Njiru v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 26231 (KLR) (29 November 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E058 OF 2022

LM NJUGUNA, J

NOVEMBER 29, 2023

BETWEEN

DAVID MURIMI NJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. Ndeng'eri J. (SRM) in the Chief Magistrate's Court at Embu Sexual Offence No. 10 of 2018 delivered on 31st August 2021)

JUDGMENT

1. This is an appeal arising from the abovementioned decision. The appellant has filed an undated petition of appeal seeking that the appeal be allowed, conviction be quashed, sentence be aside and a retrial be ordered. The appeal is premised on the grounds that the trial magistrate erred in law and fact by:

    a. Failing to consider that the prosecution's case was not proved beyond reasonable doubt;

    b. Failing to realize that the appellant was implicated because of an existing long-standing land boundary conflict;

    c. Failing to realize that the prosecution witnesses were not credible because of the inconsistencies and contradictions in their testimonies;

    d. Disregarding the appellant's defense without giving cogent reasons; and

    e. Failing to realize that the complainant's allegations were not corroborated with medical expert evidence.

2. The appellant was charged with the offence of defilement contrary to Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 26th February 2018 at

around 3.00p.m. in Embu North Sub-County within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BWK a child aged 17 years with a mental disability.

3. The alternative charge was the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars for the alternative charge were that on 26th February 2018 at around 3.00p.m. in Embu North Sub-County within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of BWK a child aged 17 years.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called six (6) witnesses in support of its case.

5. PW1 CMK is the mother of the victim and she testified on behalf of her daughter who was not able to communicate. She stated that on the material day, she received a call from one Mugendi informing her that the appellant had defiled her daughter. That she went home and along the way she found her daughter looking dirty and she was crying. That she took the victim to Kibugu Police Post where she was issued with a P3 form and thereafter took her to hospital where she was examined. That the victim told her that the appellant followed her from school then slapped her to scare her and took her to a bush then defiled her. That it is in the nature of the victim to comply when she is scared. She identified the victim's clothes produced in court as evidence. She stated that the victim was treated and the doctor stated that she had been raped. She identified the appellant as the perpetrator and said that she had known him for a long time. On cross-examination, she stated that it took her two hours before reporting the incident and that the victim leaves school at 2:30p.m. That there were bushes at the scene of the crime.

6. PW2 was stood down as the prosecution stated that she was not supposed to testify.

7. PW3, SKM is the father of the victim. He stated that he was at home when he received the news that his daughter had been defiled. That he asked PW1 to go home and get the girl ready. That the following day, he was informed that the appellant who was the suspect had been seen at the market place but since the investigating officer was not reachable on phone, he asked the members of the public to arrest him and they took him to Kibugu Police Post. On cross-examination, he stated that Mugendi, a village elder is the one who gave him the information at first but he did not record his statement because he feared.

8. PW4, Bernard Njue stated that he was at home when he heard screams from the coffee plantation. That he went to check and found the appellant walking in the farm and when he asked him what the screaming was about, the appellant told him that the person screaming is alleging that he (the appellant) had defiled a child. That he asked the appellant to stop if it was not true but he refused. That he raised alarm and a crowd gathered but the appellant managed to get away. On cross-examination, he stated that when the alarm was raised it was concerning a child who had been defiled.

9. PW5, Dennis Mwenda, a clinician, examined the victim on the day of the incident. He observed that the victim had a torn dress and a black marvin that was dirty and had dry leaves and blue underwear. That the hymen was broken on the right and the left side and there was a lot of discharge. That he filled the P3 and PRC forms which he produced as evidence. On cross-examination, he stated that the appellant was not presented for examination.

10. PW6 was CI Salome Ihiga of Kilome Police Station. She stated that the matter was reported at the station that the appellant had defiled a school girl who was mentally challenged, while she was on her way home from school. That she referred the victim to Embu level 5 hospital where P3 and PRC forms were filled. She identified and produced the victim's clothes as evidence. She also verified the age of the

child through her birth certificate. She stated that the following day, the father of the victim called her to inform her that the appellant had been apprehended by members of the public who escorted him to the station. That she obtained a letter and disability identity card from the special school where the victim attended and they were produced as evidence.

11. At the end of the prosecution's case, the court ruled that a prima facie case had been established. The appellant was placed on his defense.

12. The appellant gave unsworn evidence stating that on the day of the incident, he was preparing for some hotel work he had been given when he was called by someone who brought him to the police station alleging that he had done something bad. He stated that all the witnesses conspired against him and that the child was incapable of writing anything. That according to his investigations, the birth certificate produced in court was forged and it does not show the true age of the child.

13. DW2, Hezron Njiru stated that the parents of the appellant called him to say that the appellant had defiled the victim. That he told them to report the matter to the police as he was busy. That the next day, he heard that the appellant had been arrested. He stated that the victim is over 18 years old and had gone through an abortion before. That it is questionable that the victim was examined at Embu Level 5 Hospital yet Kibugu Health Center is near Kibugu Police Post. According to him, the witnesses were bribed to testify against the appellant. That the parents of the victim have complained against the appellant before in another case where he stayed for two years in remand.

14. The trial court found the appellant guilty of the offence of defilement and he was sentenced to 10 years imprisonment. The appellant was acquitted of the alternative charge.

15. The court directed the parties to file their submissions and both of them complied.

16. The appellant submitted that his rights under Articles 23, 24, 25, 27, 47 and 50 were infringed during the trial and that the police and the prosecution colluded to defeat justice. That Articles 73, 238, 239, 244, 157 and 75 of *the Constitution* were breached to the extent that the public officers responsible abused public office to his detriment. That the trial court did not consider the grudge that existed between the appellant and the parents of the victim. He argued that the professional credentials of PW5 were not disclosed to the appellant contrary to the provisions of Article 50(2) of *the Constitution*. That if the victim was unable to communicate, it is not possible that she positively identified him as the assailant and she was not allowed to testify through an intermediary. He stated that there is no explanation as to why the victim was examined at Embu Level 5 Hospital and not in a facility near her home. That proof of the victim's mental incapacity was not done procedurally. He relied on the cases of Joshua Gichuki Mwangi Vs Republic [2015] eKLR and P.K.W Vs Republic [2012] eKLR.

17. On its part, the respondent submitted that all the elements of the offence were proved beyond reasonable doubt. Reliance was placed on the case of George Opindo Olunga Vs. Republic (2016) eKLR in support of its argument that penetration must be proved and that in this case, it was. On the argument on positive identification of the assailant, it relied on the case of Reuben Taabu Anjononi & 2 others Vs. Republic (1980) eKLR and stated that PW1 knew the appellant for more than 10 years and so she knew him very well. Further reliance was placed on the case of Kaingu Elias Kasomo Vs. Republic, Criminal Appeal no. 504 of 2010 (unreported), Benson Kiptoo Vs. Republic (2021) eKLR and Hadson Ali Mwachongo Vs. Republic (2016) eKLR for the argument that in cases of defilement, the age of the victim is a key fact to be proved with evidence.

18. That in this case, the birth certificate indicated that the victim was born on 16th May 2001 and the same was produced in court as evidence. The respondent also relied on the cases of Republic Vs. Nicholas Wambogo (2022) eKLR and Shadrack Kipkoech Kogo, Eldoret Criminal Appeal No. 253 of 2003

(unreported). The respondent urged the court to uphold the finding of the court since the trial court already considered the mitigating factors and the appellant's defense before convicting and sentencing him.

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

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

    b. Whether the evidence of the prosecution witnesses was inconsistent and contradictory;

    c. Whether the sentence imposed was harsh and excessive.

    d. Whether the case should be sent for re-trial.

20. This court is well aware of its obligations as a first appellate court and it endeavors to review the evidence at trial. In the case of Okeno Vs. Republic [1972] EA 32 I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

21. On the issue of whether the offence was proved beyond reasonable doubt, under Section 8(1) and (2) of the *Sexual Offences Act*, the prosecution had the task of proving the elements of the offence, which are as follows::

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

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

22. Regarding the age of the victim, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No 8 of 2001 which defines a "Child" as ".....any human being under the age of eighteen years." PW1 produced a birth certificate showing the victim's date of birth was 16th May 2001. At the time of occurrence of the incident, the victim was 17 years old. Both the trial court and this court are satisfied that the victim was indeed a minor within the meaning of the Children's Act. In the case of In Edwin Nyambogo Onsongo Vs Republic (2016) eKLR the Court of Appeal held that:

> " ... 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."

23. While still on the issue of the age of the victim, DW1 and DW2 both stated that the parents of the victim were not truthful about the age of the victim and that she was much older than they had told the court. By now, it is common knowledge that he who alleges must prove. This is emphasized in

the provisions of Sections 107 and 109 of the *Evidence Act*. The appellant simply alleged but failed to prove the allegations to enable the court to consider the evidence. The court will therefore treat those sentiments as mere allegations which did not present with evidentiary weight for consideration.

24. On the element of penetration, PW1 testified on behalf of the victim after the court determined that she was unable to express herself. She stated that the victim was defiled and that when she met her on the road, the victim's clothes were dirty and the dress was torn. This testimony was corroborated by PW5 who examined the victim at the hospital and established that indeed she had been defiled, noting that the hymen was torn on the right and on the left side. That she was treated for sexual assault and he produced the P3 and PRC forms. This is sufficient proof that there was penetration

25. On identification of the perpetrator, PW1 stated that she received a call from one Mugendi, who told her that the victim had been defiled. PW3 stated that he was called by one Margorie Muthoni who told him that the victim had been defiled by the appellant. PW4 said that he heard noises from his coffee farm and when he went to check, he found the appellant walking around the farm. That when he asked him what the noise was about, the appellant told him that the person who was screaming was saying that he (the appellant) had defiled the victim. That the appellant walked away while speaking on the phone even though PW4 had asked him to stop running away if it wasn't true. That a crowd of people had gathered but the appellant managed to get away.

26. The chain of evidence on identification of the perpetrator in this case begins from a point of hearsay. The witnesses were all told by someone else that the appellant had defiled the victim, except for PW4 who found the appellant in the coffee farm. The victim herself did not testify for reasons recorded in the trial court proceedings. Section 124 of the *Evidence Act* provides that evidence should be corroborated but this requirement can be waived in sexual offences where the only witness as to identification of the assailant is the victim. It states:

> " 124. Corroboration required in criminal cases.
>
> Notwithstanding the provisions of Section 19 of the Oaths and Statutory
>
> Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> 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."

27. It is my view that the testimony of PW4 ought to have been corroborated for it to fit into the puzzle of evidence. Such corroboration would also have been successful if Mugendi or Marjorie Muthoni would have testified. When PW3 was cross-examined, he stated that Mugendi is a village elder and he did not record his statement as a witness because he feared. Nothing in the evidence speaks of Marjorie Muthoni and whether she intended to be a prosecution witness. In light of the foregoing, I do not think that the prosecution discharged its burden of proving the positive identification of the assailant in this case.

28. On the appellant's issue that the testimonies of the prosecution witnesses were marred with inconsistencies and contradictions, the weight of inconsistencies lies in their effect on the presentation of the evidence. If the evidence adduced is such that it would cause a witness to be impeached altogether, the court cannot overlook such contradictions. However, if the contradictions or inconsistencies do not affect the substance of the charges and the appellant is able to follow and participate in his trial, the same will usually be overlooked. In this case, I do not see fatal contradictions and inconsistencies. In the case of Erick Onyango Ondeng' Vs. Republic [2014] eKLR the Court of Appeal cited with authority the Ugandan case of Twehangane Alfred Vs. 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."

29. On the issue of whether the case should be retried, there are stringent circumstances where a retrial may be ordered. That purpose of a retrial is not to allow either party to fill in gaps in their case, but rather, to re-examine and avert illegalities or defects that occurred during the original trial. The Court of Appeal rendered itself on the subject in the case of Fatehali Manji Vs Republic [1966] EA 343 as follows:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

30. In the case of Muiruri Vs. Republic (2003) KLR 552, the Court held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

31. In the case of Mwangi Vs. Republic (1983) KLR 522, the Court of Appeal held at page 538 that: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

32. On my perusal of the trial court's proceedings, the trial was conducted in a manner that cannot be contested. In my view the main issue here is insufficient evidence and not an illegality at the original trial. Further, the appellant has not pleaded any flaw that would prompt this court to send this case for retrial.

33. The elements of the offence of defilement are like a three-legged stool, when one fails the other two cannot sustain a conviction. Therefore, I do find that the prosecution did not prove the element of identification of the perpetrator to the required standard and I have no option but to give the benefit of reasonable doubt in favour of the appellant.

34. The appeal is hereby allowed with orders as follows:

    a. The trial court's finding on conviction is hereby quashed and the sentence of 10 years imposed on the appellant is hereby set aside; and

    b. The appellant is to be immediately set at liberty unless otherwise lawfully held.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE