Kariuki v Republic (Criminal Appeal 52 of 2018)
[2023] KEHC 4122 (KLR) (26 April 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 52 OF 2018

AK NDUNG'U, J

APRIL 26, 2023

BETWEEN

JOHN MAINA KARIUKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 55 of 2017 – W J Gichimu, PM)

JUDGMENT

1. The Appellant in this appeal, John Maina Kariuki, was convicted after trial of defilement of a child contrary to section 8(1) & (3) of the *Sexual Offences Act*, No. 3 of 2006 (count I), and also of committing an indecent act with a child contrary to section 11(1) of the same statute (alternative count). On July 9, 2018 he was sentenced to twenty (20) years in count I and to ten (10) years imprisonment in alternative count, both to run concurrently. He has appealed against both conviction and sentence.

2. The particulars of the offence in Count I were that on November 22, 2017 at around 9:00 am at [Particulars Withheld] location of Laikipia County intentionally and unlawfully caused his penis to penetrate the vagina of JAN a girl aged 13 years. In the alternative count, it was alleged that on the same date and at the same place, the Appellant intentionally touched the vagina of the same complainant.

3. It is immediately apparent that the Appellant was convicted and sentenced of the main count and the alternative count. Having convicted the Appellant on the main charge, the trial court erred convicting and sentencing the Appellant of the alternative count. The conviction on the alternative count would only arise where the proven charge is the alternative one. Learned prosecution counsel correctly and readily conceded that point of law. The conviction and sentence on both the main count and the alternative count at the same time was legally flawed.

4. The conviction and sentence have been challenged upon the following grounds –

    i. The trial magistrate erred by not appreciating that penetration and age of the complainant was not proved.

    ii. That the Appellant's right to fair trial as provided under Article 50(2) (c) and 50 (2)(j) of the *Constitution* were infringed.

    iii. The learned magistrate erred by quashing the Appellant's defence without weighing it with the prosecution's case.

    iv. The learned magistrate erred by convicting the Appellant on the main and alternative count.

    v. The learned magistrate failed to adhere to section 169(2) of the *Criminal procedure Code* while writing the judgement.

5. The Appellant filed written submissions as well as the Learned prosecution counsel. The prosecution counsel supported the conviction.

6. I have considered those submissions. I have also read through the record of the trial court in order to evaluate the evidence placed before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I did not see and hear the witnesses testify, and I have given due allowance for that fact. (See *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

7. The duty to re evaluate the evidence at the trial court is summed up in *Okeno v Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

    > " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 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 (*Shantilal M. Ruwala v R* [1957] EA 570. It is not the junction 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 Magistrate's findings should 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, see (*Peters v Sunday Post* 1978) EA 424."

8. There are three main ingredients in the offence charged in Count I. These are-

    i. The age of the complainant;

    ii. Penetration; and

    iii. Identity of the perpetrator.

9. As to the complainant's age, the Appellant in his written submissions submitted that the age of the complainant was not proved as no documentary evidence was produced to prove that she was 13 years old. That the claim by the complainant's mother that her birth certificate was burnt during a house fire was not supported by evidence. There was also no evidence that the parent and the investigating officer tried to obtain another copy of the birth certificate or even age assessment report. That a simple statement by the complainant as to their age cannot stand. He relied on the case of *Dominic Mwareng v Republic* Cr App No 155 of 2011 and *Alfayo Gombe Okello v Republic* (2010)eKLR.

10. The learned counsel for the Respondent on the other hand submitted that age was sufficiently proved by complainant's mother and medical record which indicated that she was 13 years old. The counsel relied on the Ugandan Court of Appeal decision in the case of *Francis Omuroni v Uganda* (2000).

11. The complainant herself testified as PW1. She testified that she was 13 years old being born in the year 2004. PW4, the complainant's mother testified that the complainant was 13 years old and she was born on June 20, 2004. Indeed, there was no documentary evidence that was produced before the trial court to verify the actual age of the complainant.

12. It is trite law 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 be proved by birth certificate, the victim's parents or guardian and by observation and common sense (see the case of *Thomas Mwambu Wenyi v Republic* Criminal Appeal No. 21 of 2015 [2017]).

13. What emerges is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence on the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant.

14. It is also trite law that where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in *Jackson Mwanzia Musembi v Republic* [2017] eKLR quoted with approval its earlier decision in *Evans Wamalwa Simiyu v R* [2016] eKLR and held that: -

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu v R* [2016] eKLR, observed that –
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>> "As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.
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> "Having taken the foregoing in mind, it is our considered view, that the minor's apparent age was proved by the P3 form."

15. In the instant case, the mother testified that the complainant was 13 years old being born on 20/06/2004. This means that at the time the offence was committed on 22/11/2017, the complainant was five months shy to 13 years. She was therefore 12 years old. PW7, the clinical officer testified that the estimated age of the complainant according to the P3 form was 13 years.

16. Therefore, the apparent age according to the evidence adduced in the lower court places the complainant in the age bracket of 12-13years. Hence, the complainant's age was proved to fall under that age bracket and this means that she was a child for the purpose of *Sexual Offences Act*. I am therefore satisfied that the complainant's age was proved to fall under section 8(3) of the *Sexual Offences Act*.

17. As to penetration, the Appellant submitted that PW7 was not the initial doctor who examined the complainant as the complainant was examined by Dr Nancy. That the PRC and P3 form contained conflicting findings in that the PRC form indicated that the hymen was intact whereas the P3 form which appears to have indicated that the hymen was intact was cancelled to read that the hymen was broken. He submitted that the complainant's testimony was not supported by medical evidence.

18. The state counsel on the other hand submitted that the complainant's testimony was well corroborated by medical evidence and evidence of PW2, PW3 and PW4. That the medical evidence revealed that the hymen was broken and presence of spermatozoa which were indication of penetration.

19. A summary of the evidence at the trial court is as follows. PW1, the complainant testified that she had gone to the river to fetch water where she met the Appellant who asked her to accompany him to where she could find water. She followed him to a third place where they found more water. The Appellant held the complainant's hand and she started struggling. The Appellant overpowered her and led her to the bush and forced her on the ground. She struggled but the Appellant managed to tear her biker and underwear. The Appellant unzipped his trouser and removed his thing for urinating and inserted into her organ used to urinate. He touched her breast as well. She testified that she tried to scream but the Appellant covered her mouth.

20. PW2 testified that he was at a river fetching water when he saw a short man leading the complainant to the bush. On the way home, they found the complainant and the Appellant. He testified that the Appellant was the man who he had seen leading the complainant to the bush. He used to see the accused cultivate the shamba near the river. PW3 was the complainant's father. He testified that he heard his wife making noises some distance away. He went to the scene where he found the Appellant, complainant and his wife. His wife and the Appellant were exchanging words. The complainant informed him that the Appellant had defiled her.

21. PW4 was the complainant's mother. She testified that she had sent the complainant and her younger brother to the river to fetch water. Her son returned home alone and upon asking him where the complainant was, he told her that a man had taken her to show her where she could get more water. She became suspicious and decided to go to the scene where she met the complainant and the Appellant. She pressed the complainant who revealed to her that the Appellant had defiled her. A confrontation ensued and PW3 went to the scene. They reported the matter to the village elder.

22. PW5, the area assistant chief testified that he found people talking about the incident. He also learnt that the matter had been settled by the village elder. He reported the matter to the police and the Appellant was arrested. PW6 was the arresting officer. He testified that the matter was reported by PW5. They arrested the Appellant through the help of his employer.

23. PW7 was the clinical officer who filled the P3 form which he produced as Pexhibit 2. He testified that upon examination, there were no discharge or blood that was noted, no abnormality on the body, no bruises on the labia, vagina or cervix, the hymen was broken and the microscopic test revealed presence of spermatozoa. He concluded that the presence of spermatozoa and the broken hymen were prove of penetration. His findings were captured in the P3 form. He produced the PRC form and the initial treatment notes of the complainant.

24. Upon my own evaluation of the evidence tendered before the trial court in proof of penetration, I note that there exists material contradictions in the medical documents presented before court. The initial treatment notes (Exhibit 4) indicates that the complainant's hymen was intact. It notes however presence of spermatozoa. The P3 form (Exhibit 2) indicates the hymen was broken. It is not lost on this court that there is a cancellation of what is apparently the word 'intact'' before replacement with ''broken'.

25. In his testimony, Pw7 makes no attempt to explain away the cancellation. It is noteworthy that it is PW7 who produced the treatment notes and somehow did not find it necessary to explain the contradiction relating to the state of the hymen. The PRC form (Exhibit 3) indicates the hymen was broken. It also contains an unexplained cancellation. Both the P3 form and the PRC form note the presence of spermatozoa.

26. "Penetration" is a term of art and is defined under Section 2 of the *Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". In *John Mutua Munyoki v Republic* [2017] eKLR, the Court of Appeal in this regard held that:

> " Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt…The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of *Arthur Mshila Manga* (*supra*) observed while allowing the appeal that:-
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> > 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'

27. In our instant suit, the Appellant claimed that PW7 was not the initial doctor who examined the complainant and that the complainant was examined by another doctor. Suffice it to note that PW7 independently examined the complainant and filled the P3 form which he produced as evidence. The Appellant further submitted that the P3 and the PRC form had conflicting findings in that the P3 form indicated that the hymen was broken whereas the PRC form indicated that the hymen was intact. This is not entirely correct as PRC form also indicated that the hymen was broken though it appeared to have read intact but the same was cancelled to read broken. The treatment notes produced are the ones that indicate the hymen was intact.

28. It was the duty of the prosecution to prove penetration beyond reasonable doubt. The inconsistency between the P3 form, PRC form and the treatment notes on the status of the hymen cast doubt on whether there was actual penetration. That is not to say that the absence of the hymen is the only evidence to prove penetration. The prosecution in this case, however, introduced the evidence on the

status of the hymen and ended up manifesting inconsistences in that evidence. My evaluation of the evidence leads me to the conclusion that penetration was not proved.

29. From other the evidence on record, it is clear that the complainant positively identified the Appellant and the Appellant forced her into a sexual act. The evidence on record also reveals that the complainant knew the Appellant. She used to see him cultivate the land that was near the river. PW2 testified that he saw the Appellant lead the complainant to the bush and later found the Appellant having been apprehended by the complainant's father. PW3 and PW4, found the Appellant at the scene. He was apprehended and he was taken to the village elder where the matter was, according to PW8, the investigating officer, settled. According to PW8, the Appellant paid Kshs.3,500/- to settle the matter but the doctor and the chief informed the police of the illegal settlement.

30. There is evidence of spermatozoa on the genetalia of the complainant upon medical examination. For spermatozoa to find its way there, the Appellant must have touched the complainant's genetalia with his penis. There is therefore sufficient evidence in support that the Appellant unlawfully committed an indecent Act by touching the vagina of the complainant with his penis.

31. The Appellant raised other complaints in his grounds of appeal which I address as follows. He asserts that his rights under Article 50(2) (c) and (j) of the *Constitution* were infringed. He claimed that he was not served with the PRC form as the same was supplied to him upon his request at the tail end of the trial when all prosecution witnesses had testified. Article 50(2) (c) and (j) of the *Constitution* states;

(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

...

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

32. Article 50 (2) (c) and (j) means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross examination and in his defence.

33. The record shows that the Appellant was supplied with a copy of the P3 form and witness statement the day he took plea. On November 27, 2017, the Appellant informed the court that he was not supplied with the charge sheet. The same was served upon him. The matter proceeded for hearing and PW7 produced the PRC form as Pexhibit 3. There is no indication on record to show that the Appellant ever raised the issue of not been supplied with PRC form. It is only on 29/05/2018 that the Appellant requested to be supplied with the PRC form when the ruling for a case to answer had already been made.

34. Notably, the matter proceeded to full trial and the Appellant did not seek any adjournment on the ground that he had not been furnished with the PRC form. Even when PW7 was testifying, he did not object to its production or inform the court that the same was not supplied to him. The Appellant was expected to inform the court that he had not been supplied with the same before he proceeded with the trial and he had a right to refuse to proceed until such time he was furnished with the said evidence. Requesting for the same after the prosecution had closed its case was an afterthought and the Appellant cannot be rewarded for his inaction throughout the trial. If that were to be countenanced, it would entrench a bad practice where an accused would only need to fail to request for any piece of

evidence only to turn around after the case is finalized and raise that matter on Appeal. This would be tantamount to stealing a march on the prosecution.

35. The Appellant submitted that his defence was not properly considered by the trial court. In his sworn testimony, the Appellant testified that on his way to his employer's farm, he was stopped by a lady who asked him what he was doing with her daughter. They had a confrontation and her husband who was armed with a panga went to the scene. The alleged daughter also joined them and the lady asked her to repeat to her what she had reported. They all went to the village elder where he was released as the complainant did not implicate him. He was arrested the next day.

36. Upon my own analysis of the evidence, I, reject the Appellant's defence in light of the overwhelming evidence produced by the prosecution, particularly the very clear testimonies of PW1, PW2, PW3 and PW4 and the medical evidence which clearly shows the presence of spermatozoa on the complainant's genetalia. It is shown beyond doubt that the Appellant's genetalia had contact with the complainant's vagina whereby he deposited spermatozoa and thereby committing an indecent Act with the complainant who was a child within the meaning of Section 11 (1) of the *Sexual offences Act*.

37. The other issue raised in the appeal was that the trial court failed to comply with section 169(2) of the *Criminal procedure Code*. The Appellant contention was that the trial court did not specify the section that he was convicted under as the above section requires. While convicting the Appellant, the trial court recorded as follows;

> "The accused is found guilty as alleged in the main charge of defilement and the alternative charge of committing and indecent act with a child. He is found guilty and convicted under section 215 of the *Criminal procedure Code*."

38. Section 169 (1) and (2) of the *Criminal procedure Code* provides:

> "169(1) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
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> (2) In the case of a conviction, the judgment shall specify the offence of which and the section of the penal code or other law under which, the accused person is convicted, and the punishment to which he is punished." (Emphasis supplied).

39. Section 169(2) requires the court to specify the offence and the section of the law for which the accused person is convicted. In the present case, the trial court does not seem to have specified the section of the law for which it was convicting the Appellant. The question for determination is whether that was fatal to the conviction and sentence.

40. In the case of *Ephantus Mutembei Bauni v Republic* [2016] eKLR where the court held that;

> "In the present case, the trial court did properly specify that it was convicting the Appellant for the offence of attempted defilement. It only failed to specify the section that creates that offence. This court has already set out in paragraph 9 of this Judgment, Section 9 of the *Sexual Offences Act*. That section creates both the offence and punishment for the offence of attempted defilement. In this court's view, the failure to specify the section of the law for the offence the trial court convicted the Appellant off must have been an oversight. The

offence clearly exists in our laws and that oversight in this court's view did not prejudice the Appellant. That complaint in my view therefore is without merit and it is rejected."

41. Although the judgment did not specify the exact section of the law under which it convicted the Appellant, it is clear that the trial court found the Appellant guilty of defilement and indecent act and convicted him accordingly.

42. It is my view that this error is one that is curable by section 382 of the *Criminal procedure Code*, which provides as follows:

> Subject to the provisions hereinbefore contained, 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 inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice"

43. From the foregoing I reach the conclusion that the appeal herein partially succeeds. The conviction and sentence on the main count of defilement is hereby set aside and substituted thereof with an order acquitting the Appellant on that count. The Appellant is however convicted of the Alternative count of committing an indecent act with a child contrary to section 11(1) of the *sexual offences Act*. As regards the appropriate sentence, the Supreme Court has since clarified that the decision in *Muruatetu* case on mandatory minimum sentences only applied to the death sentence. The appellant is sentenced to serve 10 years imprisonment to run from the date of initial sentence at the trial court.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 26TH DAY OF APRIL 2023

A. K. NDUNGU

JUDGE