Mwingirwa v Republic (Criminal Appeal E071 of 2022)
[2023] KEHC 18775 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18775 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E071 OF 2022

MS SHARIFF, J

APRIL 27, 2023

BETWEEN

BENARD MWINGIRWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon E. Ayuka S.R.M in original Chuka PMC S.O Cause No. 33 of 2020 delivered on 31/2/2021)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, 2006, the particulars being; between 8th July, 202 and July 14, 2020 in Imenti South Sub County within Meru County unlawfully and intentionally caused his penis to penetrate the vagina of SW, a child aged 14 years. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Act. The facts are similar as the facts in the main count.

2. The appellant denied the offence and the suit proceeded to hearing. PW-1 was SW, the minor who testified that she was born on October 14, 2005 and therefore aged 4 years. That on the said date, she went with her friend to the market and were late coming back home. He mother being angry asked her to go back where she had come from. She went to her friend's home where she spent the night. The following day, she went to the appellant's place of work and to the appellant's friend's home the following day. She confirmed that during the period between, she engaged in repeated sexual intercourse with the appellant before going to the appellant's mother's home from where she was picked on July 11, 2020 and escorted to Kanyakine Sub County Hospital.

3. PW-2, Moses Baiyenia, a clinical officer from Kanyakine sub county hospital stated that the minor came presenting a history of being defiled by somebody known to her. On examination, the hymen

was broken with a whitish discharge. The lab results showed *inter alia* presence of numerous pus cells. He concluded that the results were consistent with sexual activity.

4. PW-3, AN the minor's mother stated she left the minor with her mother to go pick some drugs for her mother and on returning, the minor was not home. She reported the matter to the area assistant chief and the police and when she inquired from the appellant whether she had seen her daughter, the appellant denied and only informed the police of her whereabouts after arrest. The minor was later rescued from the appellant's home and she took her to the hospital.

5. PW-4, PC Simon Kiama of Murungurune Police Station who was the investigating officer stated that upon interrogating the appellant, he found that the minor had been taken to the appellant's rural home in Tigania West where they found the minor and later charged the appellant.

6. The appellant was put on his defence and elected to give an unsworn statement to the effect that he was initially employed by the minor's uncle and later moved to a place near the minor's home where he met the minor and her mother invited him to her home. He denied having sex with the minor but that she came to his place of work and slept with his female employer and later went to his rural home where he stayed with his sisters while searching for employment

7. The trial court upon consideration of the evidence convicted and sentenced the appellant to 10 years imprisonment. Aggrieved, the appellant moved this court vide amended grounds of appeal thus;

    a. The learned trial magistrate erred in both law and fact by failing to note that voire dire examination was not properly conducted.

    b. The learned trial magistrate erred by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by law.

    c. The learned trial magistrate erred by failing to find that the whole case against the appellant was based on suspicion which the same cannot form the basis for a conviction.

    d. The learned trial magistrate erred by failing to note that the clinical report does not support the allegation of defilement.

    e. The learned trial magistrate erred by failing to find that complainant herself did not tell the court that she was defiled by the appellant.

    f. The learned trial magistrate erred by failing to take into account the period served in custody under section 333(2) of the Criminal Procedure Code.

    g. The learned trial magistrate erred by dismissing the appellant's defence without giving cogent reasons for dismissing it.

8. In the submissions filed, the appellant submits that failure to carry out voire dire is fatal to the prosecution's case as it offends Section 19 of the *oaths and statutory declarations act* and 125(1) of the *Evidence Act*. He bases his argument on the decision in *Macharia Vs republic* (1976) KLR 209 for the proposition that the minor's competence to testify was not tested. He further cites the following authorities in support of his contention; *Kibangeny Arap Korir Vs Republic* (1959) EA 92, *Gamaldene Abdi Abdirahman & another Vs Republic* (2013)eKLR, *Patrick Kathurima Vs Republic* (2015) eKLR and *Isaiah Gitonga Vs Republic* Criminal Appeal No E003 of2021-Meru.

9. On the insufficiency of evidence to found a conviction, it is argued that the prosecution did not sufficiently proof that there was penetration and that he had caused the alleged penetration and supports this position with authorities in *Charles Wamukoya Karani Vs Republic* Criminal Appeal

No 72 of 2013, *Sekitoleko Vs Uganda* (1967) EA 53 and *John Mwaura Karau Vs republic*-Criminal Appeal No. 38 of 2019.

10. On the issue that the whole case was based on suspicion, the appellant contends that the there was no evidence that the appellant defiled the minor despite being found in his home. He argues that the minor testified of being carried on a motor cycle to the appellant's rural home where she was received by his brother. That the fact that the minor was found in his home does not mean that the appellant defiled her. He cites the case of *Michael Mugo Musyoka Vs Republic* (2015) eKLR and *Joan Chebichii Sawe Vs Republic* (2003) eKLR.

11. Regarding the period spent in remand, the appellant submits that he was arrested on July 16, 2020 and released on bond on November 5, 2020 meaning he spent 3 months and 8 days in custody which was never taken into consideration by the trial court.

12. The respondent on the other hand through the learned state counsel submitted on the elements of the offence thus; on the issue of age, it is contended that PW-1 stated she was born on October 14, 2005 and supported by the mother and the birth certificate produced all proved the minor was 14 years. The authorities in *Kaingu Elias Kasomo Vs Republic* (2010) eKLR and *Hadson Ali Mwachongo Vs Republic* (2016) eKLR were cited.

13. On the element of penetration, it is argued that the minor testified that she engaged in sexual intercourse on the days she spent in the appellant's home and the fact was confirmed by the clinical officer.

14. On the identity of the appellant, it is argued that PW-1 testified knowing the appellant as having worked in their home in the year 2017 and were in a relationship. In support of identification by recognition, counsel cites the decision in *Anjononi and others Vs Republic* (1980) eKLR.

15. On the sentence, the respondent submits that the trial court took into account the appellant's mitigation and the sentence imposed in the circumstances was lenient.

Analysis and determination.

16. This being a first appeal, I am guided by the sentiments expressed by the Court of Appeal in *David Njuguna Wairimu Vs Republic* (2010) eKLR where the court held;

> ..... 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 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 decision.

17. Before going into the merits of the appeal, I first wish to deal with the issue of voire dire. I have perused the record and find that the minor tendered in her testimony without first being subjected to a voire dire examination to determine whether she understood the meaning of an oath. This requirement is provided for under Section 19 of the *Oaths and Statutory Declarations Act* which provides;

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is

> possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap 75), shall be deemed to be a deposition within the meaning of that section.

18. The provision was interpreted in 2 authorities which i reproduce hereunder;

19. In *Maripett Loonkomok V Republic* (2016) eKLR the court of appeal sitting in Mombasa held as follows: -

> ..... It follows therefore that the time- honored 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that: -

In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.

20. In this case, it is not in doubt the minor was born on October 14, 2005 and the offence took place on July 8, 2020 meaning the minor was at the time aged 14 years. The issue then is whether the failure to conduct a *voire dire* examination in the circumstances was fatal to the entire prosecution's case.

21. As established by the above authority, failure to conduct a voire dire examination is not fatal to the prosecution's case if there is sufficient independent evidence to support the charge.

22. In this case, other than the minor's testimony, there also is the medical evidence showing that the physical and laboratory examination showed that the minor had been defiled. The investigating officer's testimony was that upon his arrest, the appellant disclosed the location of the minor and she was indeed found at the appellant's rural home.

23. Premised upon the foregoing circumstances I find that there was ample independent evidence showing that the offence had been committed and the failure by the trial court to conduct voire dire was therefore not fatal to the entire case.

24. Turning on to the ingredients of the offence, as earlier found above the minor was 14 years. This leaves with the issue of penetration and identity of the appellant. On the element of penetration, the minor in her testimony stated that she engaged in repeated sex with the appellant in the period she stayed with him.

25. The medical evidence tendered by PW-2 showed that the minor had a broken hymen with whitish discharge, the lab results showed numerous pus cells and the medic concluded that the broken hymen was highly indicative of sexual activity. The minor had also narrated to the clinical officer that she had sexual intercourse with the appellant.

26. Due to the above facts, I am inclined to find that the limb of the offence was proved.

27. On identity, the minor stated that the appellant had worked in their home in the year 2017 before leaving for Mombasa. The circumstances in which the minor found herself in the appellant's house shows that they were well known to each other. In fact, in cross examination, the minor told the

trial court that the appellant had been her boyfriend. This limb is further proved by the fact that the appellant disclosed to PW-4 the minor's whereabouts upon his arrest.

28. I am therefore satisfied that the evidence presented showed the appellant was properly identified by way of recognition.

29. On the sentence handed down, the appellant faults the trial court for not taking into account the period spent in remand. The proviso to Section 333(2) provides;

> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

30. The appellant was arraigned before court on July 16, 2020 and was released on bond on November 5, 2020.I find that indeed the period of 3 months and 19 days that the appellant spent in custody was not factored in during sentencing.

31. The appellant also took issue with the trial court for failing to consider his defence without reasons. On examining the record, I find that the appellant denied defiling the appellant claiming that he took her to stay with his sister and that when the minor travelled to his rural home, she stayed with his siters while seeking employment.

32. I find this line of defence implausible in light of the evidence presented more specifically by PW-1 and PW-2 which showed that the minor had been defiled. The appellant act of sending the minor to his rural home was indicative of the fact that he was treating the minor as his wife and not otherwise.

33. Premised upon the above stated reasons, I find no merit in the appeal which is hereby dismissed. Conviction is upheld and sentence hereby affirmed but the period that the appellant spent in custody prior to his release on bond that is 3 months and 19 days be deducted when computing his sentence.

DELIVERED, AND SIGNED IN MERU THIS 27TH DAY OF APRIL 2023

MWANAISHA. S. SHARIFF

JUDGE