Wairimu v Republic (Criminal Appeal E002 of 2020)
[2023] KEHC 21138 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E002 OF 2020

FN MUCHEMI, J

JULY 27, 2023

BETWEEN

JAMES GATHENYA WAIRIMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Nyeri by Honourable F. Muguongo (SRM), in Criminal Sexual Offence Case No. 3 of 2019 on 4th March 2020)

JUDGMENT

Brief Facts

1. The appellant, James Gathenya Wairimu was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between 1st January 2018 and 21st December 2018 in Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EW a child of 11 years. He was found guilty of the offence and sentenced to serve 20 years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 5 grounds of appeal which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant without the prosecution discharging the required burden of proof;

    b. The learned trial magistrate erred in law and in fact in failing to appreciate that the prosecution's case was filled with contradictions and inconsistencies;

    c. That the learned trial magistrate failed to consider the defence raised by the appellant.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the prosecution did not prove the identification of the perpetrator. He further submits that this is a case of mistaken identity as he does not reside in Kangemi but lives in Thunguma, yet PW2 and PW4 testified that he is their neighbour in Kangemi. Furthermore, PW2 testified that the perpetrator was a neighbour who was brown in complexion which the appellant argues does not fit his complexion. The appellant further relies on the cases of Kamau v Republic [1975] EA 139 and R v Turnbull [1976] 3 All ER 349 and submits that the prosecution did not prove the identification of the perpetrator as the complainant did not give a clear description of the perpetrator.

5. The appellant further submits that the ingredient of penetration was not proved as PW1, the clinical officer did not examine PW2 nor did he fill the PRC Form. The appellant argues that the minor was examined by Dr. Sarah Gichuki and she filled the PRC Form, yet she was not called by the prosecution to testify and be cross examined.

6. The appellant submits that PW1 did not produce any evidence in court to link him to defiling the minor. He argues that no DNA testing was carried out on him and further PW1 did not tell the court what type of object was used to cause penetration to the minor.

7. Pursuant to Section 144 and 150 of the Criminal Procedure code, the appellant submits that the prosecution failed to call crucial witnesses to testify namely the minor's grandmother and the three police officers who arrested him. The appellant argues that the grandmother's testimony is essential as PW4 testified that she told her grandmother that he was giving money to PW2. Furthermore, the appellant states that the three police officers ought to have been called to testify and give an account of how they came to arrest him as the appellant argues he never knew the complainant or her family. The appellant relies on the cases of Bukenya & Others v Uganda [1972] EA 549 and John Kenga v Republic Criminal Appeal No. 1126 of 1984 and submits that the failure by the prosecution to call the grandmother and the three officers prejudices his constitutional right under Article 50(2) of *the Constitution*.

8. The appellant submits that his defence was not considered as he gave a sworn testimony in court stating that he did not know the complainant and that it was a case of mistaken identity. He further submits that the matter was reported to the police on 27th December 2018 but he was arrested on 13th January 2019. He thus argues that the prosecution never explained why it took so long to arrest him after the report was made to the police.

The Respondent's Submissions

9. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent argues that the age of the victim, PW2 was proved as PW2 testified that she was 11 years old at the time the offence was committed. This was corroborated by PW3, the victim's mother and PW5, the investigating officer produced PW2's birth certificate which indicated that PW2 was born on 27th September 2007.

10. On the ingredient of penetration, the respondent submits that the victim testified that the appellant took her down the slope where alcohol is prepared, removed her clothes and his clothes and then he used his organ for urinating and put it where she used to urinate. PW2 further stated that it was painful.

The respondent further submits that the minor testified that after the first incident of sex, the appellant continued to get her from home and take her to the slopes or to the fence for sex and give her money.

11. The respondent submits that the evidence of the victim was corroborated by PW1, the medical officer. The respondent further submits that although the appellant states that there was no evidence of what exactly penetrated the vagina of the victim, the minor reported that she had been defiled and when she was examined, her hymen was found to have been broken.

12. The respondent submits that PW2 identified the appellant as the perpetrator. She testified that after the first incident, she got to know the appellant physically and not by his name. She further testified that she told the doctor who examined that she knew the perpetrator by seeing him. Furthermore, PW4 testified that she saw the appellant on several occasions and that is how she could identify him despite him not being their neighbour nor her knowing him by name. The respondent thus submits that the appeal lacks merit and ought to be dismissed.

Issues for determination

13. The appellant has cited 5 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt before the trial court.

    b. Whether the trial court considered the defence of the accused.

The Law

14. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v 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.

15. Similarly in the case of Okeno v 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 v 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 v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

16. In order to determine whether the trial magistrate erred in convicting the appellant without proof to the standards required in criminal cases, the following issues will be looked into:-

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

    b. Whether the prosecution failed by not calling crucial witnesses;

17. Relying on the case of Charles Wamukoya Karani v 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."

18. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo v 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."

19. PW2, testified that she was 11 years old at the time the offence was committed and the same was corroborated by PW3, the minor's mother. PW5, the investigating officer produced PW2's birth certificate which indicated that PW2 was born on 27th September 2007. I have perused the birth certificate and the court record and noted that the prosecution proved the age of the minor.

20. 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."

21. On the element of penetration, PW2 testified that she and PW4 were on their way to their grandmother's place after picking milk when they met the appellant. The minor testified that the appellant called her and they went down the slopes where alcohol is prepared and hidden. She further stated that the appellant removed her clothes, her trousers and panty and then he removed his trousers. She further testified that the appellant used his organ for urinating and put it where she used to urinate, which she described as painful. The victim testified that after the appellant finished, he gave her Kshs. 50/- and told her not to tell her grandmother.

22. The minor testified that after the first incident, the appellant had sex with her on several occasions between January and December 2018. She further testified that he would come to her grandmother's house, call and take her to the slopes, the fence or the incomplete house behind the fence and have sex with her. The minor testified that the appellant would give her money in the amount of Kshs. 50 or Kshs. 30/- after he had sex with her.

23. Dr. William Muriuki, PW1 testified that he examined the minor on 2nd January 2019 and filled the P3 Form. He testified that he observed that the minor's genitilia was normal, her virginity was lost and there was inflammation in her private parts. He further produced the PRC Form filled by Dr. Sarah Gichuki on 28th December 2018 as an exhibit which indicated that the minor's urine had an infection

and there was inflammation in her private parts. On cross-examination, the witness testified that the minor's hymen was broken.

24. The appellant further argued that the prosecution did not prove penetration as PW1 is not the medical officer who examined the minor or filled in the PRC Form on 28th December 2018. He argues that he did not get a chance to cross examine the doctor who examined the victim. I have perused the court record and noted that the PRC Form was prepared by Dr. Sarah Gichuki on 28th December 2018 and was produced by Dr. Muriuki who testified that he worked with Dr. Sarah Gichuki and was conversant with her signature. The prosecution made an application to allow Dr. Muriuki to produce the PRC Form on behalf of Dr. Gichuki. The appellant had no objection and the court allowed the said application. Section 77 of the *Evidence Act* allows reports of experts such as government analysts and medical practitioner to be used in evidence. Furthermore, PW1 testified that he worked with the author of the document and was conversant with her handwriting. I am of the considered view that the medical report of Dr. Gichuki and related documents were produced regularly in evidence.

25. On the issue of identification, PW2 testified that after the first incident, she got to know the appellant physically but not by name. On cross-examination, she testified that she told the doctor that she knew the perpetrator by appearance. PW4 further testified that she had seen the appellant on several occasions and that is how she could identify him despite him not being their neighbour or her knowing his name. The appellant argues that the prosecution did not prove the element of identification and that this was a case of mistaken identity. PW2 testified that the appellant was not their neighbour and that she came to know him, not by his name but physically after he had sexually assaulted her the first time. PW2 further stated that the appellant on several occasions sexually assaulted her on the slopes as he went to collect milk and in an house behind the fence.

26. PW4 the aunt to PW1 and who stayed with her testified that she saw the appellant on several occasions. Although PW4 did not know the name of the appellant, she could identify him having seen him severally. It is evident that PW2 positively identified the appellant on the date he was arrested. It is thus my considered view that the appellant was positively identified as the perpetrator. As such, I accordingly find that the prosecution did prove the element of identification.

27. The appellant has complained that the medical evidence did not implicate him and no tests were carried out which were necessary. 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.

In light of the above, it is my considered evidence that PW2's testimony was cogent and sufficient and furthermore all the ingredients of the offence of defilement were established.

28. The prosecution is required to avail to the court all relevant evidence to enable the court in making an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

> No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.

29. In the case of Bukenya & Others vs Uganda [1972]EA 549 the court addressed itself thus:-

a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

30. Similarly in Keter v Republic [2007] 1 EA 135 the court held inter alia thus:-

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.

31. It is my considered view that the prosecution did in fact call the material witnesses whose evidence as a whole it assessed as sufficient to prove the offence. Failure to call the grandmother or the three officers who arrested the appellant in my view did not occasion any injustice to the appellant or infringe his constitutional right under Article 50(2) of *the Constitution*.

32. The appellant submitted that he did not know the victim and only came to know her when he was arrested. He states that he does not live in Kangemi and thus this is a case of mistaken identity as he lives in Thunguma. He further submits that the matter was reported to the police on 27th December 2018 and yet he was arrested on 13th January 2019 with no explanation as to why it took so long for him to be arrested. I have perused the court record and noted that the appellant gave a sworn testimony and called one witness. He denied defiling PW2 and only came to know her the day he was arrested. DW2 only testified as to the character of the appellant and stated that she did not know if the appellant committed any offence. The record shows that the trial court considered the appellant's defence and found that it consisted of mere denials. The trial court further found that the testimony of good character tendered by DW2 had zero effect on the overwhelming evidence of the prosecution. As such, it is my considered view that the trial court considered the defence and found it not plausible.

33. It is my considered view that the prosecution proved the case against the accused beyond any reasonable doubt. The conviction and sentence were based on cogent evidence and or the law.

34. This appeal lacks merit and it is hereby dismissed.

35. 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