted that there was no fair hearing because he was not supplied with prosecution's witness statements before the hearing. He cited the case of Kazungu Kitsao Yaa v R- (2017) eKLR. Based on this case, he submitted that as he was not supplied with the statements, so he was not accorded a fair trial and the conviction was erroneous.

14. The Appellant also faulted the trial court for finding that there was penetration. He submitted relying on the case of Jacob Odhiambo Omuombo v R (2008) eKLR that penetration was nit satisfactorily proved. I was urged to alter the conviction and interfere with the sentence. He cited Salim Kangu v R (2019) eKLR.

15. On the part of the Respondent, they filed submissions on 22nd January 2024. It was submitted that the court correctly found that the prosecution had proved its case as against the Appellant beyond reasonable doubt. Reliance was placed on the case of George Opondo Olunga v R (2016) eKLR to canvass the point that all the ingredients of age, penetration and identification were proved beyond reasonable doubt.

16. It was further submitted that there were inconsistencies in the evidence of the prosecution witnesses and the conviction was consequently safe. The court was urged to dismiss the Appeal.

Analysis

17. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.

18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

19. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

20. I note that the complainant testified that she was a minor aged 14 at the time of the alleged defilement. Age was properly proved vide the Birth Certificate and the Appellant has not disputed this fact anyway. The Complainant identified the Appellant by recognition. On my analysis of the evidence, there were no inconsistence in the evidence of the prosecution witnesses. The point of confluence which was crucial to establish and was well done beyond any doubt was that the complainant was found in the house of the Appellant. I find no reason to interfere with this finding which was supported by the evidence of the complainant, her mother and the two cousins who testified in court The prosecution also proved vaginal penetration to the required standard.

21. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

22. Whereas the Appellant submitted that penetration was not proved, I have no reason to doubt the evidence of the complainant as corroborated by the evidence of the medical doctor that there was penetration. On my re-evaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence.

23. I consequently have no reason to interfere with the finding of the Trial Court on conviction. I understand the Appellant submitted in detail that he was not supplied with the witness statements of the prosecution and so there was no fair trail on his part.

24. Unfortunately, this was never raised in the Trial Court. In fact, the Appellant remarked in court on 11th November 2019, during trial, that he was ready. It is first raised in this Appeal through submissions. I consider this submission to be an afterthought and dismiss it. The cases that the Appellant cited are all distinguishable.

25. On sentence, the Trial Court imprisoned the Appellant to 20 years. In any case the sentence should be proportional. The Court of Appeal in the case of Thomas Mwambu Wenyi v Republic (2017) eKLR stated as follows: -

> " A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence".

26. I have perused the pre-sentence report. I am also alive to the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.

    (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

    (g) the possibility of reform and social re-adaptation of the offender;

    (h) any other factor that the Court considers relevant

27. I am well guided that the Trial Court was not wrong in imposing a custodial sentence. However, I am inclined to reduce the sentence to 15 years, considering the age of 19 years and possibility of social preadaptation of the Appellant.

28. In the circumstances, I make the following Orders:

    i. The Appeal on conviction is dismissed.

    ii. The sentence of 20 years is set aside and replaced with 15 years' imprisonment.

    iii. The sentences shall consider the time spent in remand.

    iv. Right of Appeal 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF MARCH, 2024.

....

F. WANGARI

JUDGE

In the presence of: -

M/S Mwaura S.C for the State

Appellant present in person

Barile Court Assistant