AGK v Republic (Criminal Appeal E105 of 2021)
[2023] KEHC 939 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E105 OF 2021

LN MUGAMBI, J

FEBRUARY 17, 2023

BETWEEN

AGK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence of the Chief Magistrate's Court at Gatundu (L.M. Wachira, CM) dated 14th, September 2021 in Sexual Offences Case. (S.O) Number 9 of 2020))

JUDGMENT

1. The appellant AGK was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that the appellant, on the 8th day of March, 2020 at (name withheld) village in Gatundu North Sub-County did an act which caused a penetration with his male genital organ (penis) into female genital organ (Vagina) of (MW) a child aged 13 years.

3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the alternative charge being that on 8th day of March, 2020 at (name withheld) village in Gatundu North Sub-County within Kiambu County intentionally and unlawfully touched the buttocks of MW a child aged 13 years.

4. The appellant was found guilty of the main offence and sentenced to twenty-five (25) years imprisonment.

5. The appellant was dissatisfied with the conviction and the sentence and thus filed this appeal. He raised the following grounds in his petition: -

1) That the learned trial magistrate erred in matters law and fact by conducting the trial in a manner that violated the appellant's constitutional rights to fair hearing under articles 50 (2), (c) , (j) of the *Constitution* of Kenya, 2010.

2) That the Hon. trial magistrate erred in matters of law and fact by failing to conduct viore dire as required under section 19 of the *Oath and Statutory Declarations Act*, Chapter 15 Laws of Kenya.

3) That the learned trial magistrate erred on points of law and facts by rejecting my defence as required under section 169 (1) of the *CPC* without giving cogent reasons.

4) That the learned trial magistrate erred in fact in finding that the identification of the accused person was watertight by considering matters of conjecture and speculative inferences without weighing and making a finding on the relevant evidence adduced on record

5) That the learned trial magistrate erred in fact by handling the appellant a harsh sentence and ignoring the mitigation tendered by the appellant.

6) That the Honourable trial magistrate erred in matters of law and fact by conducting the trial in a manner that violated the Constitutional rights to fair hearing under article 49(1), (f) of the *Constitution* of Kenya, 2010

7) That the learned trial magistrate erred in both matters of law and fact by failing to consider his defence thereby demonstrating open bias

8) That the learned trial magistrate erred in both matters of law and fact by failing to find that the penile penetration of PW 1's genitalia was not proved to the requisite standard as required by law.

9) That the learned trial magistrate erred in meting a harsh and most punitive sentence on the appellant despite the fact that the charge was not proven

He thus prayed that this appeal be allowed and the conviction be quashed and the sentence be set aside.

6. This is a first appeal and as an appellate court, my duty is to re-evaluate the whole evidence and arrive at my own conclusions save for the fact that I must always remember that I had no opportunity to see or listen to the witnesses as they testified (See *Okeno v Republic* 1972 EA).

7. This was also reiterated in *Bakari Rashid v R* [2016] eKLR by the Court of Appeal which explained:

> " ... On a 1st Appeal from conviction, the appellant is entitled to have the appellate court's all consideration and views on the evidence as a whole and its decisions thereof. As first appellate court, the High Court has a duty to rehear and reconsider the material evidence before the trial court. It must then make its own mind not disregarding the judgement appealed from, but carefully weighing and considering it... "

Summary of The Evidence

8. The complainant (MW) gave her evidence upon being affirmed at the direction of the trial Court. She testified that she was in class 4 and was aged 13 years having been born in the year 2007.

9. She stated that the appellant was known to her because he was her paternal uncle.

10. She recalled that on 8.3.2020, the appellant went to their home and instructed her to go and warm some water so that he could use for milking. The complainant went to do as instructed dragging along her younger sibling, Wanyoike.

11. Reaching there, the appellant sent away Wanyoike to buy some meat. He then took her to a bedroom within the grandmother's house that appellant was using. He removed her clothes including her pant. He also removed his own clothes and had sexual intercourse with her without protection. She described the act of penetration as follows:

> " ... He used his penis and put it on my private parts. My private part for urinating..."

12. The following morning, he father accompanied by police officers came and found her in the house. The appellant had by then left to take milk to the dairy.

13. The complainant explained that on another previous occasion, the appellant had similarly had sexual intercourse with her.

14. She was escorted to the Police Station and thereafter to Igegania Hospital.

15. On cross-examination the complainant denied a suggestion put to her by the appellant that she had framed him and insisted she was speaking the truth.

16. The complainant's father, JKW testified that the complainant was her third born in a family of one boy and three girls. The appellant was his cousin who lived in Nairobi but whenever he went home, he would stay within the compound as his mother's house was only 100 feet away.

17. On 8/3/2020, he went home and only found his son and his wife LW (who was by the time of his testimony was dead). It was about 8.00 P.M and the complainant was not at home. When she inquired from his wife the whereabouts of the complainant, she explained that the appellant had asked her to go and assist him in boiling water so that he could milk but had not come back yet.

18. The father went to look for his daughter. Reaching there, he heard them speaking inside the house. The daughter did not return and that morning, he decided to go and report to the police. When the police officers came, they found her daughter still inside the house that that the appellant was staying in.

19. The accused was arrested while the daughter was taken to hospital. He identified her treatment records before the trial court.

20. On allegations that he was framing the appellant, he denied stating that he had have no reason to do so. Asked why he did not take her daughter away that night, he answered:

> " ... I did not get her out as I was very annoyed ..."

21. PW3, Salat Abdi, a police officer testified that he was in at the Police Camp with a fellow police officer, Sgt. Njuguna when complainant's father went and reported that his cousin had locked his daughter in his house for 2 days. They thus accompanied him to the house and found the appellant was going back after milking. The house was locked from inside. They broke into the house and found the complainant taking cover under the bed. When they questioned her, she explained that the appellant had instructed that she should not open. She also stated that the appellant had been having sex with her. They thus arrested the appellant. On cross-examination, the police officer explained that the arrest took place at about 4.00 a.m.

22. The evidence of Sgt. Peter Njuguna (PW4) who accompanied PW3 to make the arrest was materially identical.

23. The investigating Officer- P.C. Catherine Njenga (PW 5) gave a blow by blow account of measures she took in piecing together the evidence against the appellant who was already arrested after the complainant was found in his house following police action prompted by a complaint lodged by the complainant's father. This included taking down the statement of the witnesses and issuing the P.3 forms to the complainant.

24. Clinical Officer George Kamau (PW 6) of Igegania Level 4 Hospital testified he examined the complainant who was a girl aged 13 years who had been presented with history of allegations of sexual assault by a man 35 years of age. From the examination conducted, he made several findings. The hymen was broken and she had vaginal discharge that was spilling to her inner wear. Other tests including the HIV test, VDRL, Pregnancy were negative. He then made an observation as follows:

> " ... I confirm there was penetration. The hymen was absent and the vaginal wall and orifice were widened ... "
>
> The appellant was placed on his defence and in his unsworn statement he stated as follows:
>
> " ... I am Antony GKI live in Mangu. I am a mechanic. I did not do anything. This is a grudge in the family. That is all ... "

Submissions

25. I have looked at the respective rival submissions by both the state and the appellant.

26. The appellant in his submissions pointed out a number of issues which he described as legal flaws that were made by the trial court that vitiated his right to a fair trial.

27. One of the issues raised was that the trial court went ahead and took the evidence of PW 1 who was 13 years by affirming her before inquiring into her intelligence and whether she understood the nature of an oath and the need to speak the truth. He also wondered why the Court went straight and affirmed her even before she her faith could be ascertained. He cited the case of *Samuel Warui Kirimi v R* [2016] eKLR where due to failure to conduct a voire dire examination on a child of 12 years whom the appellant had attempted to defile; it was held that it was a breach of accused's right to a fair trial as guaranteed by the *Constitution* as the approach resonated with the need to the integrity of preserve viva voce of young children in criminal proceedings.

28. He also relied on *Samuel Wanini Ngugi v R*. Criminal Appeal No. 218 of 2007 where the Court held though the effect of failure to conduct the voire dire on a trial depended on circumstances of each case, in this particular case, the appellate court found that the conviction could not stand.

29. He also pointed out that in the written judgement of the trial court, the trial magistrate invoked Section 8(4) as part of the statement of the offence he was facing without giving the opportunity to plead to the new charge as required by section 214 of the *CPC*. He argued that the sentences provided under the two sections are also different.

30. On the age of the complainant, which he submitted is a vital component of the charge he was facing, he argued that it was not established by evidence presented. He submitted:

> " ... the Prosecution witness told the Court that the child was 13 years old. The Prosecutor never produced the age assessment report. Moreso, the age of the victim was not the reason

for visit on 12.3.2020 to Igegania Level 4 Hospital where she only went to be examined in order to establish if actually she had been assaulted ..."

31. He also submitted for an offence of defilement to be committed, prove of penetration alone was insufficient, it had to be demonstrated that there was penile penetration which according to him was not proved.

32. He further contended that the trial court shifted the burden of proof to him pointing to a predetermined state of mind which he illustrated by pointing at paragraph 35 where the court remarked:

> " ... On whether the charges are herein were trumped up, the accused alleges that he was being framed. He does not tell the court why he thinks he was being framed... "

In this regard, he relied on the case of *Kamau Njuguna v R*, Mombasa Court of Appeal Cr. Case Number 82 of 2010 where he pointed out that the appellant was acquitted in a similar situation with the Court observing:

> " ... Lastly, the High Court failed to appreciate that the trial magistrate had shifted the burden of proof by requiring the appellant to explain why the witness who had no grudge with him should implicate him in the offence ..."

33. The State's response to the appellants submissions was brief. It stood its ground that it had proved all the elements of the offence, namely penetration, age and identification of the appellant beyond reasonable doubt. Citing the case of *Kaingu alias Kasomo v Republic* C.A. 504 2010- it submitted that the court addressed the question of how age is proved. It was held:-

> " .... the approved modes of proof of age is through medical evidence where this is professionally determined by a medical doctor. Further, approved modes are through birth certificate, clinical card as well as oral testimonies of parent or guardians. The Court of Appeal of Uganda in *Francis Omoroni v Uganda*; Criminal Appeal No. 2 of 2000 added by observation and common sense..."

Analysis

34. One of the salient points relied upon by the appellant in this appeal was the fact that the complainant was a child who was said to be thirteen years yet her testimony was not preceded by a voire dire examination. The Court directed her to be affirmed without conducting the examination to establish if she understood the nature of the oath, or even the need to speak the truth.

35. Under section 125 (1) of the *Evidence Act*, children are competent witnesses unless the court finds that they are prevented from understanding the questions put to them, or giving rational answers to those questions by tender years.

36. Moreover, section 19 of the *Statutory Declarations Act* directs that where any child of tender years child is called to as a witness, and the Court is of the opinion that the child understands the nature of the oath, his evidence will be taken. The other circumstance is that a child can be allowed to testify not under oath, if in the opinion of the court he is possessed of sufficient intelligence and understands the duty to speak the truth. In the second scenario, his evidence acquires the status of a disposition in accordance with section 233 of the *Criminal Procedure Code*.

37. The other section that is key is section 124 of the *Evidence Act* which provides:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 19), where the evidence of 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 in a criminal case involving a sexual offence the only evidence is that of 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... "

38. The question that needs to be answered first is who is a child of tender years before dealing with the issue raised by the appellant, i.e. if these proceedings were irregular and thus prejudicial to him for failure by the court to comply with the procedure of taking evidence of a child of tender years.

39. The definition is neither in the *Evidence Act* nor the Oath and Statutory Declarations Act. However, famous old case of *Kibageny v R* [1959] EA 92 is what has been guiding courts. In this decision, the Court said:

> " .... There is no definition in the Oaths and Statutory Declarations Ordinance of the expression 'child of tender years' for purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, apparent age, of under fourteen years: although, as was said by Lord Goddard, C.J. in *R v. Campbel*l, (1956) ALL ER 272,
>
> > " whether a child of tender years is a matter of the good sense of the court... "

40. I am aware under *Children Act* section 2, it has defined a child of tender years to be of under the age 10 years. The Court of Appeal has however deprecated any attempt to use the *Children Act* for purposes of determining the competence of a child to testify.

In *Patrick Kathurima v Republic* [2015] eKLR faced with that particular issue, the Court held:-

> " ... Whereas the question of whether a child is of tender years remains a matter for good sense of the Court as was stated by this Court in *Mohammed v Republic* [2008] 1KLR 1175, we see no reason for departing from the observation made in *Kibageny v Republic*(supra) that the expression 'child of tender years' for the purpose of section 19 means 'in absence of special circumstances, any child of any age, or apparent age, of under fourteen years ... That indicative age has been followed by courts ever since, see for instance *Johnson Muiruriv R* [1983] KLR 445 where this Court, in respect of 13½ year old child approved the step taken by trial court:-
>
> > " The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth'.
>
> We take the view that this resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to fair trial and should always be followed. The age of fourteen years remains the reasonable

> indicative age for purposes of section 15. We are aware that section 2 of the *Children Act* defines a child of tender years to be one under the age of ten years. That definition is preceded by the word 'In this Act, unless the context otherwise requires'.
>
> That definition has not been applied to the *Oaths and Statutory Declarations Act*, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes... "

41. From the above pronouncement of the Court of Appeal therefore, it is clear that a child of tender years is as was defined in *Kibageny case*, which is, the age of 14 years or apparent age of fourteen years and below.

42. When such a child appears in Court as a witness, then section 19 of the *Oaths & Statutory Declarations Act* is immediately set in motion and the Court has to determine the competency of the child to testify, firstly by finding out if the child understands the nature of the oath, in which case the child will be sworn or affirmed. The other scenario would be where the court determines the child is intelligent and has ability to understand the duty to speak the truth, in which he can testify without being sworn and his evidence will take the form of a disposition as in section 233 of the *CPC*.

43. In the present case, the charge sheet shows that the child was 13 years. In her testimony she stated as much. Her father, PW 2 equally said so. The Prosecutor alerted the trial magistrate prior to child giving her evidence.

44. The trial court however did not conduct any voire dire examination to appraise itself of the matters as provided for in section 19 of *Oaths & Statutory Declarations Act.*

45. Indeed, the record show that the trial court merely indicated "Witness be affirmed".

46. The basis for making the direction that the child be affirmed is also not given. The record does not even show how the court reached the decision that the court should be affirmed before ascertaining if she subscribed to any faith. Oathing applies to persons who subscribe to religious beliefs or to supreme being, that is, spiritual persons whereas affirmations are similar status but made by non-religious/ spiritual people. *Blacks Law Dictionary* defines affirmation as follows:-

> " Solemn pledge equivalent to an oath but without reference to supreme being or swearing: a solemn declaration made under penalty of perjury, but without an oath."

47. Why did the court make a choice for her without inquiring?

48. Most importantly, this was a child of tender years. Was it in order for the court to take her evidence before determining her competency? The answer lies in the decision of the Court of Appeal in *Johnson Muiruri v Republic* [1983] KLR 447 where the Court of Appeal guided on what a court should do if a child of tender years is tendered as a witness. In brief, the Court of Appeal restated the principle that the testimony of a child of tender cannot be taken without a demonstration on record that the court interviewed the child to gauge her intelligence to give evidence and the importance of speaking the truth, or whether she understood the meaning of an oath. This examination must be apparent on the court record.

49. This failure by the trial court to conduct a voire dire examination of the complainant made the evidence against appellant inadmissible. This position also finds support in the decision of the Court of Appeal in *Samuel Warui Karimi v Republic* [2016] eKLR where in dealing with a similar issue, the Court held:

> "... We agree that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness was aged 12 years and that essential step was not taken in a criminal trial, that becomes problematic. In the circumstances, we find evidence by the complainant was not properly received thus, conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness... "

50. Applying the foregoing principles to this case, it is clear that the failure of the trial court to follow the correct procedure in taking the evidence of the complainant compromised the fair trial of the appellant and the decision cannot therefore stand. This ground alone suffices to dispose of this appeal.

51. I do however observe that that mistake was done by the Court's lack of appreciation of the cardinal importance of that process in a criminal trial. It was neither a mistake by the Prosecution nor the complainant. The trial court was entirely to blame for the irregularity.

52. Which brings me to the next issue, what orders should this court make? In deciding this particular issue, I must bear in mind the interests of justice and this means I must consider justice for the complainant as well as the accused.

53. In *Mwangi v Republic* [1983] 1KLR 522 the Court of Appeal observed a retrial should only be ordered where the appellate court was of the opinion that on proper consideration of the admissible or potentially admissible evidence, a conviction might result.

54. I am aware that the appellant has been in custody pursuant to the sentence of the Lower Court with effect from 14th September, 2021. If for some reason a fresh trial is ordered and he is possibly convicted, under section 333 (2) of the *Criminal Procedure Code* that period ought to be taken into account.

55. Having regard to all the above factors, it is my humble view that justice will best be served if a retrial of the appellant is done.

56. I thus quash the conviction and set aside the 25 year sentence against the appellant and substitute the same with an order for retrial before a different magistrate.

57. The appellant will thus be released to Gatundu Police Station for production before Gatundu Law Courts to take a fresh plea before any other Magistrate with jurisdiction to try the case court not later than 14 days from the date of this order.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of :-

Coram:

Court Assistant: Kinyua

Appellant: Present (in prison)

DPP for Respondent: Mr. Gacharia

COURT

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE