



REPUBLIC OF KENYA



KENYA LAW
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**Gichuri v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 13179 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E008 OF 2023
AK NDUNG’U, J
OCTOBER 31, 2024**

BETWEEN

DANIEL WAITHAKA GICHURI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E004 of 2022– V. M Masivo, SRM)*

JUDGMENT

1. The Appellant in this appeal, Daniel Waithaka Gichuri was convicted after trial of sexual assault contrary to section 5(1)(a)(i) as read with section 5 (2) of the [Sexual Offences Act](#), No 3 of 2006. On 16/01/2023, he was sentenced to ten (10) years imprisonment.
2. The particulars were that on 11/01/2022 in Kieni East sub-county within Nyeri County unlawfully used his finger and his penis to penetrate the vagina of FMM a child aged 13 years.
3. Being dissatisfied with the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 27/01/2023. He later filed ‘amended grounds of appeal’ together with his submissions. He is challenging the conviction and the sentence on the following grounds;
 - i. The learned magistrate erred convicting him on a case that was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred by relying on single witness evidence of a minor without warning himself of the danger.
 - iii. Learned magistrate erred for failing to comply with section 199 of the [Criminal Procedure Code](#) for failing to record his remarks on demeanour of PW1.



- iv. The learned magistrate erred by convicting him without complying with section 208(3) of [Criminal Procedure Code](#).
 - v. The learned magistrate erred convicting him without affording him a fair trial as he was not advised on his right to cross examine the medical doctor.
 - vi. The learned magistrate convicted him without calling key witnesses who would have clarified how he was arrested.
 - vii. The learned magistrate failed to note that the scene of crime mentioned by PW1 was not corroborated by the investigating officer.
4. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the matter was dependent of a single witness evidence since no one witnessed the ordeal and since there was no circumstantial evidence, it behoved upon the trial court to focus on PW1 reliability, credibility and consistency and record in the proceedings. Reliance was placed on the case of [Ndungu Kimanyi v Republic](#) (1979) KLR where the court held that a court is entitled to consider the demeanour of a witness in assessing their trustworthiness, reliability and integrity. That it is important to note the demeanour and the danger of admitting single witness evidence especially from minors as a minor can be influenced by 3rd parties to give untruthful testimony as was held in Jamaica Supreme Court Cr. App No. 53 of 2009(2014) JMCA. That the trial court only noted that the minor was firm in her responses which was not an indication that she was truthful and credible. Therefore, the trial court failed to comply with section 199 of the [Criminal Procedure Code](#) which requires the magistrate to record his/her remarks regarding the demeanour of a witness as was held in [Rebecca Mwikali Nabutola & 2 others v R](#) Cr App No. 232 of 2012.
 5. He argued that there was contradiction on the scene of crime as PW1 testified that it was at a wheat farm whereas PW3 testified that the scene was at a maize plantation. That the variance would mean that PW3 did not visit the scene of crime or there was no such a place and this means that the case was not proved beyond reasonable doubt. He submitted that PW2 testified that the complainant's clothes were muddy which was also confirmed by PW3 the medical officer however, the muddy clothes were not produced as exhibits and therefore, this remains to be hearsay evidence. Further, the investigating officer and the arresting officer did not testify that the accused and the complainant had muddy clothes. That circumstantial evidence did not create a nexus to link him to the offence.
 6. He submitted that his right under Article 50(2)(k) of the [Constitution](#) was violated as he was not advised by the court on the need to cross examine the doctor in order to challenge the P3 form. That section 208 of the [Criminal Procedure Code](#) states that the court must ask the accused whether he wishes to cross examine the witness and the court must record the answer and in his case, none was recorded which was a violation of section 208(3) [Criminal Procedure Code](#) and section 145(2) of the [Evidence Act](#) which is fatal to the prosecution case and could vitiate a conviction as was held in [Simon Githaka Malombe v Republic](#) Crim. App No. 314 of 2010 where the court held that failure to invite unrepresented person to cross examine a witness was inconsistent with the court's role. He urged the court to find that he was not accorded a fair trial since he was unrepresented and therefore, it behoved upon the trial court to guide him throughout the trial.
 7. He further submitted that the matter of his arrest was not discussed and the issue of muddy clothes allegedly worn by the appellant and complainant was not put forward. Further, what transpired was not discussed. PW4 was stood down and her first testimony was not challenged as he was denied an opportunity to cross examine her and this violated his right under Article 50(2)(k) of the [Constitution](#) and when she was called a second time, she failed to address the issue of arrest and what



- her investigations entailed and this denied him a chance to cross examine and challenge any material evidence. Therefore, it was a misdirection for the court to rely on the evidence of PW2,3 and 4 as they were not admissible according to the law. That the trial court further failed to record the reasons why he believed PW1 in accordance with section 124 of the Evidence Act as soon as she testified as the record should show that.
8. He submitted that section 169(1) of the Criminal Procedure Code was not complied with in considering his defence as the trial court stated in its judgment that he failed to question the investigating officer on the circumstances that led to his arrest whereas the investigating officer failed to adduce evidence on his arrest. That the burden of proof was on the prosecution to adduce evidence in relation to his arrest and not vice versa. Further, the complainant's father and uncle were not called to testify as they would have clarified the circumstances leading to his arrest and therefore without any proof of why he was arrested, he was not afforded a fair trial.
 9. The Respondent's counsel on the other hand submitted that though PW1 was the only person present at the scene when the offence was committed, she clearly described the scene together with chronological order of events. Her evidence was further supported by PW2 whose evidence shed lights on the events that followed after they learnt what had happened. Nevertheless, courts have repeatedly held that the evidence of the complainant alone is sufficient to sustain a conviction if the court find the testimony to be credible. Reliance was placed on the case of Lumbasi v Republic (Criminal appeal 17 of 2016) [2016] KEHC 2942 (KLR). Further that corroboration was not necessary as the trial court found the evidence of the complainant to be truthful in accordance with section 124 of the Evidence Act.
 10. As to whether there were inconsistencies in the prosecution's case, she submitted that though there was a minor contradiction on the scene of crime, the same did not touch on the ingredient elements required to support the charge of sexual assault. Reliance was placed on the case of Philip Nzaka Watu vs R (2016) eKLR. She urged the court to find that the contradiction was not sufficient to amount to reasonable doubt.
 11. As to whether the trial court complied with Section 208(3) of the Criminal Procedure Code, she submitted that this claim as baseless as the trial court recorded Nil on the part of cross examination of PW3. Further, he had cross examined PW1 and 2 and therefore it is strange to believe that the concept of cross examination had escaped from his mind. On whether the Appellant's defence was considered, she submitted that his defence was a mere denial which did not shake the prosecution's evidence for he only chose to narrate to the court the events of the day he was arrested and only stated that he did not commit the offence instead of challenging the weighty issue raised by the prosecution.
 12. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.
 13. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
 14. The evidence before the trial court was as follows. The complainant testified as PW1. She stated that she was coming from school when she met the Appellant whom she knew as her mom's friend. He appeared slightly drunk. They passed each other but He started following her. She was grabbed on the throat from her back. She struggled but she was overpowered. He pulled her to the grasses and bushes, undressed her and he then undressed. He told her that before having sex with a virgin, fingers



are normally inserted and he inserted his fingers in her vagina which she resisted since it was painful but he threatened her with death. He told her not to reveal to anyone and that if he gets arrested, he will look for her. She stated that his penis was huge and would not enter and so he instructed her to bend but still his penis could not penetrate. That she pretended that she did not know him and she asked his name which he responded by saying that he was Gideon. He instructed her to meet him on Sunday so that he could give her Kshs100/-.

15. She went home and her mother enquired why she was late and she informed her that she will reveal everything upon the arrival of her father. The accused had followed her and hidden at the neighbour's house. The father was contacted. She told her mother that 'nilishikwa na kijana wa mama Denis. When her father got home, the accused reappeared and he was slapped by her father. He was placed in her uncle's vehicle and he was taken to police station where they reported the matter. She was treated the following day at Naromoru hospital.
16. On cross examination, she testified that the scene was on someone's farm used as a road and nobody witnessed the ordeal. That she did not bleed. The Accused overpowered her and their clothes were muddy from the struggle. She testified on re-examination that the scene had wheat planted on both side with a road inside.
17. PW2, the complainant's mother testified that the complainant got home at 5:00pm on the material day which was unusual. Sometimes she would pass by her uncle's home and she decided to call the uncle but his phone was not going through. The complainant however arrived and she appeared as if she had been strangled. She enquired why she was late but said she will wait for her father to reveal everything. She told her that she was threatened by death by Denis. PW2 added that she informed her husband that the complainant 'ameshikwa na Denis' as the complainant had informed her. Her uncle and her husband arrived and they boarded the vehicle and suddenly they saw the accused who was hiding as he had followed the complainant. They arrested him. She testified that the complainant informed her that the accused had followed her and grabbed her by her throat, he undressed her but he was unable to insert his penis so he penetrated her with his finger. They reported to the police and the complainant was treated. She contacted the accused mother who also joined them. At the hospital, they asked for the complainant's muddy clothes. She testified that she knew the Appellant from birth.
18. She testified on cross examination that she did not witness the ordeal and the matter was not due to a grudge as the Appellant would normally pass through her land and he was a friend to her son. She stated on re-examination that the Appellant's clothes were muddy.
19. PW3 was the investigating officer, she testified that the complainant was accosted by the Appellant on her way from school. She visited the scene and there was evidence of a struggle as the maize were flattened. She produced the complainant's birth certificate as Pexhibit 1. On cross examination, she testified that they found flattened grasses at the scene and that the scene was a private land with a public road.
20. PW4, the clinical officer testified that he filled the P3 form for the complainant. He stated that her clothes were muddy, she had bruises on her neck and on the entrance of her vagina. Her hymen was intact and nothing was detected in her urine and blood. He produced the P3 form as Pexhibit 2(b). He produced the PRC form as Pexhibit 2(a) which was filled by Wanjiku Muthuri. He stated that he was familiar with her handwriting and signature. He also produced the treatment notes as Pexhibit 4.
21. The Appellant in his defence gave unsworn testimony. He testified that on the material day, he was at the farm and he got home at around 6:30pm where he found two men who arrested him. One of them introduced himself as a police officer and he was taken to Naromoru police station where he was detained for two days and later charged. He denied committing the offence.



22. That was the totality of the evidence before the trial court. Section 5 of the Act provides for the offence of sexual assault as follows:

“5(1) Any person who unlawfully-

- a. penetrates the genital organs of another person with-
 - i. any part of the body of another or that person; or
 - ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes;
- b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”

23. The ingredients of the offence were discussed by the court of appeal in the case of John Irungu v Republic, [2016] eKLR where the court stated thus;

“The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”

24. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

25. As regards to proof of penetration, the complainant PW1 testified that the Appellant accosted her and pulled her by the neck. She struggled but he overpowered her. He undressed and also undressed her. He informed her that before penetrating a virgin, finger should be used and so he inserted his finger into her vagina. She felt pain and the Appellant threatened her with death. He tried to penetrate her with his penis but she testified that this was difficult since his penis was huge.

26. The fact of penetration was corroborated by the evidence of PW4 the clinician. He produced the P3 form, the PRC form and the treatment notes as exhibits. He testified that she had bruises on the neck and there were also bruises on the vagina introitus. Her hymen was however intact. PW2 the complainant’s mother also testified that she noted that the complainant had bruises on her neck as if she was strangled. This corroborated her evidence that the Appellant accosted her and sexually assaulted her.

27. As to the identity of the perpetrator, the Appellant did not dispute identity. PW1 testified that she knew the Appellant as her mom’s friend. When she got home, she informed her mother that ‘alishikwa na kijana wa mama Denis’. PW2 testified that she knew the Appellant from childhood. She even



contacted his mother who joined them when the Appellant was arrested. Furthermore, as per the testimony of the complainant, after committing the offence, the Appellant followed the complainant home and hid at the neighbor's home where he was arrested shortly after by the complainant's father. The Appellant did not challenge this piece of evidence on cross examination of the prosecution witnesses. He did not raise doubt as to his identity.

28. In his submissions, he claimed that he was convicted on single witness evidence and the trial court only noted that the minor was firm in her responses which was not an indication that she was truthful and credible as the trial court should have done as required under section 199 of the Criminal Procedure Code which requires the magistrate to record his/her remarks regarding the demeanour of a witness.

29. The court in the case of *Olweno –v- Republic*(1990) KLR 509 held that:-

“ 1. Where the only evidence of identification of an accused person is given by a single witness, the court should scrutinize that evidence under two different tests:

- a) The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.
- b) The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon, without any other evidence, to sustain a conviction.”

30. On evidence of single witness in a sexual offence, the court can convict on basis of single witness. Section 124(2) of the *Evidence Act* provides:-

“ 124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, 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.”

31. To my mind, Section 124 of the *Evidence Act* can only be complied with if the “reasons” are “recorded in the proceedings” indicating that the “Court is satisfied that the alleged victim is telling the truth”. The trial magistrate indeed complied with this proviso as he held that he considered the complainant's testimony and found that her evidence alone could be relied on without being corroborated. He further held that he listened keenly to the complainant, she was firm, was able to recall the details of the material day, her testimony remained unshaken during cross examination and further held that he had



no reason to doubt that she was telling the truth and found the complainant's evidence to be credible and truthful.

32. It is also noteworthy that a conviction can be based on a single witness testimony as was held in *Anil Phukan vs State of Assam* 1993 AIR 1462, 1993 SCR (2) 389 as follows: -

“A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone”

33. Furthermore, the charge of sexual assault is a sexual offence. Sexual offences are usually not committed in public, they almost always happen in privacy or secrecy or away from the public eye. It should not be expected that there would be eyewitness evidence to such events. More often than not the only available account would be that of the victim.
34. The Appellant in his submissions further claimed that there was a contradiction on the scene of crime as PW1 testified that it was at a wheat farm whereas PW3 testified that the scene was at a maize plantation. He stated that the variance would mean that PW3 did not visit the scene of crime or there was no such a place and this means that the case was not proved beyond reasonable doubt. He further submitted that the witnesses mentioned muddy clothes which clothes were not produced as evidence.
35. When it comes to contradictions, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead 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 if they do not affect the main substance of the prosecution's case. (See *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).
36. Indeed, PW1 testified that the Appellant pulled her to the grasses and bushes. She testified that the scene was on someone's farm used as a road. She testified on re-examination that the scene had wheat planted on both side with a road inside.
37. PW3 on the other hand testified that she visited the scene and there was evidence of a struggle as the maize were flattened. On cross examination, she testified that they found flattened grasses at the scene and that the scene was a private land with a public road.
38. It is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weigh the contradictions and consider whether they have any effect on the overall evidence in the case. It is also trite law that the inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful.
39. My view is that the contradiction regarding the scene of crime has no effect on the overall evidence in this case. Human frailty certainly would on occasion interfere with different individuals' recollection ability of minute details in a series of events and what the court should be concerned with is whether such contradiction materially affect the prove of a charge. The evidence before court on the ingredients of the offence is overwhelming. I am also guided by the court of appeal decision in *Erick Onyango Ondeng' v Republic Supra* where the court held that;

“The alleged contradictions on where the defilement took place does not amount to much when it is borne in mind that the charge and the evidence adduced related to the defilement



in the appellant's house, although PW2 had testified that the appellant had "put his penis in her vagina" on another occasion at the communal sink."

40. The Appellant submitted that his right under Article 50 (2)(k) of the Constitution was violated in that the trial court failed to advise him on the need of cross examining the doctor. That section 208 of the Criminal Procedure Code states that the court must ask the accused whether he wishes to cross examine the witness and the court must record the answer and, in his case, none was recorded which was a violation of section 208(3) of the Criminal Procedure Code and section 145(2) of the Evidence Act and which is fatal to the prosecution case and would vitiate a conviction. He further stated that he was not given an opportunity to challenge the evidence of PW3 before she was stood down and when she was called a second time, she failed to address the issue of his arrest and what her investigations entailed and this denied him a chance to cross examine and challenge any material evidence.

41. I have perused the trial court record and I note that the Appellant cross examined PW1 and PW2. PW4 testified on 11/10/2022 and after examination in chief, it is recorded as follows;

"Cross examination

Nil

Re-examination

Nil"

42. The Appellant is therefore lying to this court as it seems that he was given an opportunity to cross examine PW4 but chose not to and therefore his right under Article 50(2)(k) was not violated.

43. As to evidence of PW3, the record shows that during examination in chief, she was stood down on 24/08/2022 to avail the original birth certificate. She testified again on 01/11/2022 and the Appellant was given an opportunity to cross examine her which he did.

44. The challenge on the failure to call the complainant's father and her uncle is in my view a misplaced concern. The Appellant contends that the two witnesses would have shed light on how he was arrested. The fact of the matter is that for the Appellant to appear in court for plea, he was definitely arrested and that fact is not in doubt. Unless the Appellant is raising issues regarding, for example, torture at arrest, detention for over 24 hours etc, I do not see much value in the evidence of the witnesses above that would impact on the trial court's findings.

45. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the Evidence Act which provides that;

"In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

46. In *Bukenya and Others V. Uganda* [1972] EA 349 it was held that;

"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."



47. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate. In the instant case there was evidence of PW1 and PW2 who testified on how the Appellant was arrested. Further, the issue of how he was arrested, as stated above, cannot in my view vitiate a conviction.
48. The Appellant further claimed that Section 169(1) of the *Criminal Procedure Code* was not complied with in considering his defence as the trial court stated in its judgment that he failed to question the investigating officer on the circumstances of his arrest whereas the investigating officer failed to adduce evidence of his arrest. That the burden of proof was on the prosecution to adduce evidence in relation to his arrest and not vice versa.
49. The trial court while considering the Appellant's defence noted that his defence was an afterthought as he only gave an account on how he was arrested. The trial court further found that his defence was dislodged by that of PW1 and PW2 who testified how he was arrested.
50. It is my view therefore that his defence was duly considered and the trial court did not shift the burden of proof on him.
51. On the sentence, he was sentenced to 10 years imprisonment as provided in law. Sentencing is at the discretion of the court unless shown that the trial could considered irrelevant matters or failed to consider relevant matters or that the sentence in the circumstances of the case is manifestly excessive.
52. In an elaborate ruling in sentencing, the court made reference to the relevant sentence provided in law and made all necessary considerations including application of Section 333(2) of the *Criminal Procedure Code*. I have no basis at all upon which to interfere with the sentence herein.
53. With the result that the Appeal fails in its entirety and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER 2024

A.K. NDUNG'U

JUDGE

