WMM v Republic (Criminal Appeal E089 of 2021)
[2023] KEHC 476 (KLR) (Crim) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E089 OF 2021

LN MUTENDE, J

JANUARY 25, 2023

BETWEEN

WMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against original conviction and sentence in Sexual Offences Case No.91 of 2018 at the Chief Magistrates' Court, Kibera by Hon. E. Boke- SPM on 8th day of July, 2021)

JUDGMENT

1. WMM, the Appellant, was charged with the offence of defilement contrary to Section 8(1) and (3) of the *Sexual Offences Act*. Particulars of the offence were that on November 4, 2018 in Kibra Sub-County, he intentionally and unlawfully caused his penis to penetrate the vagina of NK a child aged six (6) years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars being that on the November 4, 2018, in Kibra Sub-County, he intentionally and unlawfully touched the buttocks of NK a child aged six (6) years.

3. Having been taken through full trial, he was convicted for the offence of defilement and sentenced to serve thirty-six (36) years imprisonment.

4. Aggrieved, the appellant proffered the appeal on grounds that the court erred in failing to find that: the appellant's rights to a fair trial were violated and this vitiated subsequent proceedings; penetration was not conclusively established thereby leaving the conviction unsafe; and, that the whole case was marred by explicit inconsistencies and contradictions.

5. Further, that the magistrate erred in law and fact by not giving regard to the defence which exonerated the appellant from the offences. And, he called upon the court to exercise its discretion in giving another sentence after considering mitigation that would be tendered.

6. To prove the case as required, the prosecution called seven (7) witnesses. PW1, LSS, testified that she was the appellant's neighbour who lived in a house behind her house, for a period of two (2) years. That on November 4, 2018, the minor complainant who was in company of another minor, J went and told her that W had defiled her. That she was shocked hence asked the complainant to explain, and, the minor said that W took her to his house and inserted his penis onto her vagina.

7. The information received prompted PW1 to go to the house of the appellant with the children, but, when she knocked the door he did not open although there was movement inside. Some ladies who were passing by sought to know what was happening, and, PW1 told them what the minor told her. The ladies checked the child's private parts and saw blood, they screamed attracting the attention of people who came with the youth and broke the door. The accused was ejected from the house and beaten, he was then taken to the chief's office.

8. PW2 NK the minor complainant, stated that she was playing outside with J but, in the opinion of the trial court, she became afraid of the appellant and could not talk. The minor was stood down to pave way for arrangements for camera proceedings and a concealed witness box. However, the evidence was never completed.

9. PW3 MMM, the appellant's neighbour, testified that while in the house having returned from church on the material date, she heard noise at about 4:00pm. She went out to find neighbours hitting the appellant's door. She enquired and heard allegations that W who lived in the house they were hitting had defiled a child. PW3 was shown the child and she noted that she was bleeding from her private parts. They were not able to get the child's grandmother and guardian, therefore, she accompanied A who took the child to hospital. It was her testimony that the child was not able to walk. They reported the matter to the police station prior to taking the minor to Nairobi Women hospital where she was admitted. Prior to leaving hospital, she managed to reach the grandmother of the minor.

10. PW4 SK, the minor's grandmother, stated that when she got the information from PW3, she went to Nairobi Women Hospital and found A with the minor who was bleeding from her private parts. She identified the minor's trouser that was alleged to have been recovered from the appellant's house.

11. PW5 JLS a minor who gave unsworn evidence stated that she was playing with the complainant when the appellant called the victim and carried her to his house. She attested to having not known what transpired inside the house, but, she saw N come out of the house while bleeding from her genitalia and angry, and, that she did not continue playing, but, went to their house while the appellant locked himself inside the house. On cross-examination, she identified the appellant as W, a person she knew very well, and also stated that on the material date she was playing with N and C another girl.

12. PW6 JN, adduced in evidence a Gender Violence Recovery Centre Form (GVRC) filled at Nairobi Women Hospital. It was indicated that the minor went to hospital while bleeding from her vagina and had perineal tear, therefore she had to be admitted. The Post Rape Care (PRC) form was also produced in evidence. It was confirmed that the child was strangled on the neck. Upon examination she had scratch marks on her neck and blood clots around her thighs and labia and pubic areas and was bleeding with evident fresh blood. Her hymen had a cut at 6:00 O'clock and 7:00 and 9:00 O'clock positions. Her clothes were stained with blood, but, she did not have a panty. The P3 form filled in that regard was adduced in evidence.

13. On cross-examination, he stated that the blood-stained clothes were not in court on that particular day, but the medical documents confirmed that the blood stains were hers. That the blood was still oozing from her vagina when she was taken to hospital, and regarding the DNA sampling having been done, he stated that they do not do it.

14. PW7 NO xxxx PC Wycliff Ogechi, the Investigating Officer, took over the case from Sergeant Ruth Kioko who had retired. He adduced in evidence the birth certificate of the minor.

15. On cross-examination he stated that the clothes indicated on the P3 were taken to Government Chemist and were not in court, and, that the report had not been received and he could not tell whose blood it were.

16. Upon being placed on his defence, the appellant gave unsworn evidence. He stated that he was a security guard at [Particulars Withheld] House. That on the fateful date he was from work and on reaching near the Estate, two people emerged and arrested him without telling him the reason for the arrest. They took him to Kilimani Police Station and he was arraigned in court on the third day.

17. The trial court analysed evidence adduced and found that the freshly broken hymen and vaginal injuries were proof of penetration as the complainant was bleeding when the doctor saw her. On the question of the perpetrator, the court was of the view that evidence of PW5 pointed to the appellant as the person who took the victim to the house in which he was ultimately found, and without alleging that there was another person in the house, it was sufficient proof that he was the perpetrator. On the issue of the victim failing to testify, the court found that the child was of tender age and not able to testify in the presence of the accused and due to further prosecution's oversight.

18. That Section 2 of the *Sexual offences Act* defines a complainant to include a person who lodges the complaint on behalf of a child who was a victim of defilement, where such child cannot lodge it. That the law recognises situations where the child may not report or give evidence due to tender age, and, that the victim cannot be denied justice because she was not able to express herself.

19. The appeal was canvassed through written submissions. It is urged by the appellant that the prosecution failed to prove the elements of penetration against him; that his constitutional rights to a fair trial were grossly violated and the whole trial was a nullity. In this regard the appellant prays that the court metes out another sentence and considers the mitigation circumstances. That he was charged under the wrong provision of law as according to the drafting of the charge, which was not only duplex, it envisaged a victim who was over twelve (12) years while in the instant case the complainant was six (6) years.

20. That the prosecution's omission was fatal since the appellant was not given sufficient details to facilitate an unequivocal plea. That charges brought caused latent confusion as the charge connoted different ages and victims.

21. The appellant cited the case of *Suleiman vs Republic, Criminal case No 181 of 2002*, where the Court of Appeal stated that:

> ' In charging a person under Section 296(2) of the Penal Code the prosecution must be extremely careful as the consequence of a conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake'

22. The appellant argues that his conviction was manifestly unsafe due to an irregularity. That his rights to a fair trial were violated, having been unwell such that he could not participate in the trial, but, the

court ignored the calls for an adjournment and proceeded with the hearing. That the order to take him to hospital as per his request on March 1, 2019, was not fulfilled.

23. That failure to recall PW2 to be cross-examined on matters that arose from her evidence in chief denied the appellant the right to challenge evidence against him which was prejudicial to him.

24. That penetration is a key element, and, without explicit evidence of seminal fluid or corroborative evidence, it was not safe to arrive at an abstract inference of sexual abuse. The appellant cited the case of *PKW -Vs- R (2012)eKLR*, where the Court of Appeal held that:

> ' They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the *Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769*.'

25. That PW5 did not know what transpired inside the house of the appellant, and, the three children never bothered to follow up on the reason why PW2 was carried by the appellant. That conclusion by PW1 that the appellant defiled the minor was not conclusively proved in this case to warrant conviction.

26. That presence of blood could be an indication that injuries could have been committed by a different object or something else from the play area. Arguing that evidence adduced was weak, he relied on the case of *Amos Kinyua vs Republic (2015) eKLR* where Ngenye-Macharia J (As she then was) found as follows:

'In the present case given the weak evidence on identification and the glaring contradictions on the evidence of Pw3 and 4 it is my view that a DNA test would have sufficed as a concrete hummer to nail the appellant. However, this was not done and as earlier noted, doubts abounded as to whether it is indeed the appellant who committed that offense. There is no doubt that Pw3 was defiled in very unfortunate circumstance'

27. Further, the appellant argued that inconsistencies and contradictions apparent which the court ignored created a doubt on the injuries alleged, and, whether he was connected to the same.

28. The appellant relied on the case of *John Mutua Musyoki vs R (2017) eKLR*, where the court found that contradictions went to the root of the case and further cast doubt on whether the complainant was a credible witness after she lied to PW1.

29. In mitigation the appellant sought pardon and urged the court to impose a definite sentence.

30. The appeal is opposed by the Respondent who submits that the burden of proof was discharged. That the age of the minor was proved by evidence of a birth certificate. That the minor was a vulnerable witness and the evidence had to be exempted as per the provisions of Section 31 of the *Sexual Offences Act*. That medical evidence adduced proved existence of a tear of the hymen at 6 O'clock to 9 O'clock,

and bleeding from the vagina was proof of penetration, and, that the appellant did not inform court that there were other people inside the house.

31. That the court made orders on March 14, 2019, July 5, 2019 and November 21, 2019 for the appellant to be taken to hospital, and it was confirmed that he was escorted to hospital. That the appellant having been duly informed of the particulars of the offence, the charges were not defective. It called upon the court to uphold the conviction and sentence.

32. The duty of the first appellate court is to reassess and analyse the evidence and come up with its own independent conclusions. The court must bear in mind that unlike the trial court, it never saw or heard the witnesses and could not test their demeanour. This was stated in the case of Okeno vs Republic (1972) EA 32, as follows:

> ' An appellant 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 weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.'

33. The appellant cites violations of the right to fair trial and his right to cross examine witnesses. He does not dispute the minor's age, therefore, the main contention is whether penetration was proved and whether he was identified as the perpetrator.

34. The fact that the appellant was sickly and even complained of eye problems was recorded, the record is also clear that the appellant was allowed to go to hospital and various orders were made to that effect. The court did not proceed with the hearing when the appellant was unwell or no such complaint was raised; Further, on the date of plea the appellant was in his right state of mind and good health. There was no violation of the appellant's constitutional rights as alleged.

35. On the question whether the charge was defective. It is trite the accused must be charged with an offence that is known in law. Section 134 of the *Criminal Procedure Code* (CPC) stipulate that:

> 'Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'

36. In the case of *Isaac Omambia v Republic, [1995] eKLR*, the court considered the ingredients necessary in a charge sheet and stated as follows:

> ' In this regard, it is pertinent to draw attention to the following provisions of S 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.'

37. In the case of *Yosefa v Uganda [1969] EA 236*, The Court of Appeal held that the charge was defective if it did not contain an essential ingredient to the offence. In the case of *Sigilani v Repic [2004] 2 KLR 480* –the court held that:

> ' The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning.'

38. The charge herein was brought pursuant to Section 8 (1) and (3) of the *Sexual Offences Act* (SOA) which provide thus:

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

39. Evidence of a birth certificate issued to the minor was adduced. It indicates that the she was born on the December 17, 2012. In the case of *Francis Omuroni v Uganda, Criminal Appeal No 2 of 2000*, the Court of Appeal stated that:

> ' In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.'
>
> Section 8(2) of the SOA provides that: 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.

40. Therefore, it was proved beyond reasonable doubt that at the time of the act, the minor was six (6) years old, therefore, the appellant ought to have been charged under section 8(2) of the SOA which refers to victims under eleven (11) years. However, it is worth noting that the statement of the offence of defilement was captured; and so were the ingredients of the offence. Similarly, particulars of the offence were sufficiently stated such that the appellant was able to understand the accusation laid, which enabled him to cross-examine witnesses and even mount a defence.

41. The appellant also contends that the prosecution brought a duplex charge. This was an argument suggesting that the indictment contained more than one count instead of alleging one offence, which meant that the prosecution brought two offences on one count. What is apparent is a typographical error which does not make the charge duplex. What was alleged in the charge was only one allegation, which could not have confused the appellant as alleged.

42. Section 382 of the CPC provides that:

> No finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury

or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

The omission in the charge where Sub-Section (3) was cited instead of Sub-Section (2) is curable under section 382 of the CPC, therefore, not fatal.

43. The charge as framed indicate that the appellant was given notice of the offence and the minor's age. The evidence did not contradict the particulars and the appellant was able to cross examine the witnesses.

44. The appellant submits that failure to recall the PW2, the victim, denied him the right to cross examine the witness. The trial court was of the view that the failure was an oversight on the part of the prosecution. However, the Respondent submits that the omission was not fatal and that the minor was a vulnerable witness under Section 31 of the Act.

45. According to the law, all persons are competent to testify unless the court makes a different finding and leaves out such testimony.

46. Section 125 of the *Evidence Act* provides that:

> 1. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

47. An accused person has a right to cross examine prosecution witnesses and must be given such chance at all times regardless of the nature of evidence to be presented by the witness. This is well captured by Section 302 of the Criminal Procedure Code stipulates that:

> 'The witnesses called for the prosecution shall be subject to cross examination by the accused person or his advocate and to reexamination by the advocate for the prosecution.'

48. In the case of *Paul Kinyanjui Kimauku vs Republic [2016] eKLR*, the Court of appeal held that:

> ' The record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.'

49. The fact that the evidence was not necessary or that the witness was not material does not alter the law.

50. Section 31 of the SOA sets out a process that leads to express determination by the court that a witness is a vulnerable witness and thus his evidence may be exempted or be taken through an intermediary.

51. That provision of the law provides that a court, before which a sexual offence is to be tried has the duty to inquire and declare if a witness is a vulnerable one, on the parameters given, declare so and then take the prescribed measures to protect such a witness.

52. Section 31(1) of the SOA enacts that:

> 'A court in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –
>
> a. The alleged victim in the proceedings pending before the court;
>
> b. A child; or
>
> c. A person with mental disabilities.

1. The court did not exempt the minor's evidence, the courts findings on the judgement were that the SOA speculates situations where the minor may not present her case due to tender age. However, that was not the case in the instant matter, the court was ready to take the minor's evidence having conducted voire dire examination. She was a competent witness under Section 19 of the *Oaths and Statutory Declaration Act*, and the appellant had legitimate expectation that he would cross examine her.

2. The right to cross examine is part of an accused person's defence and further within the tenets of fair trial where he should be given the opportunity before conviction.

3. Article 50 of the *Constitution* provides inter alia that the accused has a right:

> (j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
>
> (k) To adduce and challenge evidence;

56. The prosecution did not give reasons for its failure to complete the evidence of PW2. Further, the court was not informed whether the prosecution had abandoned that evidence, the effect would be to strike out the testimony from the record which was not done. The fact that it was an oversight was an erroneous finding since the appellant's rights were at stake and more was expected from the court sitting as the umpire.

57. The Supreme Court of India in the case of Natasha Singh v CBI cited in *Joseph Ndungu Kagiri v Republic [2016] eKLR*, it was held that:

> ' Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.'

58. The court's view that the child was terrified to speak at the sight of the accused was justified, however, the court had a duty to make a conclusive finding on the status of the evidence of the minor and whether she was exonerated from participating in the trial. It is also noted that crucial forensic evidence was shut out without any directions being given. PW4 was stood down to identify certain clothes

alleged to have belonged to the victim which were found at the house of the appellant. At the close of the prosecution's case the Government Analyst Report had not been availed, and, PW4 had not been subjected to cross-examination.

59. Reliance was made on Section 143 of the *Evidence Act* by the Respondent, that provide as follows:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

60. The evidence cannot be termed as uncalled evidence as per Section 143 of the *Evidence Act*, the prosecution had lined up the two witnesses before court and they were competent for cross examination.

61. The procedural error was a judicial mistake as it was occasioned by the court. The question to be grappled with is whether a retrial should be ordered? In the case of *Fatehali Manji -vs- Republic [1966] EA 343*. Sir Clement de Lestang, the then Acting President of the Court of Appeal stated at Page 344, as follows:

> ' In general a retrial will be ordered only when the original trial was defective or illegal; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial ; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered ; each case must depend on its particular facts and circumstance and an order of retrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person.'

62. Section 2 of the SOA defines defilement as:

> ' The partial or complete insertion of the genital organs of a person into the genital organ of another person.'

63. Ingredients of the offence of defilement were set out in the case of *Charles Wamukoya Karani vs Republic, Criminal Appeal No 72 of 2013* where the court stated that:

> ' The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.'

64. PW5 witnessed as the appellant carried the complainant to his house and when she came out she was bleeding from her genitals. PW1, and PW3 on the other hand saw her bleeding from her genetalia soon thereafter. Medical evidence adduced of Reports pursuant to the provisions of Section 77 of the *Evidence Act* established that the minor's vagina had been penetrated at 6:00O'clock, 7:00 O'clock and 9;00 O'clock positions. Injuries sustained were serious such that the minor had to be admitted to hospital. Medical evidence adduced confirmed the fact of penetration.

65. On the question of the perpetrator, circumstantial evidence tended to point at the appellant and no one else, despite the defence put up.

66. The appellant was sentenced on the July 8, 2021, remitting the matter to the trial court would not cause any injustice to the victim who would call for justice being done in the circumstances, and, the appellant would not be prejudiced as his legal right to hear and test the minor's complete testimony outweighs other interests. I am also guided by the case of *Gailord Yambwesa Landi v Republic [2019]*

eKLR, where the Court of Appeal ordered retrial where the accused did not cross examine the minor's intermediary. The accused had spent three years since the date of plea. The accused was similarly charged with defilement of an 8-year-old and on conviction sentenced to serve life imprisonment.The court reconciled the issues and points of law holding that an acquittal was not appropriate since the complainant must have her day in court. The court further noted that the evidence of the intermediary would not be disregarded and the court proceed to determine the case on the other evidence .

67. In the case of *Angechel Lotip v Republic [2017] eKLR*, the Court of Appeal held that:

> ' The record shows that after AA testified, the court went on to hear the evidence of PW 2, without the appellant cross-examining AA. No explanation or reasons were provided for this omission. As such, the appellant was denied the opportunity to cross examine the complainant, resulting in a misstep in the criminal justice process, which has led to a mistrial.'

68. The upshot of the above is that the trial having been vitiated by the mistake of the court, the appeal is allowed, in that, I quash the conviction and set aside the sentence thereof. In the result, I direct the appellant to be produced before a court of competent jurisdiction for a retrial.

69. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25TH DAY OF

JANUARY, 2023

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Mutuma for DPP

Court Assistant - Mutai