Ndwiga v Republic (Criminal Appeal E003 of 2021)
[2023] KEHC 22893 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22893 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E003 OF 2021

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

MORISON KINYUA NDWIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. G.K. Odhiambo (RM) in the Principal Magistrate's Court at Gichugu Sexual Offence No. 3 of 2020 delivered on 05th February 2021)

JUDGMENT

1. This is an appeal from the above mentioned decision. The appellant in his amended memorandum of appeal is seeking to have the appeal allowed, conviction quashed and sentence set aside, on the grounds that the learned trial magistrate erred in law and in facts by;

    a. Failing to appreciate that the critical elements of defilement being penial penetration and identification of the assailant were not proved to the required standard;

    b. Failing to consider and appreciate the fact that the case was purely premised on an existing grudge and an incurably defective charge thereby occasioning prejudice;

    c. Misdirecting himself and misapplying evidence adduced, thereby shifting the burden of proof to the appellant contrary to the law;

    d. Failing to consider that the case was riddled with discrepancies capable of unsettling the verdict; and

    e. The sentence meted to the appellant was harsh and manifestly excessive.

2. The appellant was faced with the charge of defilement contrary to Section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that, on

March 5, 2020 in Kirinyaga East Sub County within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SN a child aged 7 years.

3. The alternative charge was committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars for this charge were that on March 5, 2020 in Kirinyaga East subcounty within Kirinyaga County, the appellant intentionally and unlawfully did cause his penis to come into contact with the vagina of SN a child aged 7 years.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 7 witnesses in support of its case.

5. After *voire dire*, PW1 who is the victim, gave sworn testimony and stated that on the day of the incident she was going home from school when, the accused person carried her to a coffee plantation and removed her clothes, forced her to the ground and then put his penis into her vagina. That he did this after telling her that he wanted to pick mangoes for her from the coffee plantation. That she felt a lot of pain and screamed and that is when the accused person released her. That after she screamed, the accused's father and uncle came to see what was happening. That after she got free, she ran to the roadside where she saw her uncle, who was present in court. That the PW1's uncle took her to her (PW1's) aunty and both of them took her to Muthigine Police Station and later to Kianyaga Hospital. She stated that the accused is known to him and that she could see him sitting at their home when she is going to school. That she does not go to the home of the accused. On cross-examination she stated that she is taught not to lie in church and that she was telling the truth. On re-examination, she recounted the experience at the coffee plantation.

6. PW2, JM, uncle of the accused person, testified that on the day of the incident, he was at his home with some guests when he heard screams emanating from within the coffee plantation, belonging to his step mother. That when he went to see what was happening, he met the victim running away and the father of the accused trying to find out what had happened. That PW1 explained to them that the accused had defiled her. That PW2 took PW1 to her grandparent's home and her aunty was called. That PW2 and PW1's aunty took PW1 to the police station and to the hospital. That the accused was like a son to him and that there is no grudge between them. On cross examination he stated that the disagreement he had with the accused in the past has nothing to do with the present case. That he neither went to the coffee plantation, nor did he examine the private parts of the victim as he is barred by the law from doing so. That he took the child to the police station in his capacity as a member of nyumba kumi initiative. That the father of the accused was the first one to report the incident and later on PW2 visited the site of the incident which was disturbed.

7. PW3 IWM, aunty of PW1, stated that she is the guardian of the minor. That on the day of the incident, she received a call from PW2 who told her that the accused had tried to have sex with PW1. That she requested PW2 to take PW1 to her place of work so that they could take her to the police. That when PW2 and PW1 arrived, PW1 tearfully narrated to her the incident. That they escorted her to the police station where the incident was reported then to hospital where PW1 was treated and examined. That lab tests were also done and the results were obtained. That she also had P3 and PRC forms. On cross-examination, she stated that she did not confirm that PW1 had been defiled but that doctors at the hospital did.

8. PW4, JNM, father of the accused, stated that on the day of the incident, he was at home cooking when he heard screams from PW3's coffee plantation. That he followed the screams and found it was PW1 who was running away saying that someone in the plantation had done something to her. That she was going tell her grandmother. That a small group of people had gathered to hear the minor but he didn't stay long enough to hear the whole story and so he didn't know that the perpetrator was his son.

9. PW5, Stephen Kiama Maina, a clinical officer at Kianyaga Sub County Hospital stated that he examined PW1 and in his findings, the external genitals of PW1 were swollen and the hymen was freshly torn. That the examination was done on March 6, 2020 after the victim had already bathed and changed clothes. That no spermatozoa were found on examination. He produced the lab tests and results, P3 and PRC forms as evidence. That his conclusion was that the victim had been defiled. On cross-examination, he stated that he couldn't remember if the victim was accompanied by a police officer to the hospital. That even though the victim had bathed and changed clothes, the examination still shows that she was defiled and her hymen was broken. That even if PW1 was to be re-examined, her genitals would have healed with passage of time.

10. PW6, P.C. Joseph Otieno of Muthigine Patrol base was the investigating officer in the case. He stated that the victim had been brought to the station in the company of PW2 & PW3. That PW1 narrated the incident to him and added that she had been defiled by the accused. That he confirmed that the victim was a minor as indicated in her birth certificate. That he was arrested by his colleague P.C. Jane Biwott because he was away on official assignment. On cross-examination, he stated that his colleague had conducted the investigations but he also had a chance to verify the particulars of the case. That he relied on his colleague's findings and he did not need to have had a physical meeting with her. That he didn't accompany the child to hospital.

11. PW7, IP Jane Biwott of Kahawa West Railway Station and formerly of Kianyaga Police station, stated that she was the initial investigating officer of the case. She also recounted the ordeal as narrated by PW1. That she arrested the accused person when she was informed that the accused person was at home. That she didn't visit the scene of the incident. On cross-examination, she stated that the local police made several attempts to apprehend the accused but he had run away from his home for a few days. That the minor positively identified the accused at the Kianyaga Police Station. She stated that she made a mistake in her statement stating that the incident occurred on February 5, 2020 instead of March 5, 2020 and that this should be treated as an honest mistake.

12. This marked the end of the prosecution's case. The court ruled that a prima facie case had been established and the accused person was put to his defense.

13. DW1, the accused person testified that on March 5, 2020, he was away harvesting maize until 2PM when he returned home. That he then went to his grandmother's house to collect a plastic paper for airing the maize. That while at his grandmother's place, he drunk some porridge then headed back home before leaving again and going to his aunt's hotel where he worked until 10PM. That the next day he went to work at the hotel as usual and on the way back, he and his friend were assaulted by 2 men for allegedly defiling the victim. That his father told him that on the material day when he was entering the home, he heard screams from the coffee plantation. That he was taken to the hospital but he fell unconscious along the way and he only came to, at Embu Level 5 Hospital. That the next day when he was going to get a P3 form for the assault, he was arrested and taken to Muthigine police patrol base and was transferred to Kianyaga Police Station.

14. On cross-examination, he stated that on the day of the incident, he was not at home but was at his aunt's business in Embu County. That PW4 had a grudge with him for allegedly stealing his avocadoes. That his father told him that he had seen the complainant running from the coffee plantation but he did not want to know what had happened because he himself was nursing wounds. The accused person produced treatment notes and x-ray films which were marked as defence exhibits.

15. The parties on appeal were directed to file their written submissions and they both complied.

16. The appellant in his submissions contended that the victim was not defiled because according to PW2, the victim had her panty on. And that if she had been running she couldn't have been able to run. That the initial medical examination showed that she had a cracked private part and that her genitals had been touched. That the narrative changed into defilement when PW5 testified, stating that the victim's genitals were oedemateous or swollen in the external parts and the hymen was freshly torn. The appellant relied on the case of *Ben Maina Mwangi v Republic* (2006) eKLR to argue his case that PW5 failed to ascertain the age of the injuries which is a fatal mistake to the prosecution's case. That it cannot be proven that there was actual penile penetration and he cited the case of *Joshua Mwangi Githii v Republic* (2020) eKLR and *WWN v. Republic* (2020) eKLR. He submitted that the charge was incurably defective under Section 214 of the *Criminal Procedure Code*, as the details of the offence are not corroborated by the statements made by PW5 who confirmed that there was no blood on the panty of the victim.

17. The appellant submitted that his right to fair trial under Article 50(2)(b) of the *Constitution of Kenya, 2010* has been infringed. That the child did not expressly name or identify the accused person when she was running from the coffee farm but rather she was saying

> "*ni mtu huku chini...*"

He also submitted that there was a grudge between him and PW2 and cited the cases of *Sentalle v Uganda* (1968) EA. 63 (Note iii) and *Jason Akumu Yongo v Republic* (1983) eKLR. He cited the case of *J.O.O. v Republic* (2015) eKLR to make the point that the court ought to have considered evidence by both parties in deciding the case. That the trial court did not consider the inconsistencies in the evidence and he cited the case of *John Mutua Musyoki v Republic* (2017) eKLR. He also relied on the case of *Ndungu Kimanyi vs Republic* (1979) eKLR to state that PW1 was not a credible witness.

18. The respondent, in its submissions, stated that they have proved the offence beyond reasonable doubt according to the case of *Bakare v State* (1987) eKLR. That the elements of the offence have been satisfied and that the sentence is commensurate with the offence.

19. From the memorandum of appeal, submissions, it is my view that the issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt; and

    b. Whether there were inconsistencies in the evidence produced.

20. Under Section 8(1) and (2) of the *Sexual Offences Act*, the prosecution had the task of proving them beyond reasonable doubt:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration happened; and

    c. The perpetrator was positively identified.

21. The age of the complainant is not in question as her birth certificate was produced to confirm that she was born in 2013 and at the time of the offence, she was 7 years old.

22. On the element of penetration, PW5 confirmed that he examined the minor after she had been attended to, at {Particulars Withheld] Health Center where they had recorded that she had a crack at her private part. That she was brought to Kianyaga Sub County Hospital the day following the incident and after she had bathed and changed clothes. These details are recorded in the P3 form stating that the victim had been attended to at another medical facility before the sub county hospital and that

could explain why there was no blood on her panty. The report however confirms that the injuries are consistent with defilement. It has been proven that penetration occurred.

23. On identification of the assailant, PW1 stated that she had been carried into the coffee plantation by Kinyua, the accused person, who then proceeded to touch her buttocks and then insert his penis into her vagina. That when she felt pain she screamed and he let her go. That she ran away into the road and reported to her uncle about what had happened and that Kinyua did it. All the other witnesses mostly recounted the events as they had been told by PW1. That is to say, this case was determined largely based on the testimony by PW1. In the case of *Wamunge vs Republic*, (1980) KLR 424 it was held;

> " It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction"

Also, in the case of *Paul Ndogo Mwangi Vs Republic*, [2016] eKLR it was held thus regarding

> " .....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."

In my view, the trial court rightly and cautiously considered the evidence in making its decision. With these 2 elements being satisfied, I do find that the prosecution proved its case beyond reasonable doubt.

24. On whether there were inconsistencies in the evidence, it is my view that the main elements of the offence have been sufficiently proven. I do not think, any inconsistencies, if at all, affects the substance of the case. In the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

25. In the premises, I find no reason to depart form the finding of the trial court as I am guided by the case of *Mbogo & another vs Shah*, [1968] EA, p.15 the court held that;

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

26. In light of the foregoing and considering the record of the trial court and the submissions in this appeal, I hereby uphold the trial court's finding on conviction. However, on sentence I do find that the same was harsh and excessive and I do order as follows noting that the trial court did not apply the mandatory minimum:

a. The sentence of 40 years imprisonment is hereby set aside and reduced to 25 years imprisonment

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent