Kirinya v Republic (Criminal Appeal E021 of 2020) [2022] KEHC 3344 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E021 OF 2020

PJO OTIENO, J

MAY 25, 2022

BETWEEN

WILSON KIRINYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. S. N. Abuya SPM in Meru SO Case No. 5 of 2020)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrate at Meru, Sexual Offence Case No. 5 of 2020, charged with two offences, alternatives to such offenses being commission of indecent acts with children as well as trespass to private premises.

2. Count I and II preferred the offenses of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act* No. 3 of 2006 had the alternative charges of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006 while Count III was Trespass upon private premises contrary to Section 3(1) of the *Trespass Act*, CAP 294 Laws of Kenya. The particulars given where that on the 2nd day of February 2020 in Imenti North Sub-county within Meru County committed the offenses by intentionally and unlawfully attempting to cause his penis to penetrate the vagina of the two complainants, by intentionally touching the breasts, buttocks and vagina of the complainants and by trespassing upon the school property without authority.

3. When the trial ensued, the prosecution called a total of Eight (8) witnesses after which the appellant was put on his defense gave evidence under affirmation.

4. PW1 testified that she was 12 years old and a class 7 student at [Particulars Withheld]Primary School who was sleeping in the school dormitory on 2nd day of February, 2020, when at about 5 AM she felt

someone laying in her bed touching her private parts. She had worn a skin tight pant and a T-shirt, tried to push the person away but he became aggressive forcing her to leave her bed to go and sleep on a friend's bed. Since there was no electric power, PW1 and her friend flushed a torch light on the bed only to see a man in lying there. They screamed, a teacher came and found the man in PW1s bed. The bed had chewed miraa and underneath the bed was packet of condoms. PW1 identified the man that was sleeping on her bed as the appellant herein who was before the trial court as the accused. In cross examination, the witness told the court that she was sure of what she said that the incident took place at 5am

5. PW2 on her part also testified that she was 14 years old and a class 7 student at [Particulars Withheld] Primary School. That on the 2nd day of February, 2020 at about 5AM, she was sleeping on her bed in the dormitory when she felt someone touch her private part. She left her bed and joined her friend o another bed while thinking that it was the thought it was the watchman who had crept into her bed. Thereafter she and her mates heard the watchman passing outside and that's when they started screaming. The watchman entered the dormitory, found the appellant in the witnesses' bed asleep, woke him up and removed him outside. In cross examination, the witness said that she saw the appellant being woken up from the bed and being removed outside the dormitory by the watchman.

6. PW3 testified that he was a watchman at [Particulars Withheld] boarding having worked there for 7 years. He said that he was on patrol patrol in the morning of 2/2/2020 when he heard the students call him. He entered the dormitory and found the accused seated on bed. He removed him and called the matron who in turn called the chief after which they took the appellant to Meru police station. On being cross examined by the appellant he denied waking him up with a slap, made him sit outside as the chief was awaited and that it is the chief who searched the appellant and removed condoms from the appellant's pocket.

7. PW4, the matron at [Particulars Withheld] boarding school asserted having worked there for 4 years and that on 2/2/2020 at 5:45 AM she heard the watchman call her loudly and that's when she went to the dormitory and was informed by PW3 that he had arrested the appellant from inside inside the dormitory. He directed the watchman to guard the appellant as she went to call the chief, she came back with the chief who searched the appellant and recovered miraa and condoms from his pocket. She did confirm the purport of her evidence upon cross examination and denied having seen anybody assault the appellant/

8. PW5 was the headmaster who was called on phone by the matron with the news of the arrest of the appellant in the girls' dormitory, went to school and found the appellant seated next to her office. She restrained the workers who wanted to beat the appellant. She interviewed the appellant who told her that he had entered the compound through the back-gate and was present when the appellant was searched and miraa and condoms recovered from his pockets. She also denied having seen anybody assault the appellant. Next was PW6, also a teacher at the school who saw the appellant that morning after arrest, identified him by name and knew him as a resident of the area. He interviewed him on his mission in school that night but the appellant never responded. In the company of the headmaster and the chief, they escorted the appellant to the police station.

9. The evidence by PW7 was to the effect that he was a graduate clinician working at Nairobi Women's Hospital. He testified that PW1 and PW2 were examined at the hospital by a person whose handwriting he was conversant with and that the examination revealed no sign of penetration on the two. He then produced P3 form on the PW1 and 2. His evidence was followed by that of the investigating officer, PW8, who said to have been the duty officer to whom the appellant was handed over, who visited the school, interviewed witnesses and recorded statements. He essentially reported what the other witnesses had told him then produced the miraa, sachets of condoms, and the birth

certificates for the two girls. In cross-examination the witness told the court that he was meeting the appellant for the first time and that the appellant looked drunk and having been beaten.

10. With the evidence from the 8 witnesses, the court found that a prima facie case had been established and the accused person was put on Defence. The appellant chose to give evidence upon affirmation and not oath as he said he did not want to see the bible. In his defence, he denied the charges and testified that he was drinking alcohol at Gitimbine that night, bought condoms and paid for a lodging at Meru town but later found himself sleeping in a girl's dormitory from where he was arrested, beaten and then taken to the police station. When cross examined, he confirmed being a neighbour to the school who had studied there, was a farmer but not an employee of the school, who had found himself in the school for being drunk. He admitted having been found with miraa and the condoms but denied having known the two complainants before the incident, denied any bad blood between them as well as the allegations that he had touched them indecently.

11. A reserved judgment was subsequently delivered in which the appellant was convicted and sentenced to serve ten years' imprisonment for the alternative charge to count 1, 10 years' imprisonment for the alternative charge to count 2 and 1-month imprisonment for count 3. The sentences are to run consecutively. It is the Appellant's dissatisfaction of his conviction and sentencing that brings rise to this appeal.

12. The grounds of appeal as enumerated in the Appellant's Petition dated 27th October, 2020 read that; the learned trial magistrate erred in law and fact by failing to order the sentences to run concurrently; erred in both law and fact when she failed to take into consideration that the appellant was intoxicated during the crime and in failing to note that there was no contact between me and the complainants; erred in both law and fact by failing to note that the investigators of this case failed to investigate the case to the required standard by law; erred by failure to take into consideration the appellant's defence and mitigation." However, despite those distinct grounds of appeal, both sides made submissions on the failure to conduct voir dire. I consider that to be a matter the court cannot ignore based on its obligations as a first appellate court.

13. Both the Appellant and the Respondent filed two sets of respective and rival submissions. The first set of submissions dated the 10.05.2021 and 21.06.2021 were filed before the supplementary petition of appeal was introduced with its additional grounds. Being a first appellate court aware of the mandate to proceed by way of a retrial, I will consider the entire record and interrogate if there was any error in the decision arrived at by the trial court.

14. From the record filed and the submissions offered, I discern the issues for determination to be, whether the offenses of indecent acts with the two minors was proved to the requisite standard; whether failure to conduct voir dire vitiated the conviction; whether the offence of trespass to private property and lastly if the defense offered by the appellant was given due regard by the court.

15. I have given due regard to the submissions after due perusal of the entire record and I propose to start with the question whether failure to conduct voire dire vitiates a trial and the resultant conviction.

16. The law evidence envisages that all witnesses give evidence on oath or affirmation unless the witness be determined by the court, on a preliminary assessment, that she/he is not possessed of sufficient intelligent and does not understand the purport of an oath. In the trial giving rise to this appeal, no such assessment was conducted by the court. The appellant contends that the failure is fatal by citing the decisions in *Ben Mwangi vs Republic* (2006)eKLR and *Patrick Kathurima vs Republic* (2015)eKLR while the respondent asserts that that alone is not fatal if there is further or other cogent and sufficient evidence to support the charge by relying on the decision of *Marippet Loonkomok vs Republic* (2016)eKLR.

17. While Ben Mwangi's case, (supra) was by a court of concurrent jurisdiction and not binding upon this court, the other two decisions were by the Court of Appeal whose decisions are binding. For this court therefore, the question is whether there is a conflict in the two and how to resolve that conflict, if at all. I have read the two decisions and I find the same to agree that failure to conduct Voir dire is not fatal to the conviction if there was other evidence to prove the charge. At the 3rd last paragraph of Patrick Kathurima's case, the court had this to say: -

> " It is best, though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded verbatim as opined by the English Court of Appeal in *Regina –vs- Campbell(Times)* December 20, 1982, and *Republic –vs- Lal Khan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

18. For this case, while it is indubitable that there was no compliance with section 19, *Oaths and Statutory Declarations Act*, I do find that only the evidence of the two minors touched on the charge of indecent act of touching their private parts. The other six witnesses, PW 3 to 8, were not eye witnesses and they offered no evidence relating to the offence. Such evidence having been taken and admitted improperly, ought not to have been the basis of the conviction unless there was other independent and cogent evidence. Here there was no other evidence and it was thus a misapprehension of the law to convict the accused as the trial court did. The conviction of the appellant on the two alternative counts of committing an indecent act with a child are therefore quashed and sentence on them set aside. Having done so, the second issue for determination also stands resolved to the effect that without sufficient evidence the two alternative count were never proved and there was no legal basis for the conviction.

19. The next question is whether there was proof of the charge of trespass upon private property was sufficiently proved. The evidence by all the prosecution's witness did establish that the appellant was indeed found in a dormitory within a private school compound at night and without any lawful cause. Even the appellant in his evidence confirmed that he was in deed found inside a girls' dormitory. He gave no explanation in his evidence in chief but upon cross examination he then offered the explanation to be that he found himself there on account of drunken stupor. It being common ground that the appellant was found in circumstances that established trespass on prima facie basis, the burden shifted upon the appellant to demonstrate his right to be present there. That he could have done by showing that he had been invited or was there for a reason and with approval of the school or its authorised agent or staff.

20. The appellant made no such attempt and I do find that he was properly and safely convicted as charged.

21. Having come to the above conclusions, the issues of whether the consecutive sentence was appropriate ceases to be due for consideration.

22. In conclusion, the appeal succeeds to the extent that the conviction on the offence of committing an indecent act with the two minors is quashed and sentence set aside but fails against the conviction on the offence of trespass upon private premises whose conviction and sentences is upheld.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J O OTIENO

JUDGE

In the presence of:

Appellant in person

Nandwa for the Respondent

Court Assistant: Mwenda