EMK v Republic (Criminal Appeal 23 of 2017)
[2023] KECA 1548 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1548 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 23 OF 2017

K M'INOTI, F SICHALE & FA OCHIENG, JJA

DECEMBER 15, 2023

BETWEEN

EMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Naivasha, (Meoli J), dated and delivered on 13th April 2017) In HC. CRA NO. 71 OF 2015)

JUDGMENT

1. EMK (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court at Naivasha which he had lodged against his conviction and sentence by the Chief Magistrate's Court in Naivasha (Hon P. Gesora CM), for the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on diverse dates between 17th August 2013 and 17th October 2013 at (particulars withheld) he intentionally caused his penis to penetrate the vagina of JN a child aged 15 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the *same Act*. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of JW, a child aged 15 years.

4. The appellant denied the charges after which a full trial ensued.

   The State called a total of 5 prosecution witnesses while the appellant elected to give an unsworn statement and called no witness.

5. In a judgment delivered on 7th May 2015, (Hon. P Gesora CM), found him guilty of the main charge and convicted him of the same and sentenced him to serve 20 years' imprisonment.

6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and *vide* a judgment delivered on 13th April 2017 Meoli J, found the appeal to be devoid of merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

7. Unrelenting, the appellant has now filed this appeal *vide* a Notice of Appeal dated 20th April 2017 and undated supplementary grounds of appeal raising the following grounds of appeal;

   "a. That the entire trial was a mistrial because the learned trial magistrate erred in law by misdirecting himself in permitting the conduct of the prosecution of the case against the appellant to be conducted by police inspector, an unauthorized persons contrary to Article 157 of the 2010 Kenya *Constitution*.

   b. That the entire trial was a mistrial because the learned trial magistrate and the first appellate court judge erred in law by failing to find that the incompetent prosecutors failed to understand the law relating abortion (sic) contrary to Article 26 of the Kenya *Constitution*.

   c. That the learned High Court judge erred in law by failing to find that the entire trial was a mistrial and a grave failure of justice arose because the appellant's defence was not examined at all by the incompetent prosecutors, the question of DNA test on the aborted child was not examined at all. (Sic).

   d. That the learned High Court judge erred in law by failing to consider prosecutorial competence and the ensuring mistrial. (Sic).

   e. That the learned High Court judge erred in law by failing to consider the time spent in remand custody prior to conviction and sentence as provided for under Section 333 (2) of the *CPC*."

8. The relevant facts in this appeal as appears from the testimony of the prosecution witnesses are as follows: JW was PW1 and the complainant in this case. It was her evidence that on 17th August 2013, at about 5PM, she was at her home with her siblings and that her mother had travelled to Nyeri when the appellant who was her stepfather came and found her undressing. He held her by force on the shoulders and removed all her clothes and covered her mouth and proceeded to defile her.

9. She subsequently informed her brother (PW2) what had transpired and her brother in turn called her mum who came on a Saturday. JW informed her what had transpired and the matter was reported at Gilgil police station. It was her further evidence that after the incident, the appellant came back home on 17th October 2013 and defiled her twice. She was later taken to Gilgil district hospital for examination.

10. GM testified as PW2. He was 7 years old. It was his evidence that there was a day when her mum (PW3) was not at home and that at night while sleeping with PW1, PW1 left their bedroom and went to sleep with the appellant on PW3's bed until morning.

11. EWG testified as PW3. It was her evidence that on 17th August 2013, she had travelled to Nyeri and had left her children with the appellant and that when she arrived home, PW2 told her that PW1 had not slept with him but had slept with "uncle" (the appellant). She then asked PW1 where she had slept and PW1 told her that she had slept on her bed. That, eventually PW1 told her that they had sex once with the appellant and that further she was expecting the appellant's child. She later proceeded to Gilgil police station where she recorded her statement and PW1 was taken to hospital where it was confirmed that she was pregnant.

12. PW4 was Kinyeru Esther a medical doctor attached to Gilgil district hospital. She produced a P3 Form in respect of PW1 who had a history of having been defiled by her father. It was her evidence that PW1

came to hospital two months after the date of the alleged defilement (She saw her on 23.10.2013) and she did not note any injury on her genitalia and neither was there discharge but the hymen was broken. She further confirmed that PW1 was 13 weeks pregnant.

13. PW5 was Evans Mogaka a police officer attached to Gilgil police station. It was his testimony that on 20th October 2013, he was in the office when he received a report of defilement from PW1 and PW3 who reported that the appellant had defiled PW1 when PW3 had travelled to Nyeri. He subsequently recorded their statements and referred PW1 to hospital.

14. The appellant in his defence gave an unsworn statement and called no witnesses and testified that he was surprised to get information that the police were looking for him. He contended that he had slept in his friend's house when his daughter called him and told him that his wife was with another man and that he chased away his wife and in the process he got arrested and charged.

15. When the matter came up for plenary hearing on 20th September 2023, the appellant who appeared in person and who had initially withdrawn the appeal *vide* a letter dated 12th January 2023, backtracked and opted to proceed with appeal after Mr. Ondimu learned counsel for the State conceded the appeal on account of the credibility of the prosecution witnesses. Mr. Ondimu relied on his written submissions and digest of authorities dated 16th August 2023, whereas the appellant relied on his undated written submissions.

16. It was submitted by the appellant that his prosecution was all along conducted by police inspectors and that pursuant to Article 157 of the *Constitution*, the Inspector General of Police and the Director of Criminal Investigations had no power to prosecute or appoint a public officer of the rank of inspector of police to be a public prosecutor.

17. He further submitted that the medical evidence did not confirm that PW1 had been defiled and impregnated and that the only evidence of defilement and pregnancy was that of PW1 herself and further, that no DNA was conducted.

18. On the other hand, the respondent raised the issue of the credibility and reliability of the prosecution witnesses and submitted that PW1 claimed that the defilement occurred on two diverse occasions i.e. 17th August 2013 and 17th October 2013 while PW3 stated that PW1 told her that the defilement occurred once.

19. It was further submitted there was no evidence as to what exactly happened to the pregnancy and that there was no indication that DNA was ever carried out to confirm whether the pregnancy was as a result of the defilement; that the defilement was said to have occurred on two diverse dates i.e. 17th August 2013 and 17th October 2013, but the medical report was carried out two months later (on 23.10.2013); that even upon being issued with the P3 Form, medical examination took place two days later and questions abound as to whether there were any intervening circumstances for the period of two months and that reasons for this delay had not been explained.

20. It was further submitted that the onus was on the prosecution to tie or connect through evidence, the penetration of PW1 to the appellant. It was thus submitted that based on the delay in reporting and the medical examination thereof, there was need to ensure that DNA was carried out and that in light of the above, there were doubts whether the act of defilement was actually committed by the appellant.

21. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider

only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

22. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court 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. (See also *Chemagong v Republic* [1984] KLR 213)."

23. Having carefully gone through the record, we are of the view that the following 4 main issues arise for our determination;

    a. Whether the learned trial magistrate erred in law by misdirecting himself in permitting the trial to be conducted by police inspectors who were unauthorized persons contrary to the provisions of Article 157 of the*Constitution*.

    b. Whether the learned judge erred in law in failing to note that DNA was not conducted.

    c. Whether the learned judge erred in law in failing to note that the appellant's defence was not considered.

    d. Whether the learned judge erred in law in failing to consider the time spent in remand by the appellant prior to conviction and sentence as provided under Section 333 (2) of the Criminal Procedure Code.

24. With regard to the first ground of appeal, we have gone through the entire record and indeed the same shows that that the trial was conducted by Inspectors Nyambache, Muniko and Mutua as rightly contended by the appellant. It is instructive to note that the appellant did not raise this issue during the trial or in his first appeal before the High Court.

25. The record shows that the appellant's trial commenced on 28th October 2013, while the *Office of the Director of Public Prosecutions Act* No 2 of 2013 came into force on 16th January 2013, having been assented to on 14th January 2013. The Act had therefore taken effect as the time that the appellant was being tried.

26. Section 57 of the Act provides for savings, transitional and consequential provisions of the Act. Section 57 (1) (c) thereof provides;

    "(c) All Public Prosecutors appointed under the *Criminal Procedure Code* Chapter 75 of the Laws of Kenya or whose appointments were done pursuant to operation of any other law shall upon a notice to be issued by the Director under this Act cease to be Public Prosecutors." (Emphasis ours).

27. In the instant case, there is nothing to show that there was a notice issued by the Director pursuant to which Inspectors Nyambache, Muniko and Mutua ceased to be prosecutors. The contention by the appellant that the said inspectors were not authorized persons within the meaning of Article 157 of the *Constitution* is therefore not supported by any evidence.

28. Consequently, we find no merit on this ground of appeal which we dismiss in its entirety.

29. The learned judge was further faulted for failing to note that DNA was not conducted. It was the appellant's submission that the prosecution did not prove beyond any reasonable doubt that PW1 was indeed defiled and impregnated by him.

30. PW1 who was the complainant in this case testified that on 17th August 2013, her mother was away in Nyeri and she was at home with her brother (PW2), when PW2 went outside to play and the appellant who was her step father entered in the house and held her by force on the shoulders, removed all her clothes and covered her mouth and placed her on her mother's bed (PW3) and defiled her. She then informed her brother JG(PW2) who was then 7 years old. PW2 telephoned their mother and narrated to her what had happened. It was also her evidence that the appellant had further defiled her on 17th October 2013, and that at the time she testified on 7th February 2014, she was 6 months pregnant.

31. PW2 on the other hand who was PW1's brother testified that there was a time when PW1 left him alone sleeping and went to sleep with the appellant on PW3' bed until morning.

32. PW3 who was PW1's mother testified that PW1 told her that they had sex once with the appellant. PW4 who was the medical doctor who examined PW1 testified that she did not notice any injury on PW1's genitalia, that there was no discharge but the hymen was broken and she was bordering 13 weeks pregnant. She further testified that PW1 came to the hospital two months after the date the offence was allegedly committed. In our view, the evidence of this particular witness was really of no probative value especially due to the fact that PW1 was examined two months after the commission of the offence. We shall be reverting to this issue shortly.

33. Be that as it may, there a few disturbing aspects in this appeal regarding the credibility and reliability of the evidence of PW1 and PW3, failure to conduct a DNA test and the delay in reporting the incident by a period of two months. These were the reasons given by Mr. Ondimu for the State in conceding the appeal.

34. PW1 in her evidence in chief stated that she was defiled by the appellant on two different occasions, namely, on 17th August 2013 and on 17th October 2013. PW3 on the other hand stated that PW1 told her that she had sex with the appellant once. We also find it strange that PW1 who was older than PW2 opted not to call her mother who was in Nyeri but left it to the brother (PW2 who was then 7 years) to do the calling.

35. Turning to the issue of the DNA test, PW1 stated while testifying on 7th February 2014, that she was 6 months pregnant which evidence was corroborated by the testimony of PW4 who testified that at the time she examined PW1(On 23rd October 2013), she was bordering 13 weeks pregnant. The record shows that when the matter came up for hearing on 10th November 2014, the appellant requested for DNA to be conducted whereupon the court informed him to raise the matter before the trial court as the court was not sitting on that day. When the matter resumed hearing on 17th December 2014, PW5 subsequently informed the court in re-examination that PW1 experienced difficulties with the pregnancy which was terminated and thus he could not produce a DNA test.

36. It was further contended by the State that the defilement is said to have occurred on two diverse dates i.e. 17th August 2023 and 17th October 2023, but the medical examination was carried out two months later and that even after being issued with the P3 form, medical examination took place two days later. Mr Ondimu thus posed the question whether there were intervening circumstances within the two months' period and further, that this delay had not been explained.

37. It is indeed true that PW1 told the trial court that the defilement occurred on 17th August 2013 and 17th October 2013. PW1 was not examined until 23rd October 2013, which was two months later and indeed there could have been intervening circumstances. PW3 who was PW1's mother did not appear to be a credible witness. The trial court actually noted that she was rude and arrogant. In cross examination she stated that she became aware of the incident in "August" but she reported to the police in "October" as she was still doing her "own investigation." She further stated that she feared the appellant as she used to beat her.

38. In view of the above, we find that the charge was not proved to the required standard and this may be the reason the State did not support the conviction. Having come to this conclusion we do not consider it necessary to consider the other grounds of appeal raised by the appellant. It is our considered view that having entertained doubt as to the culpability of the appellant, we have no option but to give him the benefit of doubt. Consequently, the conviction herein is hereby quashed and the sentence set aside. The appellant is to be released forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY DECEMBER,2023.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR