Sungura v Republic (Criminal Appeal 55 of 2023)
[2024] KEHC 11520 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 55 OF 2023

DR KAVEDZA, J

SEPTEMBER 30, 2024

BETWEEN

COLLINS MNANGAT SUNGURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. W. Lopokoyit (S.R.M) on 27th July 2023 at Kibera Chief Magistrate's Court Sexual Offences Case No. E070 of 2022 Republic vs Collins Mnangat Sungura)

JUDGMENT

1. The appellant Collins Mnangat Sungura was charged with two counts of defilement and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006. He pleaded not guilty and after a full trial, was convicted and sentenced to life imprisonment on both counts.

2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In the petition of appeal grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant complained that voir dire examination was not properly conducted; he argued that the charge sheet was defective and additionally that the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence.

3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. Further, section 8(1) and (2) of the *Sexual Offences Act*, No 3 of 2006 provides thus: -

> 8. Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

7. The complainant KT (name withheld) gave unsworn testimony after voir dire examination. She told the court that that she was seven (7) years old. On a day that she could not remember she was playing with her three friends when 'Baba Kibe' identified as the appellant called them to his house. They refused and he forcefully pulled them into the house. He then covered their faces and took them to his bed. There he undressed them and inserted his fingers into their private parts. He then chased them away.

8. She recounted that on a different occasion, he forced them into the house and inserted his penis and fingers into their vagina and anus. When they started crying he would beat them. Thereafter, she told Mama B, who in turn told her mother and reported the incident to the police. She was taken to hospital for examination and treatment. She identified the appellant in court as the perpetrator.

9. B (name withheld) gave unsworn evidence after voir dire examination. She testified that the appellant would cover her face with a cloth and insert his fingers into her vagina and anus. In addition, the appellant inserted his penis into her anus. This happened in the presence of her friends, the first complainant, and two others not before this court. She informed her mother about her ordeal. She also identified the appellant in court as the perpetrator.

10. On cross-examination, the complainants were steadfast that it was the appellant who inserted his fingers and penis into their 'private parts' both front and back, meaning vagina and anus. The victims also maintained that they knew the appellant and the identification was by recognition. They could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.

11. As discussed in the Kenya Judiciary *Criminal Procedure Bench Book* 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

> " 94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), *CoK*"

12. The complainants' testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW1 and PW2 were consistent and steadfast in their respective testimonies. In addition, their evidence which was subjected to cross-examination remained consistent throughout.

13. To corroborate the evidence adduced by the complainants' PW3 and PW4 the mothers of PW2 and PW1 learnt the appellant had been inserting his fingers and penis into their children's private parts. They gave evidence that when they confronted the appellant, he indicated that they should resolve the issue as neighbours, but later denied committing the sexual assault. The incident was reported to Muthangari police station. The children were also taken to hospital for examination and treatment. They identified the appellant as Baba Kibe who was their neighbour.

14. At Nairobi Women's Hospital PW2 was examined on 20th July 2022 by Belden Nyaswabu who was not available to testify. His evidence was given by John Njuguna (PW5). Upon examination, there was no physical injury. The genital examination recorded the following findings: abnormal redness on the labia minora and labia majora; hymen broken at 6'Oclock. Lab results showed puss cells were high. He concluded that there was penetration. The examination of PW2 had the following findings: an old torn vagina; no genital injury and lab tests were normal. He concluded that this was a case of late presentation. Therefore, given the evidence of the complainants, it is my finding that penetration was sufficiently proven.

15. In his defence, the appellant denied committing the offence. He testified although PW3 and PW4 are his neighbours, he does not know their children. In addition, he knew PW4 whom he had a romantic relationship. That he was always at work and had no time to meet any children. He insisted that he was Baba Kibet, not Baba Kibe as alleged. He maintained his innocence.

16. DW2, the appellant's wife maintained that she had never seen the complainants in their house. She told the court that she knew the victims who were their neighbours.

17. DW3 told the court that she lives with the appellant and DW2. The appellant works during the night and was always at home during the day. However, the victims never came to their house. On the material day, he was attending a funeral when he saw the complainant and decided to take her home. Upon arrival, he saw PW 1 and PW3 and left the child. He later heard screams and was accused of defiling the minor. He also disputed the evidence of PW4 that the child was sitting on his lap.

18. The court considered his defence and found it to be uncredible due to inconsistencies and contradictions by the defence witnesses. In particular, the appellant maintained that he did not know

the victims, yet DW2 and DW3 admitted that they were neighbours and known. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.

19. On the age of PW1 and PW2, the trial court considered the birth certificates produced by their mothers. The birth certificate of PW1 indicated that she was born on 13th April 2014. She was therefore 7 years and 10 months at the time of the offence. On the other hand, the birth certificate of PW2 indicated that she was born on 28th January 2018 and was therefore 4 years old. There is therefore no doubt that PW1 and PW2 were children.

20. In his submissions, the appellant challenged the voir dire examination conducted on the minor as not being sufficient. He argued that although the court indicated that a voir dire was conducted, there is no record, of how it was conducted and the questions asked. He urged this court not to consider the evidence on the minor.

21. From the evidence on record, a voir dire examination was conducted on both minor complainants. The trial court wrote down the questions put forth to the witnesses and answers given in the first person in the words spoken by the witness in a dialogue form. The court then proceeded to make a decision that they should give unsworn testimony. The trial court adopted the procedure in the case of *Sula v Uganda* [2001] 2 EA 556 the Supreme Court of Uganda and the Court of Appeal case of *Patrick Kathurima v Republic* Nyeri CRA 137 of 2014. The ground of appeal therefore fails.

22. The appellant also contended that the charge sheet was defective. I have re-analysed the charge sheet and the particulars thereto. There same is not defective.

23. The uphot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction on both counts is affirmed.

24. On sentence, the appellant was sentenced to serve life imprisonment on both counts. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was a first offender. The court sentenced the appellant to the minimum sentence provided under the law.

25. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Maroro for the Respondent

Achode Court Assistant.