Kamau v Republic (Criminal Appeal 1 of 2020)
[2023] KEHC 20042 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 1 OF 2020

SC CHIRCHIR, J

JUNE 29, 2023

BETWEEN

BENSON WAWERU KAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon. E.M Mutunga, (SRM) delivered on 26/11/2019 in S.O NO. 72 of 2018 at the Chief Magistrate's court at Kandara)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement of a girl aged 4 ½ years contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 (The Act).

2. The particulars of the offence were that on the 10th day of December 2018 in Kandara sub county intentionally caused his penis to penetrate the vagina of CW a child aged 4 ½ years

3. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act.

4. He was convicted of the main charge and sentenced to life imprisonment. He was aggrieved by the outcome and consequently proffered this Appeal.

Grounds of Appeal

5. The Appellant has set out the following grounds of Appeal:

   a). That trial magistrate erred and misdirected himself in failing to comply with the provisions of section 19 of the oaths and statutory decelerations Act cap 15 Laws of Kenya on the voire dire procedure,that did not live to the required

standards and purposes of the law hence occasioning serious miscarriage of justice

b). That the learned trial magistrate misdirected himself in failing to appreciate that the critical elements in defilement and identity were not established since even the medical officer (PW4) could not ascertain the same occasioning prejudice.

c). That the learned trial magistrate erred in both law and fact in failing to appreciate that there were material contradictions capable of unsettling the verdict and hence proof not tendered to the required standards.

d). That without prejudice to the instant matter/Appeal, the sentence was imposed remains harsh and manifestly excessive.

Summary of the evidence.

6. PW1 was the complainant. After a voir dire examination, the Magistrate formed the opinion that she understood the oath and the witness was directed to give a sworn statement. She recalled that on the day of the incident, she was with Ian and her grandfather and they were picking tea at their grandmother's place at kirigithu. She recalled that her grandfather picked Sukuma wiki (kales) for waweru and when she wanted to leave, the accused accompanied her.

7. At house she went to urinate, and that was when the accused took her into his house, laid her in bed. He removed her clothes and did " tabia mbaya" to her. She told the court that the accused removed his pants and inserted his penis into her vagina, she claimed that he used his organ for urinating (she pointed to her vagina to demonstrate). He then made her wear her pants. She did not scream. She asked him to leave her, but he did not. She further stated that the Appellant's house was near that of her grandmother. when she went home she told wambui and her grandmother what had happened. She was taken to a hospital at kandara. She did not know the Accused name but she identified him in court.

8. On cross examination, by the Appellant, she stated that the accused person was called Waweru and that he was the person was making shoes for Wambui and Nyambura. She stated that that Wambui (PW2) saw her going to the Appellant's place; after the incident wambui told her to report to her grandmother what had happened to her. She denied that she was threatened with beatings.

9. PW2 , a minor aged 13 years. She testified that in 2018, in the morning, the Appellant whom she called Waweru came to her grandparent's place, where she was staying, to ask for shoes he could repair. She was with the complainant and an Ian. while she was at her grandmother's place at Kirigithu. In the evening at 7pm She, together with Ian and the complainant went to the shamba to get some Sukuma wiki (kales) .

10. She claimed that the Appellant later asked to go with the complainant to get fruits and told the witness that she and Ian should not follow them. The complainant later came with fruits and told her the accused had defiled her in his bed.

11. She stated that her grandmother was in hospital at the time and she told her what happened the next day. The complainant was taken to the hospital at Kandara. She told the court that she saw the Appellant going away with the child.

12. On cross examination she told the court that she knew the Appellant as Benson Waweru, that she got the Appellant's name from the complainant; that she knew the Appellant's work place. That it was the

complainant who told her what had happened. She told the court that she suspected that something was wrong as the complainant took so long to come back to where the witness was.

13. PW3, was the complainant's grandmother. She told the court that on 10/12/2018 she was sick and had gone to hospital. She told her grandchildren to get food. Pw2 told her what had happened to the complainant. she reported the incident at kandara police station on 11/12/ 2018. She was referred to kandara hospital. The Doctor told her the complainant had been defiled. She further told the court that the complainant was 4 years old; she had the child's immunization card, indicating her age. She told the court that the Appellant was her neighbour.

14. On cross examination she stated that she recorded her statement on 11/12/18 after the minor had informed her that she was defiled. She clarified that he was with the accused on 10.12/18 at around 4.00 pm. She stated that she saw an injury at the complainant's vagina and she insisted that the injury was not caused by climbing a tree.

15. PW4, was a doctor in Kandara. He testified that he treated complainant on 11/12/18 and that in his assessment it was not the first time that the child had been defiled. He testified that the girl was in pain. On examination, he found that the hymen was broken and there were spermatozoa. There was a high chance of penetration although partial. He produced the P3 form and the treatment Notes.

16. On cross examination, he told the court that in examining the minor, he found that her vulva was red and that there was partial penetration. He stated that the vulva was injured but could not tell if it was penis that caused the injury; That there were no sperms and penetration was partial.

17. On re-examination, he said that the vagina was inflamed and that inflammation could not have been caused by a fall.

18. Pw5 the investigation's officer. He testified that he recorded the complaint from the complainant who was accompanied by her grandmother. He was led to the Appellant's house. The complainant showed him the bed on which the defilement took place. He told the court that the complainant was born on 8/1/2014 and produced the complainant's immunization card in evidence. He arrested the Appellant and later took him to court.

19. On cross examination he told the court that he went to the scene on 11/12/18, and saw the bed where the complainant was defiled. That he was told that the Appellant worked at Gacharage town.

20. On re-examination, he told the court that he did not find the accused at his home but arrested him at Gachare stage.

21. The Appellant was put on his defence and he opted to give unsworn statement and did not call any witness. He told the court that he was charged with an offence he did not commit and that he was in court because of a grudge he had with the complainant's family. He alleged that he had beaten the children because they would go to his land to pick fruits. He insisted that was he not on the shamba on the day of the alleged incident. He further stated that the child was injured by the tree. He claimed that their grandfather told the children to keep off his ovacado tree; and that they were two girls. He pointed out that he had not been identified as the perpetrator. He told the court that the complainant and PW2 were lying to the court.

Appellant's submissions

22. It is the Appellant's submission that the ingredients of defilement were not proved. He relied on the case of Charles Wamukoya vs. Rep. (2003) eKLr where it was held that the age, penile penetration and the identity of the purported perpetrator have to be proved for a charge of defilement to be sustained.

He submits that words like "he used his organ which he urinates" were the judicial officer's own words and were not uttered by the complainant.

23. The Appellant also questions how it was possible for the complainant not to have scream, or cry as such an act will have inflicted pain. He further submits that the defilement would have caused much more damage than it has been shown, considering the complainant's tender age.

24. It is further contended that the word " tabia mbaya" is ambiguous and cannot be said to imply penetration. The Appellant further contends that a broken hymen is not prove of penetration and that the age of the injuries was not ascertained.

25. He further submits that though the doctor says there was partial penetration, he could not tell whether the penetration was caused by a penis or something else

26. On identification, he submitted that the complainant did not properly identify the accused. He alleged that PW1 testified that he did not know the accused name and identified him at the dock. He submitted that if the complainant did not know his name, any purported identification amounted to nothing in law and the dock identification was worthless

27. Though not listed among the grounds of Appeal, the Appellant has also contested the voir dire examination. He submits that the examination was improper and insufficient and that it failed to follow the Questions and Answer format and consequently, he contends, the minor's evidence ought not to have been admitted in evidence.

28. It is the Appellant's further submission that there were material discrepancies that was prevalent to unsettle the decision of the trial court.

29. It is the Appellant's final submission that the sentence was too harsh and excessive. He argues that the court ought to invoke its revisionary powers of Article 22,23(?) and 50 (2) of *the constitution* and section 362-364 of the Criminal Procedure Code and that the court can mete out any sentence other than the Mandatory sentence of life. He relied on the supreme court decision in Francis Karioko Muratetu in Pet. No 15 of 2015 (2017) eKLR as well as the High Court petition in Philip Mueke Maingi and others in Rep. (2022) eKLR petition no. E017 of 2021 which he contends, gave judges and magistrates discretion in meting out sentences.

The Respondent's submission

30. On whether the ingredients of the offence of defilement were proved, the prosecution submits that the complainant's immunization card was produced which proved her age to be 4 ½ years and that the age of the complainant was not contested during trial

31. On the issue of identification of the appellant, it was the prosecution's submission that it was not in dispute that the witnesses and the complainant knew the appellant well. That the incident happened at around 2.00 pm and that the appellant had come to the house to ask if he could repair their shoes.

32. On the issue of penetration, it is the Respondent's submission that the testimonies of the complainant, PW2 and the medical officer indeed proved that there was penetration.

33. On the whether there were contradiction and inconsistences in the prosecution's evidence, the prosecution submitted that where several witnesses testify, there are bound to be contradictions or some inconsistencies. That such inconsistencies and or contradictions may be ignored if they do not go to the root of the prosecution's case, otherwise they should be resolved in favour of the accused. Reliance was placed in the case of Richard Munene Vs. republic (2018) eKLR court of appeal and Dickson Elia Nsamba Shapwata & Another vs. the Republic (Criminal Appeal No. 92 of 2007).

34. The Respondent argues that, all the witnesses were consistent and that the alleged contradictions as highlighted by the Appellant in his submission were very remote and insignificant.

35. On whether the sentence was lawful or warranted, it is the Respondent's submission that the trial Magistrate exercised her discretion correctly and judiciously and meted out a lawful sentence.

Determination

36. The court's duty is to review and re-evaluate the evidence on record and come to its own conclusions, while paying attention to the conclusions made by the lower court. In Okeno v. Republic 1972 EA 32) the Court of Appeal for Eastern Africa stated that: "An appellant on a first appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 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] E.A. 570. 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 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) E.A. 424."

37. The following issues arise for determination:

    a). whether voir dire Examination was properly carried out.

    b). whether there were contradictions and inconsistencies in the prosecution's case

    c). Whether the charge of defilement was proved

    d). whether the sentence was excessive

whether voir dire examination was properly carried out.

38. The purpose of voir dire was explained by the high court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

    1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

    2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

    3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

    4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

39. However in the case of DMK Vs Republic(2016) e KLR, the court of appeal while citing with approval the case of Patrick Kathurima vs Republic- Nyeri CA NO. 137/2014 held:

> " It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English court of appeal in Regina vs Compell(Times)December20, 1982 and Republic vs Lalkan (1981)73 CA190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."(Emphasis added)

Patrick Kathurima's decision(supra), is one of the recent decisions emanating from the higher courts stating that the question and answer format in voir dire examination is no longer mandatory.

40. On whether the voir dire examination is necessary at all, the court in the case of Athumani Ali vs Republi(CRA no. 11 of 2015) cited with approval in the case of Maripett Loonkomok vs Republic (2016)e KLR held:

> "in appropriate cases where voir dire is not conducted , but there is sufficient independent evidence to support the charge ... the court may still uphold the conviction."

41. In view of the aforegoing, it was not therefore mandatory for the court to adopt the question and answer format and even failure to conduct the examination is not always fatal

Whether there were contradictions and inconsistencies

42. The appellant submitted that PW1 and PW2 contradicted each other on whether they knew the Appellant. He also submits that PW4 was contradictory as he did not confirm if there was penile penetration. He submitted that these contradictions go to the root of the case and are not minor. He relied on the case of John Mulwa Musyoki vs. Rep. (2017) e KLR.

43. According to the court's finding in the case of Eric Onyango vs Republic (2014)e KLR minor contradictions should be ignored unless they go into the root of the case or if the contradictions point to deliberate untruthfulness. The alleged contradiction as to the Appellant's identity is a non- issue because it emerged from the Appellant's own evidence that the parties knew each other well. He told the court that he had been framed because he had beaten the children as a punishment for harvesting his fruits. Also, much as he denied that he was not in the shamba on that day, he later indicated that there were two girls. The pertinent question is, how did he know that there were two girls in the shamba if he was not there. The contradiction in this regard was minor. It did not go into the substance of the case. The clinical officer on the other hand was emphatic that there was partial penetration of the complainant's vagina.

Whether or not the Prosecution proved their case beyond reasonable doubt

44. The necessary ingredients for the offence of defilement is penetration, identity of the perpetrator and the age of the child.

45. The age of the complainant was not an issue, either at the trial Court or in this appeal. However, to prove her age, PW3 produced the complainant's immunization card, which showed that she was born on 8/1/14 meaning that at the time of the offence, she was indeed 4 ½ years. The complainant was thus a child within the context of the children's Act.

46. On the matter of penetration, "penetration" 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"

47. The complainant testified that they had gone to pick tea(at some point she talked of Kales). She was with PW3 and Ian.When she was to leavt e the Appellant accompanied her. He took her to a house. She then went on: "he removed my clothes , lied me in bed and did tabia mbaya. There wa sunlight. Ian and PW2 were not there. The bed belonged to him. He removed his pant. He inserted his penis in my vagina. He used his organ that urinates (minor points at her vagina to demonstrate

48. The Appellant has argued that the " tabia mbaya " is ambiguous and may not necessarily be an act of defilement . However the Court of Appeal in the case of Muganga Chilejo Saha vs R, Criminal Appeal No. 28 of 2016 (2017) eKLR held as follows: -

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony".

In line with the above decision, am satisfied that the words used by the complainant such as " he did tabia mbaya", "he inserted his penis in my vagina", " he used his organ that urinates",(while pointing at her vaginal area) was an act of penetrative sex. Further her testimony in this regard was not challenged at cross- examination.

49. Furthermore, the clinical officer, PW4 who treated the minor testified that on examination, it was established the hymen was broken, her vulva was red and there was a high chance of partial penetration. It is important to remember that penetration is defined as "full or partial insertion of the genital organs of one person into the genital organs of another "(section 2 of the Act) . Thus, penetration need not be complete to constitute defilement.

50. The Appellant has further submitted that the complainant might have injured herself while climbing the Avocado tree. However, there was no evidence that the complainant was climbing a tree. In any case PW4 testified that the injury to the complainant's vagina was inflammatory, and that an injury by a tree could not have caused an inflammation.

51. Based on the evidence of the complainant which was corroborated by Pw4, it is my finding that penetration was proved.

52. On identification, the evidence of PW1, PW2 and PW4 indicate that the Complainant and the Appellant knew each other well. In the case of peter musau vs Republic(2008) e KLR the court of Appeal had the following to say about identification by recognition:

> " we do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not

a stranger to him, and thus put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question . such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence can recall very well having seen him before the incident in question."

53. PW2 testified that the accused person was Benson waweru and that he had gone to their home in the morning to ask for shoes to repair. She also testified that he saw him leave with the complainant with a promise to go and give the complainant fruits.PW1 positively identified him as the man who took her to his house and defiled her. She also testified that earlier in the morning the same person had gone to their home to inquire for shoes to repair. There is no doubt that the accused person was very well known by both PW1 and PW2. PW3 told the court that the Appellant was her neighbour. Further, from the Appellant's own testimony it is quite evident that he knew the complainant and her family well. Indeed, it was his testimony that the charges were motivated by a feud arising from the fact that he beat the children after they kept on harvesting his fruits. Thus, the complainant and the Appellant were not strangers to each other. It is further instructive that the Appellant did not take up the issue of identification either with the complainant or her grandmother, PW3. I find that this was a case of identification by way of recognition and the Appellant was positively identified.

Whether the sentence was excessive.

54. The Appellant was charged under Section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The section states as follows: -

    (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    (2) a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

    The sentence of life imprisonment is the minimum and it is mandatory for the offence set out in section 8(1) as read with 8(2) of the Act. It is founded in law and this court has no reason to fault the trial court in this regard.

55. The Appellant cannot benefit from the Supreme Court in Francis Karioko Muruatetu and Another Vs Republic, Petition No. 15 & 16 (Consolidated) of 2015 as the court made the following clarification:

    > "We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

    This court is bound by the above supreme court's decision.

56. The High court decision of Philiph Mueke Maingi vs Republic (2022)e KLR on the other hand which the Appellant has sought to rely on in arguing for a lesser sentence cannot override the decision of the supreme court.

57. In conclusion am satisfied that the Appellant was properly convicted and sentenced. There is no merit in the Appeal. The same is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JUNE, 2023.

S. CHIRCHIR

JUDGE

In the presence of:

The Appellant.