Mwalimu v Republic (Criminal Appeal 52 of 2020)
[2022] KEHC 11123 (KLR) (Crim) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 52 OF 2020

DO OGEMBO, J

MAY 31, 2022

BETWEEN

PAUL MUSYIMI MWALIMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment conviction and sentence of Hon. Chief Magistrate, H. M. Nyaga in Makadara Criminal Case no. 14 of 2016, dated 25.9.2018)

JUDGMENT

1. The appellant herein Paul Musyimi Mwalimuwas charged before the lower court with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006. That on February 13, 2016 in Parklands within Nairobi county, he unlawfully and intentionally caused his penis to penetrate the vagina of JM, a child aged 10 years.

2. He faced an alternative charge of indescent act contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. That on February 13, 2016 in Parklands within Nairobi county, he unlawfully and intentionally touched the buttocks and vagina of JM, a child aged 10 years with his penis.

3. After a full trial, the appellant was convicted on the main count. On September 25, 2018, he was sentenced to serve life imprisonment. Aggrieved with the same, the appellant has on March 9, 2020 appealed to this court. He has raised the following grounds on the memorandum of appeal filed herein:

    1. Thatthe learned trial magistrate erred in law and facts for failing to find that he was not properly identified as the perpetrator of the offence.

    2. Thatthe learned trial magistrate erred in law and facts for failing to find that the complainant (PW1) was an incredible person who cannot be trusted to have made an error free complaint.

3. Thatthe learned trial magistrate erred in law and fact for failing to find that the intermediary's testimony was not corroborated in contravention of section 31(10) of the *Sexual Offences Act*, No 3 of 2006.

4. Thatthe learned trial magistrate erred in matters of law and fact for not finding the case against the appellant was premised on mere suspicion, unsafe to base a conviction.

5. That the learned trial magistrate erred in law and fact for not finding that the case was premised on hearsay evidence, generally inadmissible in a criminal trial.

6. Thatthe learned trial magistrate erred in matters of law and fact for not finding that there was variance between the evidence given to the police and that adduced in court.

4. The appellant has pleaded that this appeal be allowed, conviction quashed and that his sentence be set aside. The prosecution, on the other hand, has urged that this appeal be dismissed.

5. By agreement of the parties, this appeal was canvassed by way of written submissions, which both sides have duly filed.

6. From the appellant's side, it has been submitted on authority of *Charles Wamukoya Karani v Republic*, Cr, Appeal No 72 of 2013, that;

> The critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant."

7. And that the prosecution must prove their case beyond any reasonable doubt *Sekitolike v Uganda* (1967)EA, 53). He challenged the evidence of the prosecution on the following grounds;-

   i. That PW1 testified that she had been playing with one M, who was however, not called as a witness.

   ii. That the man who allegedly found her at City Park and handed her to her mother was not called as a witness.

   iii. That appellant's allegedly name "bandia" was only disclosed in court and not prior at the police station.

   iv. That the evidence of PW1 contradicted that of her mother since PW1 did not disclose the name of the man to the mother.

   v. That none of the neighbours who suspected how the complainant walked ever testified.

   vi. That the P3 form (page 20) showed she had been defiled repeatedly, but it was not shown if another man had also defiled PW1.

   vii. He questioned why mother of the complainant had to take several days to take her to hospital.

   viii. That the 2 medical experts evidence contradicted each other with the 2nd one making no significant finding.

8. The appellant also maintained that the evidence of PW1 was incredible. And that it is unsafe to convicted based on the evidence that is incredible and which goes to the care of identification (*Ndungu Kimanyi v Republic* (1980)KLR 282, *John Mutua Musyoki v Republic* (2017) Cr Appeal No 11/2016). And that the court ought to decide whether the inconsistencies are minor, or whether they go to the

root of the matter (*Dickson Elia Nsamba Shapwata & Another v Republic*, CA TZ, Cr Appeal No 92 of 2007).

9. Appellant also noted that vital witnesses were also not called, witnesses, whose testimonies would have corroborated the complainant's evidence. He relied on *Juma Ngodia v Republic* (1982-88)KLR 454, that;

> " The prosecutor has in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would if produced have been unfavourable to the prosecution."

10. On the same point, the appellant also relied on *Paul Kanja Gitari v Republic* (2016)eKLR, and *Daniel Kipyegon Ng'eno v Republic* (2018)eKLR.

11. The respondent, also made submissions basically that the offence of defilement was established and the elements of the offence duly proved being, penetration, age of complainant, and identification of the appellant. Counsel urged the court to maintain the conviction and sentence.

12. This court is sitting on this matter as a first appellate court. In *David Njuguna Kariuki v Republic* (2010)eKLR, the court while directing on the duty of the 1st appellate court, held;

> " The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion."

13. It is therefore important that this court analyses the whole evidence on record both from the prosecution and the defence sides. From the record of the proceedings, PW1 was CMJ whose evidence was that she was 9 years old. That she knows the accused as "*bandia*" in the estate where they stay at "Senta", Huruma. That one day, the accused found her playing with her friend M when M was called by her mother. That the accused called her, held her and took her to [Particulars Withhheld] where there were monkeys. He led her to a bushy area, made her lie down on the ground, pulled down her pants and unzipped his trousers. The appellant then put his thing in her and she felt pain. He was on top of her, ordering her to keep quiet. He then left her. That a good samaritan later got her and took her back home to her mother. She told her mother that "*bandia*" had raped her. A few days later, she saw and pointed out the appellant who was arrested. She confirmed having been taken to hospital by her mother.

14. The appellant cross examined this witness and she answered that it had been at 1:00pm and that they took a matatu to City Park.

15. PW2, TN, is the mother of PW1. Her evidence was that PW1 was born on November 7, 2007. That she knows the appellant as one who used to come to a chang'aa den near her kiosk. That on February 13, 2016 at 5:00pm she noticed that PW1 was not at home, only to come back at about 9:00pm. That the next day on asking PW1 where she had got money, PW1 told her she had been given by a certain man. PW1 later pointed out the appellant as he entered the chang'aa den. That 2 days later, she noticed that PW1 was walking in an awkward manner, raising her suspicions. She called 2 neighbours to come and witness. On removing the pants of PW1, she noticed whitish discharge and blood. She then rushed PW1 to Blue house clinic where it was confirmed that PW1 had been defiled. PW1 then confessed that the appellant had defiled her before giving her money. She identified the medical certificate and the PRC form (MFI – 2, 3).

16. She went far then that a P3 form was later filled for PW1 (MFI-4), and that PW1 even took the police to City Park and showed where she had been defiled. She otherwise confirmed that the appellant is also known as "bandia."

17. The 3rd witness, Barbara Salano Kere, a clinic officer at MSF France clinic, Mathare, testified that PW1 was examined on February 16, 2016 that on examination, she had a foul smelling creamy discharge, and marks on her outer labia and reddening of the inner labia walls. There was also a fresh tea of the hymen and bleeding on touch. She produced Exh 3 the PCR form.

18. And Dr Kizzy Shako, PW4, also a medical doctor, examined the complainant on February 18, 2016. She noted that her hymen was normal but reddened and the right labia minora was swollen and hyperemic. In her opinion, the injuries were consistent with blunt trauma. She produced the P3 form as exhibit.

19. Lastly, PW5, PC Nasibo Abdi, the investigating officer gave evidence on the statements she got from the complainant and the other witnesses.

19. The appellant, on being put to his defence, gave a sworn defence. His evidence was that on February 7, 2016, he had gone for food at T's kiosk, and that when he called her *"mama"*, she got agree and vowed to deal with him. That a few days later, T went to him and claimed that he had defiled the complainant, but that the complainant denied this allegation. He was however, arrested. He denied the offence. On cross examination, the appellant, while conceding that he was a longtime customer of T, denied knowing her daughter whom he claimed he only saw on the day he was arrested. He denied being known as bandia. He also denied knowing where City Park is. He otherwise admitted that he had no grudges with the complainant's mother (PW2).

20. I have considered the evidence given herein by both sides and the respective submissions. This is a case of defilement. The appellant and the prosecution sides have both agreed are the issues to be proved in a case of defilement. The ingredients are fairly well settled. The appellant in this case has cited the case of *Charles Wamukoya Karani v Republic* (Criminal Appeal No 72/2013), that;

> " The critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant."

21. Without a doubt, the complainant herein, PW1 was a minor and of tender years. I say this because from the record, the court, on its own motion on observing the complainant, made an observation that the complainant was about 9-10 years. The court went on to conduct a *voire dire* examination. The trial court would not have conducted this process if the complainant was not a minor of tender years. and the actual proof of the age of the complainant came by way of the evidence of PW2, mother of complainant that she was born on November 7, 2007. The clinic card of the complainant produced by PW5, PC Nasibo Abdi, further confirmed that PW1 was born on March 23, 2007 (Exh 6). And lastly, the P3 form produced (Exh 4) noted the age of the complainant as 10 years. with all this evidence, this court is convinced that the prosecution proved beyond any doubt that the complainant was indeed a child of tender years at the time of commission of this offence.

22. The second issue is whether the prosecution proved the elements of penetration. The Act defines what penetration is at section 8, thus;

> section 8 (1) A person who commits on an act causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentence to imprisonment for life.

At the definition section 2 of the Act, penetration is:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

23. It was the evidence of PW1 that the appellate once inside the bush at City Park, made her lie on the ground, lifted her dress, removed her underpants, unzipped his trousers before inserting his "thing" in her. This evidence of the minor found corroboration from other witnesses. First, was the evidence of her mother, TN (PW2) that she noticed that PW1 was walking in an awkward manner. This was 2 days later. And that on examining the child, (with 2 other neighbours), she noticed she had a whitish discharge and blood from her private parts. There was also the evidence of PW3, BS, that on examination of PW1 on February 16, 2016, she had a foul smelling creamy discharge, marks on the outer labia and reddening of the inner wall. Her hymen was also freshly broken. The said findings were captured in the PCR form produced. (Exh 3).

24. These pieces of evidence, clearly confirms that the element of penetration was proved by the prosecution.

25. Lastly, is the issue of whether the appellant was identified as the perpetrator of this offence. On this, it was the evidence of the complainant, PW1 that she knows the appellant well as "bandia,", a fact she maintained even at the face of cross-examination by the accused. This incident was during broad daylight. The evidence of PW1 was very consistent on how the appellant took her away all the way to City Park. This witness, after the arrest of the appellant, was even able to take the investigating officer to the scene. And her evidence got corroboration from that of her mother, PW2, that on being asked what had happened to her, PW1 told her it was the appellant. PW1 then pointed out the appellant to her. PW2 also confirmed that appellant is also known as *"bandia"*. And that he is well known by both PW1 and PW2 as he often comes to the chang'aa den next to the stall of PW2.

26. The circumstances of this matter were such that PW1 knew the appellant well. The 2 of them were together the whole afternoon in broad daylight. Even the appellant acknowledged in his defence that he knows PW2, whom he referred to as "mathe". All this point to 1 inascepable fact. That PW1 properly identified the appellant as the one who defiled her on the material day.

27. This court is therefore convinced that the prosecution duly proved the 3 ingredients of defilement herein against the appellant.

28. In the defence of the appellant, he admitted that he had gone to the kiosk of PW2 and ordered for food. But that she became angry with him when he called her as "*mathe*". It is noted that the appellant did not raise this issue with PW2 while she gave evidence in court. It is also not foreseeable that these charges of defilement would be brought up against the appellant simply for calling PW2 "*mathe*". Further, the evidence of the prosecution was cogent on how the appellant led PW1 all the way to City Park before defiling her and how he was eventually arrested. The evidence of the appellant that PW1 had denied that he had defiled her is not corroborated at all. Neither did the appellant raise this defence with either PW1 and PW2. Not even with PW5. In all, I find the defence of the appellant unbelievable and lacking in any merit.

29. The appellant, in his filed submissions, has raised a number of issues for determination. First, that the evidence of the expert witnesses, PW3 and PW4 were contradictory. With respect, I have considered the evidence of the 2 witnesses keenly. I do not find any contradiction between the 2. PW3 gave evidence of the examination done on February 16, 2016. PW4 on the other hand gave evidence based on the

examination done on February 18, 2016, giving the possibility that some of the notables could not be noted.

30. Secondly, the appellant submitted that certain vital witnesses did not testify. He gave examples of the good Samaritan who had assisted the complainant back home, and 2 neighbours who helped PW2 examine PW1. Of the cases relied on by the appellant in this regard, I find the following apt.

    i. *Juma Ngodia v Republic* (1982-88)KLR 454, CA, that;

    > "the prosecutor has in general a discretion whether to call or not to call someone as a witness, If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would if produced have been unfavourable to the prosecution."

    ii. *Daniel Kipyegon Ng'eno v Republic* 2018)eKLR, Mativo J that'

    > "The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case."

31. I agree with the *ratio decidendi* in the 2 above cases. That fail to call vital witnesses may lead to an inference that the evidence of the witnesses not called could possible be against the prosecution. This, in my view would be considered according to the circumstances of each case. And it would help it the party raising this issue gives a glimpse as to the nature of the evidence. Withheld by the act of failing to call such witnesses.

32. In our case, the appellant has not ventured into giving any light as to the nature of the evidence that the witnesses not called would have given as to make this case make inference that their evidence would possibly have turned injurious to the case of the prosecution. I therefore decline to make such inference as urged by the appellant.

33. On the issue of sentence, as seen above, section 8(2) provides for life sentence for the offence that the appellant faced and was convicted of. That is the sentence that the trial magistrate meted out upon hearing the mitigation of the appellant. The said sentence is proper and legal. This court finds no reason or justification in interfering with the sentence.

34. The sum total is that I am convinced that the prosecution discharged its burden and proved their case against the appellant beyond any reasonable doubt as required by the law. This appeal of the appellant lacks any merit and must fail. I dismiss this appeal wholly.

HON. D. O. OGEMBO

JUDGE

31. 05.2022.

Court:

Judgment read out in open court (on-line) in the presence of the appellant and Ms. Akunja for the state.

HON. D. O. OGEMBO

JUDGE

31.05.2022.