Nzinzi v Republic (Criminal Appeal E093 of 2022)
[2024] KEHC 17202 (KLR) (31 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E093 OF 2022

TM MATHEKA, J

MAY 31, 2024

BETWEEN

PETER NZINZI ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal From the original conviction and sentence of Hon E. Muiru (PM) in Kilungu Principal Magistrate's Sexual Offence Case No. E028 of 2021 delivered on 22nd June 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8[1] as read with section 8[2] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 13th September 2021 at 0730hrs in Mukaa Sub-County within Makueni County, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital Organ of JM, a child aged 5 years.

2. In the alternative, he was charged with the offence of committing an Indecent Act with a child contrary to section 11[1] of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the same day, time and place, the appellant intentionally committed an indecent act with JM, a child aged 5 years by touching her genital organs.

3. Count II was Attempted Suicide contrary to section 226 as read with section 36 of the *Penal Code*. The particulars were that on 14/09/2021 at around 1200 hrs in Mukaa Sub-County within Makueni County, the appellant attempted to kill himself by taking poison namely Foliar Fertilizer [Booster], Insecticide [Alfa Degree 100EC].

4. The appellant pleaded not guilty and after a full trial, he was convicted on the charge of defilement and sentenced to 20 years imprisonment.

The Appeal

5. Aggrieved by that decision, the appellant filed a homemade appeal and raised the following grounds;

    1. That the trial magistrate gravely erred in law and facts in relying on suspicious and fictitious evidence of PW1 and without noting that PW1 was subjected to duress thus incriminating the appellant.

    2. That the trial magistrate erred in law and facts in relying on hearsay evidence adduced by prosecution witnesses and failed to note that the charges against the appellant were born out of malice and ill will.

    3. That the trial magistrate erred in law and facts in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubt without the benefit of properly conducted DNA required under section 2 of the SOA to ascertain whether or not the accused was linked with the commission of the alleged offence.

    4. That the trial magistrate gravely erred in law and facts in finding the appellant guilty as charged in absence of corresponding medical evidence of sexual activeness on the part of the appellant.

    5. That the trial magistrate failed to test the evidence of prosecution witnesses and caution the circumspection thereby convicting on flimsy, inconsistent evidence that was not water tight enough to warrant a conviction.

    6. That the trial magistrate erred in law and fact without observing that there were no substantive investigations by the I.O thereby basing the conviction on mere allegations and fabrication. He acted mala fides while handling the matter.

    7. That the trial magistrate erred in law and facts by failing to note that the I.O did a shoddy job in that his evidence was insufficient, fabricated and lacked probative values to justify a conviction, thus no eye witness testimony that a person was seen fleeing from the scene of crime and no fingerprints nor anything found linking the appellant with the commission of the alleged offence.

    8. That the trial magistrate erred in law and facts by shifting the burden of proof to the appellant in that it is trite law that an accused person should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence.

    9. That the trial magistrate erred in law and facts by failing to find that the prosecution had not proved its case beyond any reasonable doubt as required by law and also failed to scrutinize and evaluate the prosecution evidence therefore arriving at an erroneous decision.

    10. That the sentence imposed upon the appellant was harsh and excessive based on the circumstances and contravened the provisions of Article 47 of *the Constitution*.

Summary of the case before the Trial Court

6. The prosecution's case was that on 13/09/2021, the complainant's mother sent the complainant to get milk and the complainant took longer than usual. When she returned, her mother noticed that she had leaves on her back but the complainant was reluctant to say how the leaves had found their way there. The mother threatened to beat her and she disclosed that she had met with the appellant who

took her to the bush, laid her on the ground and slept on her. The mother escalated the issue to the police and the appellant was arrested.

7. The prosecution called 3 witnesses to wit; the complainant [PW1], the complainant's mother [PW2] and the Clinical Officer [PW3]. The exhibits produced were; Birth Certificate [P.Ex 1], P3 Form [P.Ex 2], PRC Form [P.Ex 3], Treatment Notes [P.Ex 4] and Appellant's Treatment notes [P.Ex 5].

8. The appellant was found to have a case to answer and was put on his defense. He elected to give sworn evidence and not to call any witness. He testified that he lived in Kitaingo and was a shamba boy. That on 14/09/2021 at 11am, two men arrived at his place of work and greeted him. He showed them what he was planting and they asked why the place smelt of alcohol. He told them that he doesn't consume alcohol. They asked whether he knew where alcohol is sold and he told them that he couldn't as he did not want to put himself in trouble. They told him that he would carry the cross and handcuffed him. He was taken to Kilome police station and locked up. The following day, his fingerprints were taken and he was then taken to court.

9. On cross examination, he said that he was arrested for no reason. That the complainant was not known to him but he had an issue with the mother as they were friends for some time. That they separated three years ago. That he saw the child in court. Further, he said that the mother used to go to his place but he never used to go to her home

10. The parties elected to canvass the appeal through written submissions and appropriate directions were given.

The Submissions Submissions by the Appellant

11. The appellant submitted that he was convicted despite various contradictions and inconsistencies during the court proceedings. He relied on the case of William Slaney v State of Madhya Pradesh [AIR 1956 Madras Weekly notes 391] where the Supreme Court of India stated that;

> " Whatever the irregularities, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of the guilty as much as the protection of the innocent.."

12. He submitted that penetration was not proved beyond reasonable doubt. Relying on section 2 of the *Sexual Offences Act* and the Oxford Learners Dictionary, he submitted that penetration is the act of putting something inside something else. That the penis is required to have been put inside the vagina partially or wholly. He contended that in this case, there is absolutely no evidence which could prove any kind of insertion. He submitted that the complainant did not respond to the prosecution's questions and wondered whether her mother was used as an intermediary. He submitted that the trial was conducted in an unconstitutional way and was prejudicial to him. He contended that PW1 was being forced to testify what she never knew and her evidence was not voluntary.

13. He submitted that the investigations officer did not testify in court and did not supply him with the investigations diary. He contended that a minister of justice and public prosecution must place all evidence before court regardless of whether it supports or weakens the case.

14. He submitted that according to the evidence of the clinical officer, PW3, there was attempted defilement which is a different charge from that of defilement. That he [appellant] was also examined by PW3 who testified that there was nothing significant to assist in the case. He submitted that PW2 talked about wetness and whitish stuff on the minor's private parts but PW3 did not establish the same.

He contended that if indeed he committed the offence, PW3 would have established some fluid from him.

15. He submitted that his father was supposed to be called to ascertain if he was called to reconcile the dispute between PW2 and 1. That even the officer who accompanied PW2 was not availed as a witness. He contended that whenever the name of a person is mentioned in a trial, the person should be availed to give his evidence in court.

16. He submitted that the dirty clothes and inner pants were supposed to be availed as exhibits and relied DPP v Marias Pakine Tenkewa T/A Naresho Bar Restaurant [2017] eKLR; submitted that the evidence of PW2 rested on suspicion as she said that the minor took a long time compared to other times. He relied on Dhalay v R; Cri. App C.A No. 10 of 1997 where the Court of Appeal held that; "Suspicion cannot and should never form a basis of conviction." He also relied on Thomas Patrick Gilbert Cholmondeley vR; Crim Appeal No. 116 of 2007 pg 7 where the court stated'

> " The duty of a prosecutor acting on behalf of the republic is not to secure convictions at all costs but to be a minister of justice i.e to help the court to arrive at a just and fair decision in the circumstances of each case. Any prosecutor who sees his or her duty as being to secure convictions misses the point."

17. He submitted that the minor's evidence was that something bad was done to her and contends that it does not elaborate expressly that the minor was penetrated by him.

18. He submitted that the evidence of a minor required corroboration and relied on Benard Kebiba v R [2017] eKLR where the court stated;

> " The importance of section 124 of the *Evidence Act* is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated notwithstanding the voire dire examination of the child under section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is speaking nothing but the truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction without corroboration of the complainant's evidence."

19. He submitted that there was no corroboration as the evidence of the prosecution witnesses was contradictory and urged this court to be guided by the case of Sims [1946] KB 531, Pg 539 where the court stated that; "Whenever there is a plea of not guilty, everything is in issue and the prosecution has to prove the whole of their case including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent."

20. He submitted that the reasons for the amendment of section 124 of the *Evidence Act* are detailed in J. Heydon Evidence Cases London 1984 and they are; [1] that a child's power of observation and memory are less reliable than adults, [2], children are prone to live in a make- believe world so that they magnify incidents which happen to them, [3], children are egocentric and can be easily influenced by adults and other children, [4], a police officer taking a statement from a child may, without ill will, use leading questions so that the child tends to confuse what actually happened with answers suggested, [5], children have little notion of duty to speak the truth.

21. He submitted that scientific and medical evidence has proved that some girls are born without the hymen. That sometimes, the hymen is broken by other factors other than sexual offences. He contended that if the trial magistrate had not attached undue and undeserved weight to the state of

PW1's hymen, she would have been less confident about the strength of the prosecution case. He relied on the case of PKW v R [2012] eKLR where the court held that;

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the 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 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 natural tearing of the hymen."

22. The appellant relied on Ng'ang'a v R [1981] KLR 483 and Bukenya & Others v Uganda [1968] E.A 123 for the submission that when the prosecution fails to call up material witnesses, they do so at their own risk and an adverse inference will be drawn that the evidence of such material witnesses, if called would be adverse to the prosecution.

Submissions by the Respondent

23. The State, through Prosecution Counsel Vincent Maina, submitted that in order to secure a conviction on a charge of defilement, the prosecution must prove all the ingredients i.e identification or recognition of the offender, penetration and the age of the victim.

24. He submitted that the age of the complainant was proved through production of a birth certificate indicating that she was 5 years old at the time of the incident. He submitted that the element of penetration was proved beyond reasonable doubt by the testimonies of PW1, 2 and 3. Further, he submitted that the appellant was a person well known to the minor as she identified him by name. That according to PW2, the appellant was a cousin to her husband hence he was a familiar person. He submitted that there was no margin of error as to the identity of the assailant.

25. Relying on section 8[2] of the *Sexual Offences Act*, he submitted that the sentence is illegal and prejudicial to the victim. He submitted that the trial court should have imposed a life sentence on the appellant and relied on Obadiah Kiriabu Magara v R; Criminal Appeal No. 16 of 2022 where the Court of Appeal stated;

> " The appellant was convicted of the offence of defilement contrary to section 8[1][2] of the *Sexual Offences Act*. The provision of the law prescribes a sentence of life imprisonment for the offender who defiles a minor aged 11 years or below..."

26. He submitted that section 354[3] of the *Criminal Procedure Code* empowers the High Court to enhance or alter the nature of a sentence imposed by the trial court and that the appellant has prior notice of their application for enhancement of sentence. He urged the court to enhance the sentence.

Appellant's Supplementary Submissions

27. In rejoinder, the appellant opposed the application for enhancement of sentence and submitted that the charge sheet was defective for being at variance with the evidence adduced. He relied inter alia on the case of Yongo v R [1983] eKLR 319 where the court stated; "In our opinion, a charge is defective

under section 214 [1] of the CPC where..... [b], it does not, for such reason, accord with the evidences given at trial..."

28. He submitted that according to the charge sheet, the offence happened on 13th but PW2 talked about 14th. He contended that the phone he used to call PW2 asking for forgiveness was not introduced to court. Further, he contended that there was a pre-meditated plan of a cartel of people which was organized with an agenda to victimize him. He cited Joseph Ndungu Kimanyi v Republic [1979] eKLR where the court held that; "The witness in a criminal case should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his or her evidence."

Duty of Court

29. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses [Okeno v R [1972] EA 32].

30. Having looked at the grounds of appeal, the rival submissions and the entire record, it is my considered view that the following issues arise for determination;

    1. Whether the charge sheet was defective;

    2. Whether the case was proved beyond reasonable doubt.

Analysis

Whether the charge sheet was defective

31. The appellant argued that the Clinical Officer testified about attempted defilement yet he was charged with defilement. The Clinical Officer [PW3] testified that; "On examination of genitalia, the hymen was perforated partially. I concluded that there was an attempted defilement."

32. According to section 8[1] of the *Sexual Offences Act*, a person who commits an act which causes penetration with a child is guilty of the offence termed defilement. The same Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

33. On the other hand, section 9[1] of the *Sexual Offences Act* provides that 'A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement'. Consequently, the evidence of PW3 points towards partial insertion of the minor's genitalia which falls within the definition of the word penetration hence there is no variance between his evidence and the charge of defilement.

34. The offence of attempted defilement is concerned with overt acts which would cause penetration and PW3's understanding of the same may not be legally sound. Consequently, the appellant cannot use PW3's evidence as a yardstick to argue that the charge sheet was defective.

35. Section 134 CPC provides as follows;

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

36. The charge as drawn contains a statement of a specific offence, namely defilement and the particulars given informed the appellant that he was being accused of causing his genital organ to penetrate the genital organ of a child aged 5 years intentionally and unlawfully. The charge is therefore sufficient.

Whether the case was proved beyond reasonable doubt.

37. The ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.

38. With regard to age, the complainant's mother testified that the complainant was born on 19/06/2016 and the birth certificate [P.Exh 1] confirmed the date. The minor was therefore 5 years and about 3 months on the date of offence.

39. With regard to identification, the minor complainant testified that; "Nzinzi did something bad to me" and her mother [PW2] testified that the appellant is a cousin to her husband. The appellant confirmed that PW2 was known to him as they were friends for some time. It is therefore evident that the appellant was not a stranger to the complainant's family despite his evidence that the complainant was not known to him. I will consider whether the appellant was positively identified as the culprit in the next issue.

40. As to whether there was penile penetration of the complainant by the appellant, the record shows that on 13/10/2021, the minor was stood down as she was crying terribly and was completely overcome with emotions. On 17/11/2021 when she was recalled, her brief unsworn evidence was that; "My name is Judy Mwende Muoki. I go to Kilea Primary School. Nzinzi did something bad to me." After that, the record shows that the minor remained mum and did not respond to the prosecutor's questions. Consequently, the prosecutor applied to call the minor's mother who gave a long account of what she had been told by the minor.

41. It is obvious that the minor was a vulnerable witness because of her age and we have provisions in our laws with regard to how such witnesses can be protected. Article 50 [7] of *the Constitution* provides that:-

> " [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."

42. Section 125 of the *Evidence Act* provides that;

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease [whether of body or mind] or any similar cause."

43. Further, Section 31 [2] of the *Sexual Offences Act* [the Act] provides that:-

    1. 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 –

    2. age

3. intellectual, psychological or physical impairment;
4. trauma
5. cultural differences
6. the possibility of intimidation
7. race
8. religion
9. language
10. the relationship of the witness to any party to the proceedings
11. the nature of the subject matter of the evidence; or
12. any other factor the court considers relevant

44. Further, Section 2 of the Act defines an intermediary to mean "...a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.

45. In our case, unfortunately, the minor was not declared a vulnerable witness and no intermediary was appointed for her. That means that PW2's evidence was hearsay and therefore inadmissible. In Kinyatti v R [1984] eKLR the Court of Appeal held;

> "Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay is that a statement other than the one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.
>
> 1. To that extent therefore, hearsay evidence cannot corroborate any other evidence and I am of the view that the trial court erred by stating; "The Court observed that the minor was a child of tender years but her mother's testimony corroborated her testimony."
>
> 2. It is my considered view that a mistrial happened right there where the victim's testimony was left out while the court proceeded to entertain inadmissible evidence. I am fortified in my finding by the one in Republic v Edward Kirui [2014] KLR where the Court of Appeal, dealt with a different irregularity namely, the non-compliance with Section 169 [3] of the *Criminal Procedure Code* and declared a mistrial. The court cited the definition of mistrial in Black's Law Dictionary [9th Edition] as:
>
> > "a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."

46. No harm would have occurred if indeed the minor would have been allowed time to heal through appropriate psychosocial support and to come back to testify. For the life of me I cannot understand this degree of impatience, and flagrant overlooking of the law. The appellant never got to hear what the complainat had to say about the alleged offence and the complainant whom the court had found capable of giving evidence was not given the opportunity to do so. The court itself failed to follow the proper procedure for the appointment of an intermediary. The fact that the child was not responding to questions by the prosecutor at that time was not a good reason to deny her the opportunity to testify. The court failed her by not giving her time to compose herself and to give testimony. For this reasons I quash the conviction and set aside the sentence.

47. Should this court order a retrial. The applicable principles were restated by the Court of Appeal in Pius Olima & Another v Republic [1993] eKLR as follows:

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic [1964] EA 481; Manji vRepublic [1966] EA 343; Mujimba v Uganda, [1969] and Merali & Others v Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

48. In the same vein in Richard Charo Mole v Republic [2010] eKLR and Joseph Macharia Miano & Others v Republic [2009] eKLR, the Court of Appeal allowed a retrial notwithstanding the fact that the Appellants therein had served 17 and 8 years in prison, respectively. The court considered the serious nature of the charges, in both cases robbery, the weight of potentially admissible evidence, the nature of the irregularities and who was responsible – the court or prosecution – for the same, as well as the interests of justice

49. It is my view, considering the nature of the offence, the vulnerability of the witness and the interests of justce it is only faiar that the victim and the accused get their fair day in court,

50. In the circumstances I will not go into the merits of the offence but direct that a retrial do on the 1st count take place.

51. The matter be placed before the Magistrate in Charge, Kilungu Law Courts for hearing and determination, and who shall take care to ensure proper psycho social support for the victim through the P&C file.

52. The appellant be produced before the SPM Court in Kilungu within 7 days hereof for retrial on or before the 7th June 2024.

5. The bond terms be determined by the trial magistrate

DATED SIGNED AND DELIVERED IN OPEN COURT, THE APPELLANT BEING PRESENT, THIS 31ST MAY 2024.

MUMBUA T MATHEKA

JUDGE.

NB: paragraphing distorted by the system

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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