Nganga v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 3600 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E051 OF 2022

LN MUGAMBI, J

APRIL 26, 2023

BETWEEN

EDWIN KARORI NGANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was charged with attempted defilement contrary to Section 9(1)(2) of the *Sexual Offences Act*, No 3 of 2006. It was alleged that on August 19, 2018 at around 1300hrs at [Particulars Withheld] area, Kikuyu sub-county in Kiambu County within Central region intentionally attempted to cause his penis to penetrate the vagina of MWN, a child aged 10 years old.

2. This appeal is against the conviction and sentence of 10 years imprisonment for indecent act contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

3. The prosecution called a total of six witnesses while the appellant called three witnesses.

4. The petition of appeal dated October 4, 2022 listed the following grounds of appeal;

    a. That the learned magistrate erred in law and facts by finding the accused person guilty of an offence that he was not charged in the charge sheet and subsequently convicting him.

    b. That the learned magistrate erred in law and facts and violated the rule of natural justice and particularly Article 50(1)(2) of the *Constitution* of Kenya 2010 by failing to inform him of the charge and give him a chance to defend himself of the charge of committing indecent act with a minor.

    c. That the magistrate erred in law and fact by being selective in administering his evidence and failing to consider the 1st medical report that was procured

at Lusigetti sub-county hospital and only considering the subsequent medical report and using the same to arrive at a charge of committing indecent act with a minor.

d. That the learned magistrate erred in law and fact by only using PW1 evidence to convict the accused since there was no other person to corroborate PW1 evidence except PW1.

e. That the learned magistrate erred in law and facts by giving excessive punitive judgment without proving the case beyond reasonable doubt.

f. That the learned magistrate erred in law and facts by finding the offence of committing indecent act by a minor on assumption.

g. That the trial court erred in law and facts by failing to record reasons for believing a single witness contrary to Section 124 of the *Evidence Act*.

h. That the trial court erred in law and facts by failing to find ingredients to the offence of committing indecent act with a child.

i. That the trial court erred in law by failing to consider the defence of the appellant that was plausible and that impeached the prosecution case.

j. That the trial court erred in law and facts by making a sentence based on assumed charges, by failing to remain a neutral arbiter, and by bringing its own charges, without informing the accused, prosecuting the charges silently and later convicting the accused person. Every offence has the same threshold of being proved beyond reasonable doubt.

k. That the learned magistrate failed to consider that nowhere in the record did the complainant state that her breast, buttocks or vagina was touched by the Appellant.

5. The Appellant prayed that the appeal be allowed and the judgment, conviction, sentencing and order issued by Honourable Orwa in Kikuyu Senior Principal Magistrate's Sexual Offence no 33 of 2018 be set aside. He prayed that he be set free forthwith.

6. Directions were issued on December 7, 2022 for the hearing of the appeal to be dispensed with by way of written submissions.

Appellant submissions

7. The Appellant filed his submissions on January 16, 2023 and outlined six issues for determination. On whether the learned magistrate violated the *Constitution* by not upholding the right of the accused person to a fair trial, he submitted that his rights to a fair trial were violated since he was convicted on a charge that was not in the charge sheet and he was not given a chance to defend himself. He cited the decision in *Andrew Nthiwa Mutuku v Court of Appeal & 3 Others [2021] eKLR* where the importance of the right to a fair trial was addressed.

8. He submitted that he was never charged with the offence of committing indecent act with a minor, he was not given the chance to take a plea on the said offence, he was never informed nor given sufficient details for the same and never answered to it and was never informed of the charge in advance. He stated that it is unfortunate that the provisions of Article 50(2)(b) of the *Constitution* only remain

in the text as it was never applied in this instance and asked the court to uphold the said Article. On whether the charge of committing indecent act with a child was proved beyond reasonable doubt by the prosecution, he stated that the circumstances of the occurrence of the offence ought to be crystal clear without any shred of doubt on whether the act was committed. In this particular case, it was PW1 who was present with the accused person when the alleged offence took place and all the other evidence given by PW2, PW3 and PW4 is hearsay as deduced from the proceedings. He continued that the investigating officer failed to take the evidence of the child or the grandmother who was at home to corroborate the evidence of PW1. He submitted that the charge of committing indecent act with a minor should be proved, that it must be shown that it was intentional and indecent in nature. Under Section 124 of the *Evidence Act*, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence. He stated that the learned magistrate should not have assumed that once the court finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed and that every offence has the same threshold of being proved beyond reasonable doubt.

9. On whether the trial magistrate disregarded the appellant's plausible defence and imposed an excessive sentence than what is provided for under the law, he submitted that the trial magistrate had the discretion to impose a lower sentence or a fine in the circumstances. The sentence meted upon him by the trial court was unlawful and unwarranted. He relied on the decision in the case of*Brian Nyachio v Republic [2022] eKLR*.

10. In conclusion, he prayed that the court allows the appeal and set aside the decision of the trial court and quash the conviction and set the accused person free.

Respondent's submissions

11. The Respondent did not file written submission but on January 27, 2023, the court gave leave to Mr Gacharia for the Director of Public Prosecution to make oral submissions.

12. In his brief oral submissions, Mr Gacharia contended that the trial magistrate properly exercised her discretion under section 186 of the Criminal Procedure Code when she found that the offence charged had not been proved but ingredients of a sexual assault charge had been established.

13. He further submitted that pursuant to section 11 (1) of the *Sexual Offences Act* under which the Appellant was convicted, the minimum sentence of 10 years imprisonment is provided for hence the sentence imposed on the appellant was a legal sentence which he urged the court not to interfere with.

Analysis and Determination

14. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses and assess their demeanour. In *Kiilu & Another v Republic [2005] 1KLR 174* the Court of Appeal stated that:

> ' 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. It is not the function 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. 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.'

15. The issues that come up for determination of this appeal are;

    a. Whether the conviction on a charge that was not preferred against the appellant was proper;

    b. Whether there was evidence to prove the case against the appellant beyond reasonable doubt;

    c. Whether the sentence was excessive;

    d. Whether the appeal is merited.

16. The appellant has said that he was convicted on the charge of indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act*. The said charge was not read to him during plea taking and thus his right to a fair trial under Article 50 of the *Constitution* was violated. The appellant pleaded not guilty to the charge of attempted defilement contrary to Section 9(1)(2) of the *Sexual Offences Act*, No 3 of 2006. The trial court in its judgment stated as follows;

> ' It is not disputed that ENK was not charged with the alternative to committing indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The court has powers to convict a suspect on an offence proved vide evidence on record though not preferred against him/her.
>
> In this case evidence on record proves indecent act with a child by accused person who touched the vagina of MN with his fingers as she wore her pants hence invoke the provisions of Section 186 of the *Criminal Procedure Code* and convict accused person of the offence of committing indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* hence convicted in accordance with Section 215 of Criminal Procedure Code.'

17. Section 179(2) of the Criminal Procedure Code provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

18. Section 186 of the Criminal Procedure Code provides that when a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.

19. The *Sexual Offences Act* in Section 2 defines indecent act as any unlawful intentional act which causes:

    a. Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.

    b. Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.

20. Consequently, it was proper for the trial court to convict for an offence of indecent assault where the appellant was only charged with attempted defilement as long as the necessary ingredients for the offence of indecent assault had been established beyond reasonable doubt by the prosecution evidence on record.

21. The next question then becomes, was there enough evidence to prove to offence of indecent act against the minor in this case by the appellant as found by the trial court? The complainant in the trial court, PW1, testified as follows;

> ' He laid on me and started kissing me and putting his hands in between my legs.'
>
> On cross examination, she stated as follows;
>
> 'He did not remove my clothes. He only kissed. He put his fingers in my private parts when I was wearing panties.'

22. One of the grounds of appeal by the appellant was that the trial court did not consider his defence. And indeed, it is clear to me that the trial court only set out the defence of the appellant in its judgment but did not evaluate it against the prosecution evidence.

23. The appellant in his defence said he went to his farm at around 1.00 PM that day to get some maize to roast and found three children in his shamba. The complainant was top of a tree picking fruits and throwing them down for the two others who were collecting them. He threatened to report them to their parents then let them free. He went back home, roasted the maize and went back to work.

24. In his submissions before the court, the appellant also submitted that the trial magistrate failed to consider the 1st medical report that was procured at Lusigetti sub-county hospital and solely relied on the subsequent medical reports. The 1st medical report procured at Lusigetti sub-county hospital noted that there was no bruise on the vagina of the complainant in which examination was done on August 19, 2018 which is the date of the incident. The subsequent medical report was filed on August 20, 2018 and noted that there was superficial bruising on the left vagina.

25. The trial court in its judgment opined that medical evidence given by PW 5 (who prepared the second medical report) provided credence to the complainant's testimony that her genitalia had been touched on the basis of the bruising that had been noticed. The trial court said:

> ' It is noteworthy that evidence on record from complainant and PW 5 (GM) discloses the fact that genitalia of PW 1 (MN) was touched by the suspect.'
>
> The Court made this finding without reconciling the two medical reports, the first report by the medical officer who attended to the complainant on the date of the alleged offence did not notice anything.
>
> The trial court relied on the second medical report to find it corroborated the complainant's oral account, which means it was a substantial consideration in the case yet it did not resolve the apparent conflict between the two medical reports. If the first examination which was conducted on the first day revealed nothing, what could have happened in between that time and when the 2nd examination was done? In criminal law, any unresolved doubt goes to the benefit of the accused. The trial court only took the evidence of one of the medics and disregarded the other. Listening to the two could have provided a ground why it preferred one to the other. In my view, I would find that due to the apparent conflict that was not resolved, neither of the two medical reports could be used without raising fundamental

questions. The Court of Appeal in *Richard Munene v Republic [2018] eKLR* noted that it is not every inconsistency that should affect the substance of the prosecution case but if it was on a substantial point, it has to be to the benefit of the accused. It stated:

'Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

26. I would thus disregard those medical reports which means a critical component that the court used as corroborative of element to the testimony of the complainant also collapses.

27. Was there was sufficient evidence therefore that the complainant had been indecently assaulted? In her testimony, she stated:

> ' E came to our house at I.00 PM. He took me to a place where there is grown grass. He laid on me and started kissing me and putting his hands in between my legs. He found me giving cows grass. He pulled me and afterwards he told me to go and harvest fruits called 'Pera'.'

28. In his defence the appellant denounced the above narration by the complainant and instead testified that he found three children picking fruits in his farm whereby the complainant was on top of a tree while the other two were collecting the fruits she was picking. She threatened to tell their parents and let them go.

29. In cross-examination that was conducted on behalf of the appellant the defence confronted her with those set of circumstances. She denied she was caught stealing the fruits 'mapera' with the other children. She stated:

> ' I was not stealing mapera with other children. If they came they cannot say we were stealing mapera. Our grandmother cucu was in the house. After leaving the accused, I went locked the door then went to my grandmother. When I went to cucu, I did not tell her about the story. I was shocked. When I told my sister, she is the one who told others. She came after 6.00 PM.'

30. The trial court did not comment on the defence side of the story. It did not even say if it disbelieved it or not. The appellant in his submissions faulted the trial court for failing for only failing to consider his defence but also the failure to record reasons for believing a single witness contrary to Section 124 of the *Evidence Act*. The said Section provides as follows;

> ' Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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.'

31. In the case of *JWA v Republic [2014] eKLR*, the Court of Appeal observed: -

> ' We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.'

32. A similar position was taken in *Mohamed v Republic [2006] 2 KLR 138* where the court stated: -

> ' It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.'

33. It is possible to convict on the evidence of a single child witness but section 124 of the *Evidence Act* has a rider. It requires the court to give reasons in writing as to why it is satisfied that the child is speaking the truth. It is one thing for the court to establish that the child understands the nature of an oath and the duty to speak the truth and another for a child to live to that expectation when actually testifying before the court hence the requirement that the court has to record the reasons for believing the evidence (evidence that was given) and especially where it is to rely on that evidence to convict. In the present case, the trial court did not record any reasons for believing the evidence of the lone minor, apparently in my view, because it wrongly assumed there was corroboration. The defence mounted serious contestation to her testimony during cross-examination and in the defence tendered by the appellant in which he gave a version of what happened which was different from what the complainant stated. Without a clear finding as why, the trial court believed the evidence of the complainant as against the appellant, and there being no other corroborative evidence to back it up, there was no way of telling whose version was truthful. That means the defence had succeeded in creating doubts in the prosecution case which are to be applied to the benefit of the appellant.

34. From the analysis of the above issues, it is my finding that the conviction of the appellant by the trial court was not safe in the circumstances. I find the grounds of appeal in the petition of appeal dated October 4, 2022 are merited. I set aside both conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 26TH DAY OF APRIL 2023.

L.N. MUGAMBI

JUDGE

In presence of:

Appellant-

Advocate for Appellant-

State-

Court Assistant- Brian

Court

This Judgement be transmitted digitally by the Deputy Registrar.

L.N. MUGAMBI

JUDGE