Mutwiri v Republic (Criminal Appeal E050 of 2021)
[2022] KEHC 440 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 440 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E050 OF 2021

LM NJUGUNA, J

APRIL 28, 2022

BETWEEN

BRIAN MUTWIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. J.Ndeng'eri. in CM's Court in Embu Criminal Case (Sexual Offence) No.49 of 2020 delivered on 08.12.2021)

JUDGMENT

1. The appellant herein filed a petition of appeal dated 30.12.2021 and wherein he challenges the conviction and sentence by the trial court in Chief Magistrate's Court in Embu Criminal Case (Sexual Offence Case No. 49 of 2020. The trial court convicted the appellant of the offence of defilement contrary to section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006 and sentenced him to serve Seven (7) years imprisonment.

2. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as here below:

    i. The learned magistrate erred in both points of law by convicting and sentencing the appellant on a defective charge.

    ii. The learned trial magistrate erred in both points of laws and facts by convicting the appellant on uncorroborated and contradictory evidence of the witnesses.

    iii. The learned trial magistrate erred in both points of law and facts by convicting the appellant whereas the complainant recanted her evidence and was declared a hostile witness and absolved the appellant.

iv. The learned trial magistrate erred in both laws and fact by totally disregarding the fact and the complainant's evidence and appellant's evidence leading to an erroneous conclusion.

v. The trial magistrate misdirected herself in failing to consider that the superior courts have established that relying on recanted evidence is unsafe to support a conviction and unfair on the rights of an accused thus ignoring the principle of ratio decidendi.

vi. That the learned trial magistrate erred both in law and in fact by generally disregarding the defense submissions throughout the trial which had raised 'hiccups' in the prosecution case and not considering the 'hiccups' in the judgment.

vii. That the learned trial magistrate erred both in law and in fact by convicting and sentencing the appellant on insufficient evidence which left the prosecution case not proved beyond reasonable doubt as by law required.

viii. That the learned trial magistrate erred both in law and in fact by totally disregarding and dismissing the appellant's defence given on oath without giving reasons.

ix. That the learned trial magistrate erred in law by imposing a sentence which is both unlawful and excessive.

3. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.

4. On the first ground, the appellant submitted that the charge sheet was defective in that it did not disclose the time of the commission of the offence. That time is material because the alleged minor victim is a high school student and her absence and the timing of it should have been noticed by her parents, guardians and peers. It was submitted that the complainant denied the incident for which the appellant is charged and as such, the prosecution proceeded to declare her a hostile witness. It was his case that there was no evidence adduced by the complainant that required corroboration. That though the evidence of PW5 confirmed that PW1 may have been defiled, the question remains as to who actually defiled her when the minor categorically stated that the accused did not do anything like that to her. Reliance was made on the case of *Daniel Odhiambo Koyo v Republic* (2011) eKLR.

5. Further the appellant submitted that the prosecution witness's evidence is worthless and does not support or prove either the main or the alternative charge as preferred against the accused. Further, it was submitted that the sentence meted out was irregular and that the same arose from a trial and judgment that raised a lot of reasonable doubts in favour of the appellant. Reliance was placed on the cases of *Lekishon Senjo v Republic* (2020) eKLR and *Solomon Locham v Republic* (2015) eKLR]. In the end, the appellant urged this court to quash both conviction and sentence and set him free.

6. The appeal was opposed by Ms. Mati, the Learned Prosecution Counsel wherein she submitted that the same is devoid of merit in that, all the ingredients of the offence of defilement were proved. In regard to the alleged defective charge sheet, it was submitted that the appellant has not demonstrated how the charge sheet was defective. Reliance was placed on the case of *George Njuguna Wamae v Republic* Cr Appeal No. 417 of 2009.It was the respondent's case that the appeal herein is not merited and that the case be reverted to lower court for disposal by way of diversion.

7. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on both conviction and sentence wherein the appellant contends that his conviction was not safe and further that his sentence is both excessive and unlawful.

8. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where

it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination by the court and thereby weigh conflicting evidence and thereafter draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles [See *Gunga Baya & another v Republic* [2015] eKLR].

9. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

10. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington v DPP 1935 AC 462 and Miller v Minister of Pensions 2 ALL 372-273.

11. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As it was correctly held in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 , "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

12. The question which needs to be answered is whether the above elements were proved to the required standards?

13. It is not in dispute that the complainant at the time of the commission of the offence, was 16 years old as the same could be determined from the evidence produced in the trial court (Birth Certificate); and the age of the complainant has not been a subject of the instant appeal.

14. In the case of *Edwin Nyambaso Onsongo v Republic* (2002) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) 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, guardian or medical evidence among other forms of proof.....

15. As such, I am satisfied that the complainant was a minor which satisfies the legal requirement.

16. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

17. In this case, the complainant having been declared a hostile witness by the court, the prosecution proceeded to cross examine her, PW 4 upon examining the complainant, determined that there was laceration on the hymen at 5 O'clock; the region around 6 O'clock and linear abrasions noted at different stages of healing. There were white vaginal discharge and further, that the complainant did not consent to a speculum examination. The outer genital swab was negative of spermatozoa and STI's was positive and termed the degree of injury as harm. PW3 testified that having interviewed the complainant in camera, the complainant told her how on her way home, the appellant requested her to go to his home and that she resisted but the appellant threatened her and even tore her skirt. That she

stayed in the appellant's house locked up and the appellant allegedly defiled her severally. PW2 testified that the complainant had escorted her sister but instead never returned home. That upon enquiry, the complainant confessed to have been with the appellant herein.

18. The complainant testified that the appellant was her boyfriend and further that, she had told the chief that she had spent three days in the house of the appellant. The complainant gave a graphic account of what transpired even as much as she ended up recanting her own statement. I will later on determine the effect the recanted testimony should have, on prosecution's case. But nonetheless, it is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. (See *George Kioji v R* Nyeri Criminal Appeal No. 270 of 2012 (unreported) also section 124 of the *Evidence Act*, Cap 80 Laws of Kenya].

19. In relation to the defective charge sheet, the appellant has argued that the time during which the alleged offence happened was never indicated in the charge sheet. Section 382 of the *Criminal Procedure Code* focuses not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. Reliance was made on the case of *Samuel Kilonzo Musau v Republic* Criminal Appeal No. 153 of 2013.The appellant's concern is baseless since he argues that the time during which the alleged offence happened was never indicated in the charge sheet. Nonetheless, it has been held that Section 382 of the Criminal Procedure Code insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. [See *George Njuguna Wamae v Republic*, CR. APP. No. 417 of 2009). In *Samuel Kilonzo Musau v Republic*, Cr App. No. 153 of 2013, the Court of Appeal declined to interfere with a conviction where the appellant was charged with "defilement contrary to section 8(1) (2) of the *Sexual Offences Act*" instead of "defilement contrary to section 8(1) as read with section (4) of the *Sexual Offences Act*", after finding that he had suffered no prejudice. In light of the above, the appellant failed to show how he was prejudiced.

20. Further, the appellant submitted that his defence was never considered. From the record, the trial magistrate in her judgment considerd the defence by the appellant in it's totality and in the end, she was satisfied that the prosecution proved its case beyond any reasonable doubt. The court noted the discrepancy between the appellant and his witness's evidence and further noted the place where the appellant slept was vital to the determination of the case; as such, judgement was pronounced based on all the facts and evidence presented before the trial court including that of the appellant.

21. The appellant did submit that the evidence was contradictory; the Uganda Court of Appeal in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 quoted with approval by the Court of Appeal of Kenya in *Erick Onyango Ondeng' v Republic* [2014] eKLR. The court 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."

22. Further, in *Joseph Maina Mwangi v Republic* CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure

Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

23. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his testimony cannot be relied on. The court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (See *Nyakisia v R*. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal].

24. This court has subjected the evidence adduced before the trial court to a fresh scrutiny and with honest belief, it is not persuaded that the inconsistencies in the evidence of the witnesses are material to the case.

25. The appellant has in his submissions urged this court basing his arguments on the law on recanted testimony to quash the decision of the lower court ; in *Daniel Odhiambo Koyo v Republic* [2011] eKLR, the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

> " ... The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In *Maghenda v. Republic* [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:
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> "The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."
>
> There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.
>
> Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify...

26. The Court of Appeal also summarized the applicable law in *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR as follows: "In *Coles v Coles*, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-

> " A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.'

27. In *Alowo v Republic* [1972] EA at page 324 the predecessor of the Court said:-

> " The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.'

28. Again in *Batala v Uganda* [1974] E.A. 402 the court at page 405 said:

> " The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

> The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt....

29. The complainant recanted her evidence following which she was declared a hostile witness and was cross examined by the prosecution. Her statement was filed in court. The court has keenly perused the same and it sets out in graphic details the events of the three days when she went missing, where she was and on cross examination she admitted that she was in the house of the appellant and they had sexual intercourse.

    She also admitted that she told the chief that the appellant put her in his house for 3 days, defiled her and threatened her. Further, she told the doctor that she had intercourse with the appellant for 3days. She identified the P3form and the post care forms which were in her name and she confirmed that she was examined at Embu level 5 hospital, on the 31st August, 2020 and she were given medication. On her part P.W.2 confirmed that the complainant was away from home for 3 days from the 23rd August 2020 until 26th August 2020 when she returned home. The complainant told her that she was with the appellant which is the same information that she gave to the chief. P.W.4 in her evidence stated that after examining the complainant, she noted linear abrasion at different stages of healing which in my view was consistent with sexual encounters that the complainant had with the appellant on different days.

30. The appellant in his testimony testified that he does not have a house and that he lives in his parent's house but in the same breadth, confirmed that he knows the complainant since she comes from their neigbourhood. It was his submissions that charges were trumped up since the complainant fears her parents. The evidence does not add up because the complainant's testimony was that the appellant was her boyfriend. It is of equal importance as was also noted by the trial court that the appellant was not truthful in telling the court that he never had a house of his own while all other evidence pointed to the house being in existence.

31. The appellant did submit that the sentence meted by the trial court was unlawful and excessive. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., (1950) 18 E.A.C.A 147:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewky, (1912) C.C.A. 28 T.L.R. 364."

32. In the instant case, the sentence under Section 8(1) (4) of the *Sexual Offences Act* states that:

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement

    (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

33. In my view, the sentence imposed despite being harsh according to the appellant, was within the law and within the discretionary powers of the court. This court cannot interfere with the exercise of the said discretion as the appellant did not justify the interference. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

34. In view of the foregoing, I uphold the decision of the trial court and dismiss the appeal herein

35. It is ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF APRIL 2022

L. NJUGUNA

JUDGE.

.....for Appellant

.....for Respondent