Mwiti v Republic (Criminal Appeal E177 of 2022)
[2024] KEHC 10753 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10753 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E177 OF 2022

LW GITARI, J

AUGUST 21, 2024

BETWEEN

PIUS MWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the proceedings in Isiolo Chief Magistrate's Court Sexual Offence Case No.22/2018 where the appellant was charged with two counts defilement contrary o Section 8(1)(3) and 8(1) (2) of the *Sexual Offences Act* with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to charge and a full trial followed. The prosecution called nine witnesses in support of their case. In the end the learned trial magistrate found the appellant guilty on the two counts of defilement and he convicted him accordingly then sentenced to serve 30 years imprisonment on the 1st count and fourty (40) years imprison on the 2nd count.

3. The appellant was aggrieved by both the conviction and sentence and filed this appeal which raised six grounds. His prayer was that the appeal be allowed, the sentence be set aside, conviction be quashed and he be set at liberty. The four main grounds of appeal are as follows:-

    1. That the learned trial magistrate erred in law and fact by failing to note that the light intensity was not favourable from possibility of errors.

    2. That the learned trail magistrate erred in law and fact by failing nobody who heard the struggle at the commissioning of the alleged offence.

    3. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradiction evidence tendered by the prosecution witnesses.

4. That the learned trial magistrate erred in matters of law and fact by failing to consider my defence.

The prosecution's Case:

4. The PW1 Female Adult was the complainant in the 1st count. Her evidence was given on oath as the court found that she did not understand the significant of an oath but appeared to understand duty of telling the truth. It was her testimony that on 31/10/2018 she had gone with her sister to fetch water. The rested under a tree then decided to go and look for fruits. They realized it was late and decided to go back to where they used to stay. On the way they met the appellant who offered them a place to sleep in his house. The appellant had only one bed where they all slept. According to her after she slept nothing happened to her during the night. However Winnie claimed that the appellant had done 'tabia mbaya' to her. The appellant told them to leave. On the way a person gave them a lift and took them to child welfare and madam Grace asked them where they were. They told her what happened and she in turn took them to hospital. PW1 told the court that she was given an injection on the finger and the doctor did not examine her private parts.

5. PW2 WW was a girl aged ten years who gave evidence on oath. She testified that on 31/8/2018 with F, S & H they had gone to swim at River Uhuru and as they were swimming they saw other people from their school coming and decided to run away to the mountain. On the way back they met the appellant and he asked them where they were coming from. He offered them a place to sleep and they accepted. They entered his house and he lit a lantern. He then left and came back with Githeri which they all ate. They then slept on the bed of the appellant together with the appellant. In the night the appellant did 'tabia mbaya' on F by sleeping on top of her. She told the court that Fatuma did not hear it. The appellant then went to where PW2 was sleeping and removed her underpants. He then removed his trouser and slept on top of her. In the morning she saw some little blood on her pant. They left the house of the appellant and were carried on a motor bike to the Child Welfare where thy used to stay. They reported to Madam Mary wheat happened and they were taken to general hospital where their urine samples were taken. Karaiyu Jilio (PW3) is a clinical officer attached at Isiolo County Referral Hospital. He testified that he filled a P3 form for S.A aged 12 years. The hospital PO is 16/20/2018 TOD (sic). On examination she had her (sic) parts were blood stained. She had a history of being sexual assaulted by a person she could identify. She had difficulties in walking. The examination was done 7 hours after the alleged incident. She had bruised over labia majora (sic), had broken hymen and bleeding. HBS had yeast cells urinalysis show lot of positive cells (sic). The hymen was broken and the injury on labia majora was an indication of penetration. He filled the P3 form on 15/9/2018 and produced it as exhibit 2 a&b.

6. PW3 also filled a P3 form for WW who was nine (9) years old. OIP No.16209/18. She gave a history of assault by somebody she could identify. She had an old broken hymen but fresh bruises over her labia majora and minora. Had also a cohilist discharge. He also examined the male accused and found that he had a bruise over his genitals, lab tests done and H.I.V was negative. On the lab test of the child nothing significant was seen. There was evidence of bruises over labia majora an indication of external object penetration. He signed the P3 on 1/10/2018 they were having a break at [Particulars withheld] Primary School and they left to go and drink water. She was in company of S, F and W. They went to Lapa and while there they saw a person who was naked and was talking to himself. The man began to chase them and they ran towards Limist Game and got lost. They found themselves at Limist game and it was at 6.00pm. They could not get their way back to the school. They managed to get back to the road where they met the appellant. He took them to his house where he bought them 'Githeri' which they ate. They then decided to sleep in his house and they slept together on one bed including

the appellant. According to her the house had electricity light on and so she was able to see the person well. She slept and did not hear anything. In the morning the appellant woke them up and they left the house. He sister told her that the appellant did her 'tabia mbaya'. They were taken back to school by a boda boda rider. Wangui and Fatuma were taken to Hospital.

7. SNJ (PW5) was a child aged 6-8 years. She gave evidence on oath. She gave similar evidence like that adduced by PW4 and how they ended up with the appellant. She told the court that the appellant had lit a candle in the house and was able to see his face. As they slept she saw the appellant doing 'tabia mbaya' to her sister. By then the appellant had switched off the candles. She could see the appellant we as there was some light coming from outside. In the morning the appellant told them to go home. They got a person who took them back to the children's home. They were then asked to show where they slept. F was taken to hospital. Duncan Muchache (PW6) is a Social Worker at Child Welfare Centre. On 31/0/2018 he was informed that some four pupils did not return to school after 10.00 am break. They were FA, WW, SJ and HH word of missing pupils was circulated. The next day the children returned and they were interrogated. They informed him that they were chased by a mad man until they got lost. They were hosted by a good Samaritan who took them to his place. The children were taken back to the school. They led him to a house but the occupant was not there. He was arrested at Isiolo. PW6 identified him as the appellant.

8. No. 10888 P.C Grace Galgalo is the investigating officer. She testified that on 1/9/2018 she was in the report office when two children on allegation of defilement. It was alleged that on 31/8/2018 four children from Child Welfare got lost and spent the night at a man's place within Mwangaza. The two were defiled during the night. She booked the report in the OB and escorted the children to hospital where they were examined by a doctor and P3 forms were filed. She then accompanied the appellant to his house but nothing was recovered. The appellant admitted that he sheltered them but did not defile them. The appellant was then charged. She produced a birth certificate for FA showing she was born on 7/4/2006. No.227245 Corporal Nicholas Gitonga from Makima Police Station testified as PW8. He told the court that on 31/8/2018 at 10.30 hours he was guarding Child Welfare Premises when the administrator Nelly Ekong reported that four girls were missing from the school. On 1/9/2018 at 9.30 hours the children were taken to the Child Welfare Centre by a boda boda rider one Geoffrey Muchena who said he had found the children on the road at Isiolo town where they were stranded.

9. The children said they slept in the home of a man who defiled two of them. They led police to the house where they spent the night. They were led by villagers to the place where the appellant works and he was arrested.

10. Godfrey Muchena (PW9) testified that on 1/9/2018 he saw a woman pointing at some children who had spent the night in the bush. That they were girls aged between 9, 10 and 22 years. He asked the children where they come from and they said they were from child Welfare Association. They further informed him that they were chased by a mad man and spent the night at Mwangaza in a house of a man. The children also alleged that the man had defiled two of them. The children led them to Mwangaza and showed them the home which was a double roomed house. The appellant was not there. He was arrested at Isiolo.

The defence Case:

11. The appellant gave his defence on oath and testified that he was arrested on 31/8/2018. He told the court that he was not involved in the act. He further told the court that no identification parade was conducted.

12. The appeal was canvassed by way of written submission. The respondent submitted that the charges were not proved beyond any doubts. He further submits that the evidence of penetration with regard to the second complainant (PW2) was not proved. He relies on the case of P.K.W.-v- Republic (2012) eKLR and Maina –v- Republic (1970) E.A.

13. The appellant submits that the evidence adduced by the witnesses was contradictory and was not corroborated. He relies on Section 163(1) (c) of the *Evidence Act*. He also relies on the case of John Barasa –v- Republic Criminal Appeal No. 22/2005 Kitale High Court, Buckish Padya-v- Republic.

14. The appellant submits that the time spent in custody awaiting trial was not considered when passing sentence. He relies on Ahamad Abolfathi Muhammed & Another –v- Republic (2018) eKLR and Bethuel Wilson Kibor –v- Republic (2009) eKLR. The appellant further submits that the learned magistrate erred by rejecting his defence without giving cogent reasons.

15. For the Respondent, it was submitted that the court has to consider whether the conviction was right.

16. That the appellant was identified by the complainants and the evidence was not challenged. That the evidence is clear, cogent and reliable.

Analysis and determination:

17. I have considered the proceedings before the trial court, the grounds of appeal and the submissions. The issue which arise for determination is whether the charges against the accused person were proved beyond any reasonable doubts.

18. This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is Okeno-v- Republic (1972) E.A 32 where this duty was discussed. This was buttressed in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
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> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

19. The appellant was charged with defilement under Section 8(1) (2) and Section 8(1) (3) of the *Sexual Offences Act*. The Section provides:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement
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> (3) 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."

The critical ingredients which the prosecution is supposed to prove are:-
Age of the victimPenetrationPositive identification of the perpetrator

20. With respect to the 1st complainant FA her age was proved by the production of the birth certificate which showed that she was born on 7/4/2006. It is trite that the age of the victim may be proved by the production of a birth certificate, baptism card, or any other credible evidence which proves the age of the victim. The production of the birth certificate proved the age of the victim to the required standard. The next consideration is whether penetration was proved. FA (PW) testified on oath after voire dire examination. The learned trial magistrate had the opportunity to see PW1 and assess her demeanor. She stated that,

> " Though the child does not understand the significant of an oath she appears to understand the duty of telling the truth. Accordingly, she can give evidence on oath."

21. It was therefore expected that the complainant would tell the truth and nothing but the truth.

22. On proof of penetration the law is well settled that it is proved by the testimony of the complainant and corroborated by the medical evidence. In Dominic Kibet –v- Republic (2013) eKLR to proof defilement, the critical elements remain to be proof of penetration, the age of the complainant and positive identification of the assailant. The standard of proof of all these ingredients is that of beyond any reasonable doubts. In Mbugua Kariuki- v- Republic (1976-1980) 1 KLR 1085 the Court of Appeal reiterated, that;

> " that- the burden of proof remains on the state throughout to the accused beyond any reasonable doubts. Where the defences raises an issue such as provocation, alibi, self defence the burden of proof does not shift to the accused instead, the prosecution must negate that defence beyond any reasonable doubt and the accused assumes no onus in respect of any such defence. In John Mutua Muyoki –v- Republic (2017) eKLR. The Court of Appeal held that-
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> > "Therefore in order for the offence of defilement to be committed the prosecution must approach each ingredients beyond any reasonable doubt."

23. The law is therefore well settled that the burden of proof in criminal cases rests on the prosecution backyard and never shifts.

24. In this case there was no evidence tendered by the prosecution to proof that FA (PW1) was defiled. The young angel on the issue penetration had this to say-

> "I then slept and I do not know anything else. I did not feel the accused touching me. In the morning Winnie told me that the accused had done 'tabia mbaya' on her. I asked the accused if he had done anything on us and he said no. I do not know what 'tabia mbaya' is. Winnie also said she do not know (sic) what tabia mbaya is..... They took us to general hospital. We were then treated and examined. The doctors only gave me an injection on the finger. The doctor did not examine my private part.....

25. There is no person who has ever done tabia mbaya on me. Winnie is the one who said I had been done what she said was 'tabia mbaya' Empasis added see page 22-23 of the record.

26. Despite this testimony, PW3 clinical officer at Isiolo the County Referral Hospital told the court that he examined Salumi Ali at the hospital on 1/9/2018 and found that she had bruises over labia majora, had broken hymen and bleeding. Also foul smelling discharge. He produced a P3 form in the name

of FA. The medical evidence does not corroborate the testimony of the victim. The testimony of the victim was not challenged by the prosecution. It is corroborated by the testimony of PW2 who said that she saw the appellant do 'tabia mbaya' on FA PW2 was not truthful as she told the court that she had not done 'Tabia mbaya' before but the medical evidence showed that her hymen was broken but not freshly. The burden was on the prosecution to proof that the complainant was defiled. It is expected that PW1 told the truth. In deed there is a requirement that where the victim of a sexual offence is the sole witness the court must be satisfied that the victim is truthful and record the reason for that finding . See Section 124 of the *Evidence Act* . (Cap 80 Laws of Kenya)

27. In this case the victim FA (PW1) testified that she was not defiled and she was not examined on her private parts. The clinical officer states that "there was penetration by foreign object. I note from the P3 form and the treatment notes that no treatment was given to FA (PW1) Medical evidence in Sexual Offences is supposed to corroborate the evidence of the victim. Medical evidence cannot itself prove penetration when the victim has not adduced evidence of penetration and refutes the medical evidence. The nature of the evidence by PW1 & PW3 leads me to the conclusion one of them or both were not truthful. In such circumstances, it is not the duty of the court to choose who to believe and who not to believe, it must pronounce itself that the evidence is wanting and it is doubtful. The appellant then benefits from the doubts. I find that penetration was not proved with regard to PW1.

28. With regard to PW2 WW she told the court that she was ten (10) years old. No medical evidence was tendered to prove her age. The doctor assessed her age as nine years. I find that her age was proved to the required standards.

29. On penetration, she told the court that the appellant defiled her. PW3 produced a P3 form filed on 1/9/2018. The doctor noted that there was an old broken hymen and bruises on the labia majora. Penetration is defined under Section 2 of the *Sexual Offences Act* as-

> " the partial or complete genital organs into the genital organs of another."

30. Penetration need not to be deep inside the genital organs. Proof of contact with the genital organs of another fits in the definition of the contact. The PW2 testified that she was defiled. I find that medical evidence corroborates her testimony that she was defiled. Though there was an old broken hymen, the presence of bruises on her genital organs is indicative of there having been penetration as testified by the victim.

31. The third key ingredient is the positive identification of the perpetrator. This ingredient largely depends on the credibility of the victims of the crime. In the persuasive case from South African Court –v- Trainor (2003) 1 SA CR. (SCA quoted with approval the case of OKK –v- Republic (2021) eKLR it was stated:-

> a conspectus of the evidence is required evidence that is reliable should be weighed alongside such as may be found to be false independently, variable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of the evidence must of necessity must be evaluated as most corroborative evidence if any." Similarly in Vokere-v- Republic (2014) SCCA 41 Domah J held-
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> > "Judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole, not a forensic dissection of every detail removed from its coherent whole."

32. It is important to look at the evidence of the victim as a whole to determine whether their testimony is credible and therefore reliable. The witnesses treated the court with diverse evidence which lacked

corroboration as to why they disappeared only to end up meeting the appellant on the road at night. In brief, their evidence was as follows:-

33. PW1 stated that they went to fetch water at the Laga with her sister H. Then her sister told her to go and sit at the tree. We then decided to look for fruits and it became dark. We then decided to go back towards town. We used route passing through game. They then met the appellant standing with another lady talking.

34. PW2, she told the court that they had gone to swim. They then saw people from the school coming as they were swimming. They ran away to the mountain. They then began to go back. On the way they met the appellant with two ladies. According to this two, they decided to run away and they were not chased by anybody.

35. PW4 told the court they were having a break at the school and left to go and drink water. They went to Laga which is near the school. A person came and was talking to himself. The man chased them and they went to Limist Game and they got lost. They had left school at 10.00 am. They got lost and could not find their way to school. It was dark and they met the appellant.

36. PW5 testified that they went to drink water and were chased by a mad man while armed with a panga.

37. The analysis of these evidence shows that they were not truthful as to ow they ended up running away from school only to meet the appellant at night. There were also contradictions on the light which was in the appellant's house. PW2 said there was a lantern lamp, PW4 there was electricity light while PW5 stated that the appellant had lit a candle. There were contradictions on who led the police to the house of the appellant. PW7 stated that it is the appellant who led them to his house but they did not find anything. On the other hand PW8 testified that they accompanied the children to the appellant's house. He then relied on hearsay evidence of villagers who were not called as witnesses to identity the house. No identification parade was conducted.

38. The analysis of this evidence shows that it is riddled with inconsistencies and contradictions on material particulars.

39. It is trite law that where evidence is contradictory and uncorroborated it casts doubts on the case and where it is the only evidence tendered it cannot be relied on to convict. The witnesses were minors whose evidence requires corroboration but in sexual offences if the witnesses are truthful the court can rely on their testimony.

40. Section 124 of the *Evidence Act* provides as follows:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

41. The rule on contradictions and inconsistencies was laid out by the Court of Appeal in Erick Onyango Ondongo –v- Republic (2014) eKLR while quoting the Uganda case in the Court of Appeal of Uganda in Twehangane Alfred –v- Uganda (2003) UGCA 6 where is was held-

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessary led to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or they do not affect the main substance of the prosecution's case."

42. The duty of the court is to determine whether the contradictions and inconsistencies in the prosecution case were on material particulars and were to the extent that a reasonable person can be left in doubt as to whether the allegations against the accused were proved, and if they were so material the evidence ought to have been rejected. Where contradictions and discrepancies and inconsistencies unless they are explained must be resolved in favour of the accused. See court of Appeal in Richard Munene –v- Republic (2018) eKLR where the court stated-

> "Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where inconsistencies are proved they must be resolved in favour of the accused. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in evidence of the prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issue in question and thus creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

43. In this case it is not clear why the complainants ran away. It was also not clear where they were between 10.00 am too late in the evening when it was already dark. There were contradictions on the source of light which led them to identify the appellant. These contradictions are on material particulars. There were also contradictions on who led police to the alleged house. The contradictions show that the witnesses were not truth. The prosecution did not conduct an identification parade to rule out any possibility of mistake. In the end the prosecution failed to avail corroboration to the evidence of the complainants who were minors children. Since it is clear from the evidence that the witnesses were not truthful, corroboration was necessary under Section124 of the *Evidence Act*. The appellant denied the charges and gave his defence. It is trite that he had no burden to prove his innocence or to prove his defence. There was no prove beyond any reasonable doubts that he was the perpetrator. The investigating officer stated that she visited the scene- that is he accompanied the appellant to his house in Mwangaza but she did not find anything. It means there was no bed as testified by witnesses, no candle no lantern no indication whether there was electricity.

44. Based on these analysis, I find that the conviction of the appellant was not safe.

Disposition:

45. I find that the appeal has merits. I allow the appeal. I quash the conviction and set aside the sentence. The appellant is set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF AUGUST 2024.

L.W. GITARI

JUDGE