Nyabugo v Republic (Criminal Appeal E019 of 2021)
[2023] KEHC 24533 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E019 OF 2021

GL NZIOKA, J

OCTOBER 31, 2023

BETWEEN

LAWRENCE NAMWANGA NYABUGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of; Hon. Daffline Nyaboke Sure, Senior Resident Magistrate, delivered on, 27th June, 2019, vide Criminal Case S/ O No. 38 of 2019, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case S/O No. E03 of 2021, with the offence of defilement contrary to section 8 (1) as read with (2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") and an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each charge are as per the charge sheet.

2. He pleaded not guilty and the case proceeded to full hearing with the prosecution calling a total of five (5) witnesses. The prosecution case in brief is that, on 25th January 2021 (PW1) MM (herein "the complainant") was returning home from school when she met her classmates AW and AM at their gate who requested her to accompany them for a walk.

3. The complainant agreed and they went to Daraja Mbili to the house of one Joseph, who was A's boyfriend. That, at 9;00 pm, the complainant's friends and Joseph took the complainant to the appellant's house, situated in the same plot, and left her there. The house had a plastic chair and a mattress on the floor. That she sat on the chair as the appellant was eating.

4. At around 10;00pm, the appellant offered her the mattress to sleep on while he slept on the chair. Later that night, the appellant put on the lights went to the mattress where she was removed her skirt and

pants, while he was naked, and then put off the lights and raped her thrice. That she felt pain in her private parts. That she left the appellant's house the following day at 6;00am and joined her friends, who had spent the night in Joseph's house and another, and they set off for home.

5. However, while on the way (PW4) RMM, a boda boda rider and A' uncle met them and inquired why there were not in school but they did not answer him. He then alerted the Area Chief who arrested them and took them to Murungaru Police Station where they were booked in the OB, placed in the cells and interrogated.

6. Apparently, (PW2) JWW, the complainant's mother, had been searching for her when she disappeared on 25th January 2021 went to Murungaru Police Station to report that she was missing when she found the complainant and her friends arrested. She took the complainant to hospital where she was examined and treated, and later a P3 form was filled sat Engineer District Hospital where. Upon conclusion of the investigation the appellant was arrested and charged accordingly.

7. At the close of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. He testified vide unsworn statement and denied committing the offence. He stated that on 28th January 2021, he was at the butchery where he was working when he saw a police car passing. Later, three people came to the butchery and called out for one Sammy but he did not respond since that is not his name. That, he welcomed them to the butchery and they introduced themselves as Police Officers. That they insisted that he was called Sammy but was pretending. That, he was arrested without being informed of the reason and taken to the police station where the Police Officers continued questioning him over his name.

8. Later, three girls were brought and he was asked whether he knew them which he denied. That, on Monday morning the police took his fingerprint and thereafter he was taken to court and charged with the offence herein.

9. At the conclusion of the hearing of the case, the trial court delivered a judgment dated 26th August 2021 and held that the prosecution had proved its case beyond reasonable doubt, convicted the appellant on the main count and sentenced him to serve twenty (20) years imprisonment.

10. However, the appellant is aggrieved by both conviction and sentence and appeals against the same based on the following grounds:

    a. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredient of the offence were NOT conclusively proved.

    b. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the applicant to the commission of the offence.

    c. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    d. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.

    e. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation thus imposing the maximum sentence which is harsh and excessive and not informed by the unique facts and circumstances of the offence.

    f. That I pray to be supplied with a copy of the original trial court's proceedings and its judgment.

g. That further grounds shall be adduced at the hearing of this appeal.

h. That I wish to be present during the hearing and determination of this appeal.

11. It suffices to note that, at the time of filing the submissions, the appellant filed amended grounds of appeal that states: -

a. That, the learned trial magistrate erred both in law and fact when she convicted the appellant in this case basing her conviction on the evidence adduced yet failed to apply the principles applicable under such evidence being circumstantial.

b. That, the learned trial magistrate erred in fact and law by convicting the appellant in this instant case on the evidence of uncalled witnesses.

c. That, the learned trial magistrate erred in both law and fact by convicting the appellant in this case yet failed to note that identification of the assailant was not conclusive.

d. That, the learned trial magistrate erred in both law and fact when he convicted the appellant in this instance case yet failed to note that the element of penetration was not conclusive against the appellant.

e. That, the learned trial magistrate erred in both law and fact when he convicted the appellant in this instant case yet failed to note that Age of the victim was not conclusively proved.

f. That, the learned trial magistrate erred in law and fact by convicting the appellant in this case yet failed to consider his plausible defence which was not rebutted by the prosecution.

g. That, the learned trial magistrate erred both in law and fact when she convicted the appellant in this present case to a mandatory minimum sentence of 20 years, yet failed to note that the same denies the judge's discretion to decide cases according to the circumstances of the individual case.

12. The appeal was disposed of vide filing of submissions. The appellant in submissions filed on 16th March 2022 argued that the prosecution's case was based on circumstantial evidence since nobody saw him commit the offence. He relied on the case of, R vs Tailor Weaner & Donvan (1928) where the court set out the principles governing admissibility of circumstantial evidence and stated that circumstantial evidence is capable of proving a proposition with mathematical accuracy through intensified examination.

13. That, the girls were found alone on the road but were not near his house, Further, the complainant had been reported missing and therefore the report that she was defiled was based on mere suspicion. He alleged that, the complainant was intimidated after being arrested and her confession that she was defiled was procured through prodding and therefore inadmissible

14. He further submitted that the prosecution failed to call the two other girls that were in the company of the complainant, and the Chief, all of whom were crucial witness leading to an inference that their evidence would have been adverse to the prosecutions case and cited the case of Donald Majiwa Achilwa & 2 others vs Republic (2009) eKLR and Bukenya & Others vs Uganda [1972] EA 549.

15. That, he was not properly identified as the prosecution refused to avail the first report and that no identification parade was conduct as set out in the case of R vs Mwango s/o Manaa (1933) EA CA 29 thus his identification amounted dock identification that was held to be worthless in the case of Ajode bs Republic (2004) eKLR.

16. Further, the prosecution failed to prove penetration as the medical evidence filled on 26th January 2021, indicated the complainant had a normal, clean and dry genitalia with old hymen tears was ambiguous which contradicted the complainant's evidence that she had sex for the first time on 25th January 2021. He relied on the case(s) of Michael Odhiambo vs Rep (2005) eKLR and David Mwingirwa vs Rep (2017) eKLR that evidence of a rapture or missing hymen alone is not conclusive evidence of defilement.

17. He argued that, the age of the complainant was not conclusively proved as the prosecution produced an uncertified copy of the complainant's birth certificate contrary to section 66 of the *Evidence Act* (Cap 80) Laws of Kenya on production of secondary evidence. Further, the birth certificate was procured on 9th April 2021 four (4) months after the case against him was instituted.

18. Furthermore, the prosecution failed to carry out an age assessment to determine the complainant's age yet the evidence was full of contradictions. That, the P3 and PRC forms indicated she was about or above 18 years old, while the complainant stated she was 14 years and PW2, J, her mother stated she was 15 years old.

19. Lastly, the appellant submitted the trial Magistrate failed to consider his defence that was cogent nor did she give reasons why she doubted his defence over the prosecution's case in breach of section 309 of the Criminal Procedure Code (Cap 75) Laws of Kenya. Further, the trial court did not warn itself on the dangers of relying on the uncorroborated evidence of a single witness in finding a conviction against him as required under section 124 of the *Evidence Act*. He relied on the case of Chila v Republic (1967) EA 722.

20. However, the respondent in their submissions dated 28th October 2022 argued that contrary to the appellant's assertions, the evidence in the trial court was direct evidence from the complainant.

21. That, the prosecution proved the ingredients of the offence. Further, the age of the complainant was proved through the production of her birth certificate (Pex 1). Furthermore, the penetration was proved through the evidence of the complainant that the appellant defiled her three (3) time in the night and which was corroborated by the medical evidence. That, the complainant was able to identify the appellant as she spent the evening, night and morning in his house and that the lights were on prior to the defilement.

22. It was submitted that, section 143 of the *Evidence Act* provides that no specific number of witnesses is required to prove a fact. That, the witnesses who had not been called to testify did not witness the offence thus were not relevant. That, in any case, the trial Magistrate dealt with the issue uncalled witnesses and dismissed the same stating their evidence would not have been averse to the prosecution case.

23. Further, the appellant did not prove an oblique motive for not calling the witness. They relied on the case of Julius Kalewa Mutunga v Republic [2006] eKLR where the Court of Appeal stated that the general principle of law is that calling a witness is at the discretion of the prosecution and the court will not interfere unless it is shown it was influenced by some oblique motive.

24. Furthermore, the trial court considered the appellant's defence and found that it did not challenged the prosecution's case. Lastly, the trial court considered the appellant mitigation and noted that he took advantage of the complainant's gullibility yet it was clear she was a minor and sentenced him to serve twenty (20) years imprisonment.

25. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellant court thereof is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.

26. In that regard, the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, thus observed: -

> " An appellant on a first appeal is entitled to expect the evidence as a 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"

27. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of the Act, that states: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

28. The law is thus settled that, the ingredients of defilement as discussed in the case of; Agaya Roberts vs. Uganda, Criminal no. 18 of 2002, by the Court of Appeal are that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

29. Similarly, in Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

30. In the instant matter, the first issue of age emanates from the charge sheet that states that the complainant was aged fourteen (14) years old, at the time of the alleged offence. The complainant herself testified that she was fourteen (14) years old. Her mother PW2 JW stated that, she was fifteen (15) years old. That she was born on 27th November 2004. The investigating officer (PW5) PC Stanley Kipyegon produced the complainant's birth certificate as prosecution exhibit 1. Taking into account the fact that, the offence is alleged to have occurred on 25th January 2021, and the complainant born on 27th November 2007, I find that, the age of the complainant was adequately proved as fourteen (14) years old.

31. As regards penetration, the evidence adduced by the prosecution's witness (PW3) Dr. Martin Owour indicates that upon examination of the complainant on 27th January 2021, he found that, she had an old hymenal tear at 3, 5 and 12 o'clock positions. This opinion is reflected in the P3 form and PCR form produced in evidence. I further find that, other than the medical report the complainant testified as follows;-

> " Lawrence offered me the mattress and he slept on the chair. I slept on the mattress. I do not know when he came to the mattress but he started undressing me. It was dark at the time. He lit the electricity when undressing me. He removed my skirt and pants and started

raping me. When he started raping me, he put off the lights. Lawrence was naked. I do not know when he undressed. I know what rape means. He touched my private parts with his private parts"

32. The doctor's evidence was that, the tear on the hymen was occasioned by penile penetration as supported by the history given by the complainant. To that point, penile penetration leading to the broken hymen is supported.

33. However, the key question is when did the penetration take place? The evidence herein reveals that, the alleged offence took place on 25th January 2021. The complainant was examined on 27th January 2021. Yet the finding of the Doctor is that, there was old hymenal tear. Is it possible that, the tear would be old in less than two (2) days? It's even doubtful when one takes into account the complainant's evidence that; she felt pain in her private parts, and that "It is was the 1st time" she was raped and was raped "3 times that night". The Doctor's further finding indicate that, no bruises or lacerations were noted on her private parts. I therefore find the complainant evidence inconsistent with the medical reports produced. Furthermore neither the prosecution nor the court sought to establish from the Doctor, how old the hymenal tear was.

34. The last issue concerns the identity of the appellant as the perpetrator of the crime. The complainant evidence is that, the appellant, by the name of Lawrence alias Sammy was unknown to her prior to the incident. That, she was introduced to him on the material date by her friends. That he "raped her". The appellant has denied the offence. Therefore it is the word of the complainant against the appellant's. How then would the contrary evidence be reconciled. According to the appellant, the Chief who took the complainant and her friend to the police station should have been called as a witness. The trial court however held that, the Chief was not a crucial witness as he did not witness the "defilement" and that failure to call him did not prejudice the prosecution case.

35. However, it is the finding of this court that, the chief would have at least indicated why he arrested the three girls, took them to the police station and what they told him which would have corroborated or otherwise the complainant's evidence.

36. Furthermore, the appellant's submissions that key witnesses were not called is not in vain. The evidence herein is that, the complainant was introduced to the appellant by one Joseph who was a boyfriend to one of her friend's she went with to visit the said Joseph. Indeed, the complainant was lured and led to allegedly the appellant's house by her two friends; AW and AM. These were the "star" witnesses of the prosecution that, would have nailed the appellant in corroborating the complainant's evidence that they took her to the appellant's house. Why were they not called to testify.

37. The finding of the trial court was that, the prosecution "is not bound to call a plurality of witnesses to establish a fact" as held in Donald Majiwa Achilwa & 2 others -vs- Republic (2009) eKLR. But the same authority states that, the prosecution should call "all necessary" witnesses to establish a fact, and these were necessary witnesses. Therefore the failure to call them in my considered opinion weakened the prosecution's case.

38. I note that, the trial court properly warned itself of the application of provisions of section 124 of the *Evidence Act* (Cap 80) Laws of Kenya and found that, having considered the evidence of the complainant on cross-examination, and her demeanour, she "appeared credible with her evidence". That, there was electricity in the house and she sat for almost one hour before the appellant offered her a mattress". That the accused turned on the lights while undressing her.

39. However, with utmost due respect to the finding of the trial court, the prosecution failure to call key witnesses to establish, prove and/or corroborate any given fact, cannot be cured by the provisions

of section 124 of the *Evidence Act*, nor the demeanour or the court's opinion on the credibility of a witness. The provisions of section 124 of the *Evidence Act*, envisaged situation where there is no eye witness or corroborative evidence. It will be a dangerous precedent to allow the prosecution deviate from its legal duty under section 107 of the *Evidence Act* prove the case beyond reasonable doubt by relying on section 124 of *Evidence Act*, yet there is an alternative evidence to prove the fact.

40. The upshot of the aforesaid is that, I find the complainant's evidence of the defilement, (which may have indeed taken place) and in particular it was the first time she was engaged in sexual activity inconsistent with the doctor's report and more so the failure to call the key witnesses to corroborate, her evidence that, it is the appellant who defiled her to the exclusion of any other person rendered a fatal blow to the prosecution's case.

41. Therefore, I give the appellant the benefit of doubt. The resultant finding is that, the appeal is allowed in its entirety. I quash the conviction, set aside the sentence imposed. The appellant shall be set free unless otherwise lawfully held.

42. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF OCTOBER 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Ndiema for the respondent

Ms. Ogutu Court Assistant