Ndungu v Republic (Criminal Appeal E019 of 2020)
[2023] KEHC 20821 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E019 OF 2020

FN MUCHEMI, J

JULY 27, 2023

BETWEEN

JOHNSON MUREGI NDUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction in the Chief Magistrate Court in Nyeri by Honourable F. W. Andayi (CM), in Criminal Sexual Offence Case No. 14 of 2019 on 11th April 2022)

JUDGMENT

Brief Facts

1. This appeal was lodged against the judgement of the Chief Magistrate Nyeri whereas the appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. He was convicted of the principal charge and sentenced to serve twenty (20) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 8 grounds of appeal which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in convicting the appellant whereas the prosecution had not proved its case to the standards required in criminal cases.

    b. The learned trial magistrate erred in law and in fact in failing appreciate that the appellant was ignorant in the field of law thus contravening Section 193 of the Criminal Procedure code and Article 50(2)(h) of *the Constitution*;

    c. The learned trial magistrate erred in law and in fact in failing to comply with the appellant's rights under Section 200 of the Criminal Procedure Code;

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the provisions of Section 193 of the Criminal Procedure Code and Article 50 (2)(h) of *the Constitution* were violated as he was not offered legal representation. The appellant further relies on the case of Karisa Chengo & 2 Others vs Republic [2015] eKLR and submits that he was ignorant in the field of law and ought to have been offered legal representation at the expense of the state.

5. The appellant further submits that the court did not comply with Section 146 of the *Evidence Act* as it declined to recall witnesses that the appellant had requested to be recalled. The appellant further relies on the case of Arthur Muya Muriuki vs Republic (2015) eKLR and submits that proper voire dire examination was not conducted which explains the doubtful evidence adduced by PW1.

6. The appellant argues that the prosecution did not prove its case beyond reasonable doubt. He further contends that the prosecution did not prove the element of penetration as the absence and loss or broken hymen is not conclusive proof of penetration. To support his contentions, the appellant cites the cases of Langat Dinyo Domokonyang vs Republic (2017) eKLR and P.K.W. vs Republic [2012]eKLR. The appellant further urges the court to disregard the evidence of the medical examiner as it is just an opinion and not cogent evidence to prove penile penetration.

7. The appellant further argues that his rights under Section 200 of the Criminal Procedure Code were violated as he made a request to have PW1 and PW2 recalled but the court declined to do so.

8. According to the appellant, the evidence tendered by PW1 was incredible due to contradictions that existed. He argues that PW1 could not have been defiled in the same house that he, his wife and three children resided and no one witnessed the alleged incident. The appellant further argues that PW1's testimony contradicts that of PW2 and the investigating officer as she testified that she did not go to hospital yet PW2 testified that PW1 was taken to hospital by the investigating officer. PW1 and PW2's testimony further contradicts that of PW3 who testified that the investigating officer escorted both PW1 and PW2 to the hospital.

9. The appellant submits that the trial court did not consider his defence as that stemmed from a grudge between him and the victim's mother as he refused to give her a job.

10. The appellant states that the period he spent during detention was not taken into consideration during sentencing thus contravening Section 333(2) of the Criminal Procedure Code.

The Respondent's Submissions

11. The respondent submitted that the prosecution proved its case beyond reasonable doubt. The respondent argues that the age of the victim was proved vide production of the birth certificate as an exhibit. The birth certificate clearly indicated that the minor was 14 years and 7 months old at the time she was defiled.

12. On the element of penetration, the respondent submitted that PW1 testified that the appellant caused his penis to penetrate her vagina and she bled. She further testified that she was cleaned up by a person she thought was the wife of the appellant because she found her in the house.

13. It was further submitted that the evidence of the minor was corroborated by the medical evidence in form of the P3 Form and Post Care Rape Form that reported that the minor's hymen was broken. The

respondent further states that the hymen was not freshly broken because the incident was reported late leading to the healing of the hymen.

14. The respondent submitted that the complainant identified the appellant by the name Jeff and stated that he was the one who defiled her and that she had known the appellant for a long time, PW1 knew the location of the appellant's residence as she had been there before. PW2, the complainant's mother also identified the appellant as Jeff, as he was popularly known in the neighbourhood. From the evidence of the victim, her mother and the investigating officer, the appellant's residence was located not far from that of the complainant's family meaning they are neighbours.

15. The respondent argued that Section 200 of the Criminal Procedure Code was complied with despite the appellant's allegations that it was not. Hon. W. Kagendo heard the prosecution case whereas Hon. W.F Andayi heard the defence case. The respondent further submitted that the appellant was informed of his rights under Section 200 of the Criminal Procedure Code and he requested for PW1 and PW2 to be recalled. The court declined to grant his request as it noted that the witnesses had testified over one and a half years and thus it was not in the interest of justice to recall them. The respondent further submitted that the appellant was availed the opportunity to cross-examine the witnesses. Furthermore, the appellant did not give any reasons as to why he wanted the said witnesses to be recalled at a point where the defence and prosecution case was closed.

16. On the issue that the appellant was not afforded legal representation, the respondent cites Article 50(2)(h) of *the Constitution* and submits that the court can only assign an advocate in a case where substantial injustice would arise. The respondent argues that there was no risk of injustice because the appellant was supplied with witness statements, he was allowed to cross-examine witnesses, his rights under Section 211 of the Criminal Procedure Code were explained to him before defence hearing and he had time to prepare for his defence. Moreover, the respondent argues that the appellant ought to have requested for an advocate during trial if he felt that an injustice would be occasioned to him.

17. The respondent submits that no injustice was occasioned on the appellant for the failure to recall PW1 and PW2 and therefore Section 146 of the *Evidence Act* was not violated. The respondent argues that the wording of Section 146 (4) of the *Evidence Act* is such that the court is not bound to recall the witness. From the court record, the court ordered recalling of the witnesses but they could not be traced for bonding. In the circumstances if the court would have insisted that the said witnesses be recalled, the matter would have unreasonably been delayed. That notwithstanding the respondent contends that the appellant had an opportunity to listen to the evidence of the said witnesses and cross-examine them.

18. It was the submission of the respondent that the court conducted a proper voir dire on the complainant and concluded that she could not comprehend the oath and therefore directed that she gives unsworn evidence. It was further argued that in its judgment, the court took note of the fact that the complainant could not remember some details regarding the day of the incident and she could not comprehend the oath. The court noted to proceed with caution before relying on her testimony and in doing so the court was still convinced that the complainant was telling the truth as her evidence was well corroborated by that of other witnesses.

Issues for determination

19. The appellant has cited 8 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the trial court considered the defence.

20. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is 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 that 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 decisions.

21. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding and 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 vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

22. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

    a. Whether there was conclusive evidence of all the ingredients of defilement;

    b. Whether the trial court conducted a proper voir dire examination on the complainant.

23. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

24. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> " ....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

25. PW2, the mother of the minor testified that the minor was aged 15 years at the time she gave her testimony. PW3, the investigating officer produced the birth certificate which indicated that the victim was born on 28th July 2004. As such, the minor was years and 7 months at the time the offence was

committed. From the evidence on record, I am satisfied that the prosecution proved the age of the minor.

26. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

27. On the element of penetration, PW1 testified that the appellant went to her home where she was looking after her younger siblings and told her to visit him. PW1 then proceeded to the appellant's house which was not far from their house and met the appellant and his wife. The minor stated that the wife offered her tea and bread and then the appellant chased the wife away and locked the door from the inside. PW1 further testified that the appellant told her to remove her clothes and when she refused to do so, he removed them by force. The appellant then removed his clothes and told her to touch him and when she refused to do so he told her to lie down and spread her legs. PW1 stated that the appellant put his thing for urinating in her private parts and that she felt pain and screamed but the appellant covered her mouth with his hand. The wife of the appellant came and she told her that the appellant has sexually assaulted her.

28. Dr. William Muriuki, PW4 testified that he examined the minor on 3rd March 2019 and filled the P3 Form. He testified that he observed that the minor's genitilia was normal and that her hymen was broken but not recently. He further produced the Post Care Rape Form which was filled on 28/2/2019 and indicated that the findings were the same as those in the P3 Form. On cross-examination, the witness testified that the minor's broken hymen had healed as she was not brought to the hospital immediately.

29. The evidence of PW1 was corroborated by the medical evidence produced by PW4. The inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.

30. On the issue of identification, PW2 testified that she knew the appellant as Jeff and that she had seen him at their house and had also gone to his house. She testified that she knew the appellant for a long time and that they were neighbours. PW2 testified that he knew the appellant as Jeff and that she worked together with him before. The appellant denied being a neighbour to PW1 and PW2 and stated that he lived in Kiambu with his family. PW3, the investigating officer testified that the appellant was a neighbour of PW2 as his residence is not far from that of the witness. PW3 said that she arrested the appellant at his residence where he was lying in bed with another man. It is thus my considered view that the appellant was positively identified.

31. The appellant argued that the medical evidence did not implicate him and that no tests were carried out in regard to his participation in the incident. As the Court of Appeal noted in Geoffrey Kioji vs Republic Nyeri Criminal Appeal No. 270 of 2010 (UR):-

> Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

32. The appellant further argued that the trial court did not conduct a proper voir dire examination on the complainant. On perusal of the court record, the trial magistrate noted that when the minor was called to testify she could not remember some necessary details regarding the day of the incident. The court further noted that she could not comprehend the oath and thus she gave an unsworn statement. Accordingly, the court noted that it ought to proceed with caution and circumspection before relying on the minor's testimony. The trial court was satisfied that the minor was telling the truth as she gave a very comprehensive narration of the events of the fateful day. Furthermore, her evidence was consistent and the trial court did not find any incident where she materially contradicted herself or the evidence of any other witness. It is my considered view that the trial court did conduct a proper voir dire examination on the complainant as her evidence was cogent, consistent and well corroborated by that of other witnesses.

33. Section 200 (3) of the Criminal Procedure Code provides:-

> Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

34. The record indicates that the court explained to the accused his rights under Section 200 of the Criminal Procedure Code. The accused person elected to have the case start afresh and asked the court to recall the complainant and PW2. The court considered the application by the appellant and declined to grant it for the reason that the said witnesses had testified over one and a half years earlier and it would not be in the interest of justice to recall them. The court also noted that when the appellant was put on his defence, he absconded and the case had substantially proceeded after the defence stage and as such, it would not have been appropriate to reopen the prosecution case. The appellant had an opportunity to substantially cross-examine the witnesses as noted by the court. The appellant requested to recall PW1 and PW2 as the succeeding magistrate was taking over the case. The court allowed the recalling of the two witnesses but the appellant absconded court on two occasions thereafter. The succeeding magistrate gave sound reasons why he could not again allow the recalling of the two witnesses. It is my considered view that the trial courts complied with Section 200 of the Criminal Procedure Code.

35. Similarly, on the allegation by the appellant that his right under Section 146 of the *Evidence Act* was violated, it is my considered view that Section 146 (4) of the *Evidence Act* is not couched in mandatory terms. It does not bind the court to recall witnesses as the proviso states that the court may in all cases permit a witness to be recalled. The trial court recalled the two witnesses upon the request of the appellant yet he absconded court on two occasions after his application was allowed. I find that the appellant's rights under Section 146 (4) of the *Evidence Act* were not violated.

36. The appellant argues that he was not conversant with the law and ought to have been offered legal representation at the expense of the state and thus his constitutional right under Article 50 (2) (h) was violated.

37. Article 50 (2) (h)of *the Constitution* stipulates:-

> Every accused person has the right to a fair trial, which includes the right-
>
> To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

38. A closer reading of Article 50 (2)(h) of *the Constitution* denotes that the right to legal representation is not an absolute right but a qualified one. Legal representation at the expense of the state is thus

only available where there is a likelihood of substantial injustice occurring to the detriment of an unrepresented accused person. The Court of Appeal in the case of Macharia vs Republic stated as follows:-

> Article 50 of *the Constitution* sets out a right to a fair hearing which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where public interest requires that some form of legal aid be given to the accused because of the nature of the offence....We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at the state expense.

39. In the instant appeal, the appellant was charged with the offence of defilement and sentenced to serve twenty (20) years imprisonment. The appellant was informed of his rights during his first appearance in court provided for in Article 50(2)(h) of *the Constitution*. The appellant was supplied with witness statements at the onset of the trial and extensively carried out cross examination on the prosecution witnesses. The appellant never requested to be given a counsel at any one time during the trial. It is my considered view that there was no risk of any injustice occurring and that Article 50 was fully complied with.

40. The appellant submitted that the trial court did not consider his defence. He states that he has a sour relationship with PW2 and therefore she has fabricated the trial case against him. Upon perusal of record, I note that the trial magistrate in his judgement stated that he was not convinced that there was any vendetta against the appellant by PW2 as he had alleged. The trial magistrate stated that he was inclined to believe the evidence of the prosecution witnesses and not that of the appellant as they all identified his residence in PW2's neighbourhood. The trial magistrate considered the alibi of the appellant and found that his alibi was displaced by the overwhelming evidence of the prosecution. The appellant's allegation that his defence was not considered is not supported by the record.

41. It is my finding that the prosecution proved its case against the appellant beyond any reasonable doubt. The trial court did not err either in law or in fact in convicting the accused of the offence. The sentence imposed by the trial court was in accordance with the law.

42. Consequently, the conviction and the sentence are hereby upheld.

43. The appeal stands dismissed.

44. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 27th day of July 2023