JOM v Republic (Criminal Appeal 183 of 2019)
[2023] KECA 1406 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1406 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 183 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

JOM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence from the judgment of the High Court of Kenya at Kisumu (F. Ochieng, J.) dated 12th June 2019 in HCCRA No. 89 of 2018)

JUDGMENT

1. The appellant, JOM, was convicted in the Senior Resident Magistrate's Court at Tamu on a charge of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006; and sentenced to serve life imprisonment. The case against him was that on July 19, 2018 in Muhoroni Sub - County within Kisumu County he caused his penis to penetrate the vagina of MKM a child aged 8 years old. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same statute.

2. The evidence presented at the trial was that the minor, who lived with her aunt, was playing within the compound when the appellant who used to herd cows therein, called her aside; ordered her to remove her panty, before removing his trousers and defiling her. She complained to the appellant that he was hurting her, and he, in turn, warned her not to inform anybody, otherwise he would kill her. In fear, she dressed up, and, upon realizing that she was bleeding from her vagina she washed herself and went to bed without informing her aunt. The pain in her genitalia persisted, and ultimately her aunt, RMO (who testified as PW2), noted an abnormality in her gait, and demanded to know what had transpired. That is when the minor disclosed what the appellant had allegedly done.

3. In his sworn defence, the appellant confirmed that he used to herd cattle at the place where the incident allegedly took place; and explained that it was usual for the minor's aunt to give him casual work in

her compound; that at a particular instance he performed some work for her, but did not receive his pay, and had to persistently ask for the balance of payment for work done; and that this seemed to have generated some ill-will. He was surprised later at his arrest.

4. Relying on the contents of the travel document, and the age assessment done by Jared Okoth Olala, the Clinical Officer, PW3, the trial court found that it proved the complainant was a child aged 8 years and 9 months at the time of the incident. The trial court also found that defilement was confirmed by the evidence of PW2 who noted the odd gait adapted by the chid, and a physical examination which revealed lacerations in her vagina; and fortified by the medical evidence which confirmed that the complainant's vagina was inflamed and reddened; the hymen was missing; and laboratory results revealed the presence of pus cells and a sexually transmitted infection. The court further concluded that there was no possibility of mistaken identity since the evidence placed the appellant at the scene, and his conduct implicated him as he had previously complimented the minor's beauty, and even told her he would marry her in the future. His defence that the whole incident stemmed from his demand for unpaid dues was dismissed as unbelievable.

5. Being dissatisfied with the outcome, the appellant appealed in Kisumu High Court Criminal Appeal No 89 of 2018 on grounds that: the trial court failed to consider that the prosecution evidence was not well corroborated to support a conviction; no medical evidence was produced to ascertain that he was the perpetrator, yet samples were taken from him; and that the defence statement was not given due consideration.

6. In dismissing his appeal as lacking merit, the learned Judge held that the age of the complainant herein was proved to be six (6) years, proved through her travel document issued on May 2, 2018, as well as the medical age assessment, which was conducted by the medical officer; and the act of penetration was proved through the results of the medical examination, which disclosed an inflamed vagina with lacerations, a hymen that was not intact, and urine which had blood cells and pus.

7. The learned Judge noted the appellant's argument that the medical examination absolved him from the incident as the complainant had a sexually transmitted disease yet the appellant did not; and that whereas the appellant was HIV positive, the minor turned to be negative and reasoned as follows:

> " Ordinarily, when a person has engaged in sexual activity with another person, the results of medical tests would show that the two persons had similar sexually transmitted diseases, if one of them had had such disease prior to the sexual activity. However, that is a generalized statement, which has not been shown to be applicable in most cases. There is no evidence before the court to demonstrate that if the appellant was HIV positive, the complainant would definitely be HIV positive after engaging in sexual activity with the appellant. Therefore, whilst the medical reports may not have linked the appellant to the defilement of the complainant, I find that the complainant had positively recognized the appellant."

8. The appellant is still aggrieved by this outcome, and filed this second appeal stating that the two courts erred in law in failing to find that the appellant did not penetrate the complainant; the two courts erred in law in failing to weigh the conflicting evidence; the trial court and the first appellate courts erred in law in failing to dislodge the appellant's alibi defence and disregarding the same without giving cogent reasons; the two courts erred in law in failing to observe that the mandatory nature of the sentence under section 8(2) of the *Sexual Offences Act* No 3 of 2006 is unconstitutional and not warranted on plea.

9. In arguing that penetration was not proved, the appellant invites us to consider the findings in the medical examination report dated June 22, 2018 which confirmed that the complainant was HIV

negative, but had a sexually transmitted infection, whereas his medical examination report dated June 26, 2018, indicated that apart from being HIV positive, he did not have a sexually transmitted infection. On the basis of these two reports, it is the appellant's submissions that since HIV is transmitted during sexual intercourse by direct contact of seminal fluids of the two parties, in the case at hand, given the injuries noted on the complainant's genitalia, then all those clinical indications enhanced the chances of getting infected with HIV and left no chance of escaping infection unless post exposure prophylaxis (PEP), was administered within 3(three) days immediately after the sexual activity – which was not the case here. That the only rational conclusion to make is that the appellant was not the one who penetrated the victim (minor) in addition, the prosecution did not state that there was use of a condom. The upshot is that, as far as medical findings are concerned, penetration may have been established, but there was nothing to link it to the appellant, hence a reasonable doubt had already been created which ought to have been resolved in his favour.

10. Drawing from the decision in *R v Johnson* 1961 3A II ER 969 in which the general principle of the law applicable to the defence of alibi the appellant argues that his alibi defence was never dislodged, and the two previous courts simply elected to ignore that defence.

11. The appellant also submits that the two courts erred in law in failing to observe that the mandatory nature of the sentence under section 8(2) of the *Sexual Offences Act* is unconstitutional in light of recent decisions of the superior courts that such sentences under the *Sexual Offences Act* deprive a convicted person of the right to a less severe sentence (unlike other offenders); and amounts to discrimination contrary to article 27 of the *Constitution* of Kenya 2010, as it forces courts to impose sentences which are pre-determined. In support of this argument, the appellant refers to *Julius Kitsao v Republic* Criminal Appeal No 12 of 2021 at Malindi where the court [Lesiit, Nyamweya & Odunga, JJA] held that:

> " indeterminate life sentences, ... denies a convict facing life imprisonment the opportunity to be heard on mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before ... "

12. The appellant points out that although the learned trial magistrate while delivering the judgement acknowledged his mitigation, he nonetheless stated that his hands were tied by law under section 8(2) of the Act; that the first appellate court was silent on the issue; he thus urged that as the second appellate court we exercise our discretionary powers and interfere with the sentence.

13. In opposing the appeal, the respondent submits that the three ingredients necessary to prove the offence of defilement, as was discussed in the case of *George Opondo Olunga v Republic* [2016] eKLR, was that the ingredients of an offence of defilement namely: identification or recognition of the offender, penetration and the age of the victim, were proved. It is pointed out that the appellant's presence in the home squarely placed him at the scene where he gained access to the complainant who was playing at the verandah; that he was well known to the minor; that age was proved using information from the minor's copy of travel documents; and penetration was proved by the complainant's graphic description regarding how the appellant defiled her, and confirmed by the medical evidence.

14. It is also argued that there is no illegality on the sentence as the same was pegged on a statutory provision anchored on the constitutional provisions.

15. This being a second appeal, our mandate is conferred by section 361(1) (a) of the *Criminal Procedure Code*, which provides:

(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section - on a matter of fact, and severity of sentence is a matter of fact.

16. Indeed, our jurisdiction on a second appeal, as is the case here, has been the subject of various judicial pronouncements in various cases, for instance in *Stephen M'Irungi & another v Republic* [1982-88] 1 KAR p360 the Court held that

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

17. We also acknowledge what this court stated in *Samuel Warui Karimi v Republic* [2016] eKLR:

> " This is a second appeal and this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings..."

18. We thus confine ourselves to the points of law raised in this appeal, including the question as to: whether the trial court and the High Court acted on wrong principles of law in making the findings that the ingredients of the offence were proved against the appellant; and whether the concurrent findings of fact in the two courts on the life sentence was unconstitutional; and the subsequent decision to dismiss his first appeal.

19. From the evidence of the complainant, coupled with the medical findings, the elements of penetration were well laid out, not just by her graphic description of intrusion into her genitalia, but also fortified by the medical evidence presented, such as to confirm that without a doubt, the minor was involved in a penetrative sexual encounter. The presence of the appellant at the place where the offence was said to have occurred; and his encounter with the complainant, was confirmed by his own evidence.

20. The point of departure, and the pivotal issue in this appeal, rotates around the question as to whether that evidence linked the appellant to the offence, courtesy of the medical evidence regarding his health status visa vis that of the complainant. Whilst we can easily take judicial notice of the fact that scientific research has been shown that an unprotected sexual encounter with a person who has the Human Immunodeficiency Virus (HIV) predisposes one to a very high risk of infection, such encounter will not necessarily produce a 100% infection outcome- See for instance Indian Journal of Dermatology, [2013] *Discordant HIV Couple: Analysis of the Possible Contributing Factors*; BC Ravikumar and Poornima Balakrishnal.

21. This state of affairs is linked to a variety of factors including low viral loads or the presence of replication-defective virus strains in the primary partner resulting in discordant partners, HIV-specific antibodies or cells that are capable of inhibiting infection and/or viral spread. We also take note that there is a period of incubation before the infection can be detected, so that the 12 days examination, would not be adequate for seroconversion (that is, the period during which the body starts producing detectable levels of HIV antibodies).

22. This brings in the second aspect, the sexually transmitted infection which was detected in the complainant, but not found on the appellant following the medical examination. The appellant's argument is that if, indeed, he was the one who had penile penetration of the minor, then he, too, ought to have been found with the same condition. He pegs this to the statement attributed to PW3 who told the trial court that:

> " ... laboratory findings showed that her urine had blood cells and pus cells. It showed that she had a sexually transmitted infection ... "

23. Against this background, we have read through the record the P3 form dated June 26, 2018 relating to MKM that was issued by Koru Police Station, and which was produced as an exhibit, and therefore forms part of the record of appeal. Section C ascribed to "Female Complainant" paragraph 2(a) of the form relates to a physical description of the injuries, genitalia and the conclusion whish reads as follows:

a) Noted difficulty in walking with pain.

b) No bleeding but noted inflammation of labia minora and reddening.

c) Hymen not intact.

d) Noted whitish discharge on the external genitalia.

e) No presence of venereal disease (Emphasis ours).

This is the same information recorded in the complainant's General Out-patient Card issued at Muhoroni County Hospital- which was the first port of call for medical attention. It reads as follows:

a) HVS [which means High Vaginal Swab] RBC [Red blood cells] seen, an indication of bleeding, E-cells these are the epithereal cells found in the vaginal lining.

b) PITC – N/R [PITC means Provider Initiated HIV Testing and Counselling while -N/R means Non-Reactive (Negative)]

c) Urinalysis simply confirmed RBC [red blood cells- therefore a sign of bleeding].

d) VDRL- a test for venereal diseases also posted N/R (Non-Reactive results)

We take note that the medical field has a wide variety of disciplines, ranging from clinical medicine, research, pharmaceutical, immunology and pathology, so it is not easy to find a one-source-fits-all text book for all terminologies and abbreviations, but for starters the following are useful text:

a) *Medical Terminology: A Quick & Easy Reference Book – Basics of Terminology, Anatomy, and Abbreviations*.

b) *Harrison's Principle of Internal Medicine* (21st Edition) Loscalzo, Fauci, Kasper, Hauser, Longo, Larry Jameson.

c) See also: *Mastering Healthcare Terminology* -7th Edition; Author: Betsy J. Shiland 2023.

24. It is therefore misleading for the appellant to consistently wax lyrical about the complainant having had a sexually transmitted infection, yet the medical reports loudly announce otherwise, and do not support the statement that the minor had a sexually transmitted infection. It would seem that the appellant's arguments are entirely based on the testimonial words of PW3 who appears to have said that the complainant had a sexually transmitted disease. Given the explicit information in the two medical documents from which PW3's testimony was based, that part of PW3's testimony is either an error in recordation or the witness simply misspoke. The medical documents produced in evidence are

categorical that the complainant did not have a sexually transmitted disease at the time she was tested. Indeed, the learned judge, on appeal, did take into account the argument regarding his HIV status vis a vis the complainant's negative status, and reached a scientifically sound conclusion. We thus find no error on any principle of law as regards conviction, and the same is upheld.

25. In relation to sentence Odunga, J (as he then was), pronounced himself in the case of *Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR while acknowledging the need to condemn the perpetrators of sexual violation; and the good intentions of the drafters of the *Sexual Offences Act* in curbing the menace of sexual offences and the trauma it causes to the victims of the said offence, nonetheless pointed out that the sentences to be imposed must meet the constitutional dictates. Odunga, J frowned upon minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing as they are not in tandem with the *International Covenant on Civil and Political Rights* of 1966, which Kenya ratified in 1972 and which at its article 10(3), stipulates that—

> " [t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

In the cited case, the learned Judge was of the view that an indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. This approach was replicated by this court by a differently constituted bench, in the case of *Julius Kitsao* (*supra*).

26. In the present case, before the pronouncement of sentence, the appellant tendered his plea in mitigation, telling the trial court that:

> " I seek forgiveness. I am an orphan, and sickly, I am likely to lose my life in prison. I take care of my siblings, I am asking court for assistance. I didn't commit the offence"

The trial court in pronouncing the mandatory life sentence, took note of the nature of the offence, and pointed out that the court's hands were tied under the Act. On appeal, the High Court did not address the issue regarding sentence. Since there was already a plea in mitigation, we are of the view that it equips us with sufficient information to consider the propriety of the sentence; and this matter need not go back for resentence hearing. Apart from the trauma that the complainant underwent, there was the risk that the appellant, whose medical record not only confirms that he is HIV positive, but was well aware of his status, exposed the complainant to HIV infection. In our view, the life sentence was well deserved, but in light of the emerging jurisprudence that even a life sentence ought to be determinate, we set aside the life imprisonment; and order that the life sentence shall translate to a determinate term of 30 (thirty) years imprisonment. The sentence will be computed to begin on June 26, 2018 since the appellant has been in custody since then. It is only on that aspect that the appeal succeeds.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

ANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR