Ndichu v Republic (Criminal Appeal 23 of 2020)
[2023] KEHC 1306 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 23 OF 2020

J WAKIAGA, J

FEBRUARY 23, 2023

BETWEEN

JOHN NJOROGE NDICHU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against conviction and sentence of Hon. M. W. Kurumba SRM in Kandara Magistrates Court Criminal Case No 43 of 2016 Republic vs John Njoroge Ndichu)

JUDGMENT

1. The Appellant was charged with the offence defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006, the particulars of which were that on the August 19, 2016 in Gatanga Sub County within Muranga County, intentionally and unlawfully caused his penis to penetrate the vagina of AW a child aged 8 years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offence Act*.
3. He pleaded not guilty, was tried, convicted and sentenced to life imprisonment and being aggrieved by the said conviction and sentence filed this appeal initially through the law firm of Kaburu Miriti Advocates on the ground that the trial court sentenced him to life imprisonment, whereas the law sets a minimum sentence for such offence, and that the trial court did not address itself to the question of whether or not he had discretion, thereby denying the appellant the chance to mitigate.
4. When the appeal came up for hearing, Dr Khaminwa appeared for the same and filed Supplementary petition of appeal together with written submissions wherein the following grounds were raised:-
   - A. That the Trial Magistrate erred in law and in fact when she found that the prosecution had discharged the burden of proving their case beyond reasonable doubt.

B. That the Trial Magistrate erred in law and in fact in rejecting the appellant alibi defence thereby coming to wrong conclusion.

C. That the Trail Court erred in law and in fact in relying on the evidence which had no evidential value as being contradictory, incredible and uncorroborated.

D. PW7 should have been declared a hostile witness.

Submissions

5. It was submitted that PW7 a brother of the appellant whose report to PW 4 that he had seen PW1 entering into the appellants house should have been treated as a hostile witness as defined in *SCG v Republic* [2018] e KLR as one who from the manner in which he gives evidence shows that he is not desirous to telling the truth to court and that having been declared hostile witness by the prosecution, the court should not have relied on his evidence as was held in the case of *MKN v Republic* [2020] e KLR.

6. It was submitted that the evidence of PW1 as well as other prosecution witnesses was incredible and marred with discrepancies, as the evidence of PW1 was that she went to play with her friends after the incident regardless of what happened and that she stated that the appellant removed her clothes, including her skirt and underwear, yet they had blood stains without explaining how. It was submitted that the evidence of PW7 was confusing on when and how he saw PW1 enter into the appellant's house and that the discrepancies created a doubt on the Prosecution Case as was stated in *R v Mary Felesa Ogenga* [2005] e KLR.

7. It was submitted that the evidence of PW1 required corroboration, since PW7 who was the key prosecution witness altered his version of the event during the trial thereby becoming unreliable and that the trial court could only convict on the evidence of PW1 if it was satisfied that she was truthful and reasons for believing so recorded in the proceedings as was stated in *Odhiambo v Republic* [2005] e KLR and that since the trial court failed to record the same, it was fatal as was stated in *Reagan Mokaya v Republic* Criminal Appeal no 49 of 2006.

8. The appellant submitted that the trial court should have found that the alibi defence put forward by the appellant cast doubt on the prosecution case and that in rejecting the appellants alibi defence on the basis that he had not put it forward at early stage was in error as was stated in *Kibale v Uganda* [1999] 1EA 145.

9. It was finally submitted that the sentence was illegal and excessive on the basis of the decision in *Francis Karioki Muruatetu & another v Republic & 5 others* [2016] e KLR and as applied in *Christopher Ochieng v Republic* [2018] e KLR and *Evans Wanjala Wanyonyi V Republic* [2019] e KLR, where the court held that the mandatory nature deprived the court of their legitimate jurisdiction to exercise discretion and was therefore unconstitutional.

10. The court was urged to quash the conviction and set aside the sentence.

11. On behalf of the state it was submitted that the age of the complainant was proved through her birth certificate, penetration through P3 Form which confirmed that her hymen was broken, as corroborated through her account that after the act she felt pain and her skirt and innerwear had blood. The identification of the appellant was through recognition and that there was no mistaken identity as the act happened during the day time.

12. On the appellant alibi defence, it was submitted that the court concluded that it was an afterthought having been introduced so late in the trial and in support the case of *Ricky Ganda vs The State* (2012)

ZAFSHC 59 Free State High Court Bloemfontein , where the court held that the best approach is to consider alibi in light of the totally of the evidence in the case and impression of the witnesses and to weigh all the elements which points toward the guilty of the accused against all those which are indicative of his innocence .

13. It was submitted that the guilt of the appellant was proved beyond reasonable doubt and that not all inconsistencies would amount to rendering the prosecution case as failing below the required standard as was held in *Richard Munene vs Republic* [2018] eKLR. On PW7, it was submitted that despite being the appellant's brother, his testimony implicated him and corroborated the evidence of PW4 and he only retracted his evidence when the appellant recalled him and he was declared hostile, hence cross examined by both the prosecution and the appellant.

14. The court was urged to find that the appeal lacked merit and find that the appellants conduct during the trial pointed to a guilty conduct.

Proceedings

15. This being a first appeal, the court is under a duty to re-evaluate and re-assess the recorded evidence and to come to its own conclusion, though giving allowance that unlike the trial court, it did not have the advantage of seeing and hearing witnesses see *Okeno v Republic* [1972] EA 32.

16. PW1 AW a minor, who was found not to understand the meaning of oath was a firmed and stated that she was aged 8years and living at the time with (Shushu) her grandmother, (Guka) grandfather SK and M. On August 19, 2016, at 1.00pm she went A home which was next to hers and the appellant who was in his room called her and told her not to tell anyone what they would do, he then took her to bed, removed her clothes and did "tabia Mbaya "to her, he then warned her not to tell anyone what he had done or else he would kill her.

17. She then went to play with Nyambura, and later on threw her blood stained panties in the toilet and that it is A who told Derick and Nyambura what had happened, then Derick called her Mum and told her, while Nyambura told her grandmother, she was then taken to the Doctor who examined her before being taken to Nairobi by her father. In cross examination, she stated that she knew the Appellant as Njoroge.

18. PW2 SWK testified that Derick sent her a text massage and informed her that A (Compliant) had told him that Njoroge had defiled her, she informed her mother who confirmed the same with PW1. The following day they took PW1 to the local hospital where the doctor confirmed that her hymen had been broken. PW7 confirmed that he had seen the complainant leave the appellants room with blood in her skirt, which she confirmed on 23rd before washing the skirt and that it took two weeks before the appellant was arrested. In cross examination, she stated that PW1 could not report because the appellant had threatened her.

19. PW3 MWK, she stated that she had gone to visit the appellant's mother who was sick when PW2 called her on phone and informed her of what she had been told. She went home and inquired from Derick who told her that AN PW7 asked him what PW1 was doing in the appellant's home while it was known that he was a bhang smoker, she called PW1 who confirmed to her what the appellant had done to her.

20. PW4 Derick Nganga Chinga stated that he met PW7 on the road, who told him that he had seen the complainant leave the appellants house with blood on her clothes, he then informed his mother through text message, when he asked PW1 about the blood, she told him that she had sat on the paint, she later said that she was afraid to say what had happened because the appellant had threated to kill her.

21. PW5 James Kamande the Area Assistant Chief received the report and since cases of that nature were on the raise, she referred them to the police at Kirwara. On September 22, 2016, they arrested the appellant together with PW6 PC Jared Obiero who arrested the appellant at Gatunyu shopping Centre

22. PW7 AN aged 13 years being found not to possess sufficient intellect, gave was affirmed and stated that he saw PW1 coming to visit the appellant, who was washing clothes outside and that she stayed there for about one hour. She stated that she was told by the complainant's grandmother to lie.

23. When cross examined further he stated that the appellant was at his place of work as a conductor and that he never met Derick and further that the grandmother of PW1 took him to the police and told him what to say. He stated that the appellant was his brother and that he loved him. He did not tell the appellant that he had implicated him.

24. PW8 Wilson Mburu Kamau, a Doctor at Kirwara Hospital produced the P3 form on the complainant, though he did not examine her and confirmed that her hymen was broken, with no discharge. She stated that she had bled but her clothes had no blood stains.

25. PW9 INSP. Ibrahim Mohamed testified on behalf of CLP Cheruiyot the Investigating Officer, who stated that the case was reported on September 5, 2016, they recorded statements from witnesses and produced all the exhibits. He stated that it took them sixteen days to arrest the appellant.

26. When put on his defence the appellant stated that he had a wife and one child. It was his case that he was framed up and that MW forced PW1 and 7 to say that he had committed the offence. He stated that he was sick on 22nd September so he did not go to work and on 4th September he stayed at home, on 19th August he was at work from 5.00am to 10pm together with DW2 and that his wife was at home with him in August, he stated that M wanted a sexual relationship with him, which he declined since they were distant relatives, so she said she will teach him a lesson.

27. DW2 Peter Gikonyo Ndiba stated that the appellant was his conductor, on the 22nd he was informed that he had been arrested on allegation that he had raped a child on 19th august, while he was on duty with him from 5am to 10 pm.

Determination.

28. From the proceedings and submissions herein I have identified the following issues for determination:

    a. Whether PW7 was or should have been treated as a hostile witness

    b. Whether the prosecution case was proved

    c. Whether the appellant defence was considered

    d. Whether the sentence was excessive

    e. What order should the court make on this appeal.

Whether PW7 should have been declared a hostile witness?

29. PW7 was a brother of the appellant whose evidence placed the appellant together with the complainant. At the trial the same testified and was cross examined by the appellant only for the same to later on apply for his recall upon which the prosecution sought that he be declared a hostile witness as it was apparent that the same was changing his statement, the court did not make a ruling thereon but allowed him to be recalled and cross examined further by the appellant and re -examined by the prosecution.

30. In allowing for the recall of the witness the court exercised the right under Section 150 of the *Criminal Procedure Code* and as was stated in *R v Salim Mohamed* [2016] e KLR, recalling a witness is part of the right to fair hearing and for the purposes of further cross examination and therefore the court cannot be faulted for not declaring PW7 a hostile witness since he did not change the content of his evidence in chief for which he would have been declared as such.

31. I am therefore not persuaded by the submissions by the appellant that the same should have been declared a hostile witness at the stage when he was recalled for further cross examination as that right would only have been exercised at the time of his examination in chief and not during cross examination whose purpose is to test the varsity of the evidence in chief.

32. In convicting the appellant on the strength of the evidence of PW 7 the Trial Court considered his conduct and evidence during the examination in chief and under recall and found as a fact that he was a witness who had been interfered with by the family and had this to say:-

> ”when asked why he had chosen to implicate his brother and only came later to say that he did not defile AW, he said that he came to say that truth because at home everyone was saying that he is the reason why his brother is in prison. I observed his demeanour and noted that during the recall he was shaking and fidgety. It became clear that what he was saying was not consistent with what he knew was true and he was afraid”.

33. The purpose of declaring a witness hostile is equivalent to a finding that the witness is unreliable and therefore none of his evidence can be relied upon as was stated in the case of *Batala v republic* [1974] E.A 404 and having not been declared so the court cannot be faulted in using his evidence.

34. Having not been declared a hostile witness, the only issue which the court was required to determine is whether PW7 was a reliable witness and if so did it believe his evidence. In this the court as stated herein above, was clear that the witness had been interfered with and those are finding of fact based on the demeanour of the witness as observed by the trial court having looked at his statement to the police, his evidence in chief and under cross examination, which an appellant court cannot interfere with. It was further finding of fact by the trial court that PW7 changed his story because he was being blamed by his family for causing his brother to be in prison.

35. The question for the court is whether the prosecution case was therefore proved beyond reasonable doubt? The age of the complaint was proved through her evidence, the evidence of PW2 her mother who produced her Birth Notification card and as corroborated by the evidence of PW8 who confirmed her age and penetration as it was his evidence that her hymen was broken.

36. The appellant was placed together with the complainant by PW7 as corroborated through the evidence of PW4 who confirmed that the complainant entered into the house of the appellant and when she came out, her skirt was blood stained which when asked what it was she said that she had sat on paint, the appellant identification was that of recognition as he was known to the complainant and therefore find that the identification was free from mistake.

37. On the appellant alibi defence, it is clear that the same was considered by the Trial Court and dismissed, on the grounds that PW7 and the complainant had placed him at home on the material day which the Trial Court believed based upon the evidence placed before it and which I have re-evaluated herein.

38. I therefore find and hold that the conviction of the appellant was safe and free from error and dismiss the appeal against conviction.

39. On sentence, the same remains at the sole discretion of the Trial Court which an appellant court may only interfere with if the same took into account irrelevant matters and of failed to take into account relevant material. Further the appellate court will only act if the sentence is so excessive so as to be unreasonable.

40. In sentencing the appellant, the Court looked at the conduct of the appellant during trial of having absconded trial and further took into consideration the pre-sentencing report and the prevalence of the offence within the area and whereas the court had discretion to pass any sentence rather than the minimum sentence provided for in law, I have taken into account the age of the victim at the time of the offence and find the sentence lawful and will, not interfere with the same.

41. In the final analysis I find no merit on the appeal herein, which I dismiss both on conviction and sentence.

42. The appellant has a right of appeal and it is ordered.

DATED SIGNED AND DELIVERED THIS 23rd DAY OF FEBRUARY 2023.

J. WAKIAGA

JUDGE

In the presence of :

Ms Mutahi: Court assistant