Kuya v Republic (Criminal Appeal E107 of 2022)
[2023] KEHC 1381 (KLR) (Crim) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E107 OF 2022

LN MUTENDE, J

FEBRUARY 28, 2023

BETWEEN

ELDART MZEE KUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Sexual Offences Case No. 92 of 2016 at the Chief Magistrates' Court Kibera by Hon. Maroro - PM. on 26th April 2022)

JUDGMENT

1. Eldart Mzee Kuya, the Appellant, was arraigned in court following allegations of having defiled LK a child aged eleven (11) years. The act was stated to have been committed in contravention of Section 8 (1) and (2) of the *Sexual Offences Act*.

2. In the alternative, it was alleged that he committed an Indecent Act with a child, LK by intentionally and unlawfully allowing his genital organ(penis) to come into contact with the female genital organ (vagina) of LK a girl aged eleven(11) years, in contravention of Section 11(1) of the *Sexual Offences Act*.

3. The offence in issue was stated to have been committed on the 11th day of September, 2016, within [Particulars Withheld] Stage 2 area, Nairobi County.

4. The charges were denied by the appellant, but, having been taken through full trial, he was found guilty, and convicted for the offence of defilement. In the result, he was sentenced to serve life imprisonment.

5. Aggrieved by both the conviction and sentence, he appeals on grounds as amended that: the prosecution did not discharge Its burden beyond reasonable doubt as required by Articles 47(1). 50(1), 157(11), and,159(2) (e), of *the Constitution*, Section 107 of the *Evidence Act*, and Section 362 of the *Criminal Procedure Code*; that the prosecution case was marred by inconsistencies; the prosecution

relied on hearsay evidence; the appellant's defence and mitigation were not considered as required; and, that the appellant's good character was admissible.

6. The appeal was canvassed through written submissions. It was urged by the appellant that the prosecution's case was not watertight as the witnesses were not consistent, they were unclear, and, they contradicted themselves. The Post Rape Care Forms and P3 Forms were not supported by treatment notes. That the Investigating Officer did not investigate the case, but, simply adopted oral testimonies of witnesses.

7. The appellant faulted the trial court for relying on hearsay evidence, disregarding the defence put up and the appellant's good character.

8. The Respondent/ State opposed the appeal. It was argued that all elements for the offence of defilement were proved. That the defence called four(4) alibi witnesses, but, their evidence was not consistent with the narrative that they wanted the court to believe. Therefore, the conviction and sentence were proper.

9. This being a first appellate court, I am guided by the principle pronounced in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated that:

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

10. Facts of the case were that on a date that the complainant could not remember, she went to a house where F lived with her parents, but, did not find her. However, F's father grabbed her and violated her sexually. On the second occasion, he repeated the act and gave her Ksh.2/- money that she used to buy chewing gum. However, this time round she felt pain in her genital region. As a result, fearing to divulge to her mother what transpired, she confided in her friend, PW2,M.N. of the ordeal. They reported the incident to PW4, MIL, who notified PW5,PM, a teacher, who contacted the Director at [Particulars Withheld] Academy where the complainant was learning. PW6, JO, a teacher was tasked to verify the allegations. She called PW3, JKL, the mother of the complainant requiring her to go to School. She complied and they took the child to hospital. PW 7 Peter Wanyama, a Clinical Officer, adduced in evidence of Post Rape Care form which was authored following examination of the complainant at Nairobi Women Hospital. Subsequently a P3 form was filled by PW8 Dr. Maundu. He examined the complainant and found her with an old wound, the hymen was torn, an examination that was done five months later. PW9 NO. 10xxxx PC(W) Munyolo Maryanne arrested the appellant who was subsequently charged.

11. Upon being put on his defence, the appellant stated that on the 11th September, 2016, he was at a Chama meeting within Kasarani area, a meeting that started at 11:05am and ended at at 4:00pm. He called witnesses to buttress the allegation of having been at a meeting. DW2, Miriam Wawire Wasike, stated that the meeting was held at her house on 11th November,2016, and the appellant was in attendance. DW3, GNB, the appellant's 3rd wife stated that she was the secretary to the group and, that, they were at the meeting. On the material day. DW4, Martina Situma, testified that she was the treasurer of the group that met Kasarani Hunters area and adduced in evidence a list of contributors who included the appellant.

12. The trial court considered evidence adduced and was satisfied by averments of the minor complainant. It found that the child was defiled severally, hence, presence of a broken hymen that was not fresh, and, that the appellant was properly identified as the perpetrator.

13. The burden of proof in a criminal case rests with the prosecution and the standard of proof is beyond reasonable doubt. It is not the duty of the accused to prove his innocence; where he gives an explanation, it is usually on a preponderance of probability.

14. The act of defilement is defined by Section 8 (1) of the *Sexual Offences Act* that provide thus:

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

Ingredients of defilement were stated in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the court delivered itself thus:

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

15. To prove the case to the required standard, the prosecution was required to prove existence of the following ingredients.

(i) Age of the victim

(ii) Proof of penetration.

(iii) Positive identification of the perpetrator of the act.

16. A birth certificate was adduced in evidence to prove the age of the complainant. In the case of *Omuroni Francis verses 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..."

17. It is not in dispute that the complainant was born on 9thNovember, 2005; therefore, at the point of the alleged incident she was eleven (11) years old, hence a child.

18. On the Question of penetration, the act is defined by Section 2 of the *Sexual Offences Act* thus:

> " Partial or complete insertion of the genital organs of a person into the genital organs of another person;"

19. Following allegations raised, at the outset, the complainant was seen and examined at the Nairobi Women Hospital, on the 14th September,2016 and her hymen was not intact. Evidence of a P3 (Medical Report) was adduced that confirmed that the victim's hymen was broken which may have been evidence of insertion of something into her vagina, amounting to penetration.

20. The question this court has to grapple with is whether the act of penetration was committed by the appellant. There was no independent witness to the act. In the case of *Kassim Ali v Republic* [2006] eKLR it was stated that:

> "... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

21. In her testimony, the complainant testified that the assailant inserted his penis into her vagina. She described how the appellant made her to lie down having pulled up her clothes and removed her inner wear, prior to penetrating her vagina. This was the second time the act was being committed. Unlike the first time, the complainant was in pain. This is what prompted her to confide in her friend, PW3. At the outset she mentioned the appellant as her assailant.

22. Section 124 of the *Evidence Act* provides thus:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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.

23. The appellant denied the allegations. He came up with an alibi defence. In reaching the decision to convict, the trial court was of the view that the minor categorically stated what transpired at the house of the appellant. That other witnesses confirmed that the offence occurred thrice as narrated by PW3 and PW4. In the result, the court was satisfied with the evidence of the minor which did not require corroboration. It is worth noting that PW3 and PW4 were not eye witnesses to the act, therefore their evidence was hearsay. The court would still convict if it found the victim having been truthful, and, it was required to give reasons for the belief. The complainant and the appellant lived on the same block. She called him "Baba Joni"

24. Looking at medical evidence adduced, the complainant was found with a hymen that was not freshly broken. She was examined some four days after the alleged act. There was no laceration of the external vagina. This puts a doubt on whether penetration occurred on the stated date.

25. On the question of contradictions and inconsistencies, it was argued by the appellant that there were discrepancies in the evidence of witnesses. In the case of *Philip Nzaka Watu v Republic* [2016] eKLR, the court stated that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions

of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

26. And, in the case of *Joseph Maina Mwangi v Republic* [200] eKLR where the court stated that:

> "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

27. This was a case where other witnesses purported to state what they were told by the victim, therefore, deviating slightly from what they heard which was immaterial to the case.

28. A statement having been inconsistent would imply that she made two (2) different statements in material particulars regarding the same fact. This was not the case herein.

29. Although the complainant explained vividly the purported act of penetration that was committed by the appellant, I have afore found that medical evidence adduced did not support the allegation of an act of defilement having occurred beyond reasonable doubt, and circumstantial evidence similarly did not support that fact.

30. However, in the alternative, the appellant faced the charge of committing an indecent act with a child Section 2 of the *SOA* defines an indecent act as:

> "Indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

31. The issue to ponder over could be whether there could have been contact of any part of the assailant's body with that of the complainant's genital organs?

32. This is a case where the appellant admitted having been the Complainant's neighbor, therefore, this was not a case of mistaken identity. The only issue to be ascertained is the alibi defence that was put up by the appellant.

33. The law is that the burden of proof does not shift to the accused but rests on the prosecution to displace the appellants defence, in this case the appellants defence raised an alibi. The appellant argued that he could not have been the assailant because he was elsewhere, and, in particular, at a meeting and he availed witnesses who testified in support of the alibi.

34. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the Court of Appeal held :

> "It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."

35. In the case of *Erick Otieno Meda v Republic* [2019] eKLR the Court of Appeal held that:-

> "The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)"

36. In the case of *R v Mahoney* [1979] 50 CCC it was held:

> " The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."

37. In the case of *R v Sukha Singh S/o Wazer Singh & Others* [1939] 6 EACA 145 it was held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interim and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

38. The appellant having raised an alibi defence did not have the duty to prove his case. It was enough for him to make the court think that it was probable. The appellant alleged that he was attending a meeting at Kasarani on the fateful date.

39. He availed witnesses alleged to be officials of the self-help group who tendered evidence that he was in attendance and that the meeting started at 11:00am and ended at about 4:00pm. The trial court which was not convinced by the alibi defence dismissed the documentary evidence adduced as having contradicted the testimony of witnesses, and that there were discrepancies as to the time of starting the meeting hence they could not tell the whereabouts of the appellant between 8.00am and 11:00am.

40. If the appellant had such a strong alibi, he would have been expected to bring it forward at an early stage for purposes of being tested. This should have been at the point of cross-examination of the prosecution witnesses and especially the complainant and the officer who investigated the case and formed the opinion to charge him.

41. Notably, the alleged self-help group should have been one that exists in law and thus proof of its registration was required. There was nothing to suggest the office holders of the group if it did exist. There was no way a meeting could be held on 11th September, 2016 and minutes confirmed on the same day. As correctly pointed out by the trial court there were discrepancies on the document authored by the appellant's wife which could not be overlooked. The question begging is where exactly the accused was during the morning hours?

42. The complainant alluded to the act having been committed in the morning hours after she returned from church, on a Sunday. PW2 stated that she met the complainant after returning from church. Indeed, the stated date happened to be on a Sunday. The trial court had the opportunity of observing

the demeanor of the complainant. It was noted that the testimony of the complainant was consistent, therefore, believable.

43. In the premises, I find the prosecution having proved that the appellant's genitalia came into contact with the genital organs of the complainant, an act that was done intentionally and unlawfully, which was an indecent act. That being the case I quash the conviction on the main count, set aside the sentence meted out, which I substitute with a conviction on the alternative count of committing an indecent act with a child contrary to Section 11(1) of the *SOA*, and having taken into consideration the six (6) months that the appellant was in remand custody, I sentence the appellant to serve nine and a half (9 ½) years imprisonment effective from the 26th day of April, 2022.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 28TH DAY OF FEBRUARY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr, Mutuma for DPP

Court Assistant Evance