Aminga v Republic (Criminal Appeal 131 of 2019)
[2022] KEHC 10571 (KLR) (Crim) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 131 OF 2019

LN MUTENDE, J

MAY 19, 2022

BETWEEN

PAUL MIRITO AMINGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction in Criminal Case No. 3014 of 2012 at Chief Magistrates Court Makadara by Hon. H. M. Nyaga –CM on 12th April 2019.)

JUDGMENT

1. Paul Mirito Aminga, the Applicnt, was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2016. Particulars being that on the 7th day of May 2012 at [Particulars withhed] Village in Industrial Area within Nairobi Area Province, intentionally and unlawfully caused his penis to penetrate the vagina of LM a child aged 13 years.

2. In the alternative he faced the charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2016. Particulars of the offence were that on the 7th day of May, 2012 at [Particulars withheld] Village in Industrial Area within Nairobi Area Province, intentionally and unlawfully committed an Indecent Act with LM a child age 13 year by touching her private parts namely vagina.

3. It was the prosecution's case that LM, the complainant was at her mother's stall on the 7/5/2012 when the appellant went and took some (2) nets then asked her to collect money from his house. When she went to collect the money for the items, he gave her Ksh. 150/- and molested her, but when she returned home she was afraid of telling her father.

4. On 21/5/2012 she met the appellant who gave her Ksh. 80/- and told her to get tested for pregnancy and it turned out to be positive. PW2 JOM, the complainant's father came to learn of the fact of the complainant being pregnant, therefore she told him the person responsible. He reported the matter to the police. The complainant was taken to Nairobi Women Hospital where she was examined and a pregnancy test done was positive. Consequently the appellant was arrested and charged. The complainant gave birth to a child who later died.

5. When placed on his defence the appellant stated that he met J and J, an uncle to the complainant who told him that the complainant was selling table clothes. When he went to purchase they haggled over the price as the complainant wanted Ksh. 100/- but he had only Ksh. 80/-. Later on J told him that he had paid the complainant which meant that he was required to refund the sum. Afterwards, he met J who told him that he had been given a Notice to vacate the house therefore he accommodated J and K but could not accommodate J as he had a wife. Eventually J told him that he was being accused of instigating J to move out of the house an act that made him suffer. That he also warned him to be careful. At the time the complainant was pregnant. He concluded that they had a scheme to extort money from him as his father had sold property and he had money. He denied having defiled the complainant.

6. The trial court considered evidence adduced and reached a finding that evidence adduced was sufficient to prove the charge of defilement. It convicted and sentenced the appellant to serve twenty (20) years imprisonment.

7. Aggrieved, the appellant preferred the appeal on the following grounds:

    1. That the learned trial Magistrate erred in law and in facts in convicting the Appellant basing his judgment on a trial that key witnesses failed to turn up

    2. That the learned trial Magistrate erred in law and in fact in convicting the appellant despite glaring contradictions and inconsistences in the prosecution's case.

    3. That the learned magistrate erred in law and in fact in convicting and sentencing the appellant without taking into account the appellant mitigation before the court.

    4. That the charges against the appellant were not proved or at all and the prosecution evidence did not support and/or warrant a conviction.

    5. That the conviction and sentence is a miscarriage of justice hence the same should be quashed and set aside.

8. The appeal was disposed through written submissions.

    The appellant's counsel condensed issues for determination thus:

    a. Whether the main ingredients of defilement were proved beyond reasonable doubt.

    b. Whether the learned trial magistrate erred in disregarding the appellants' testimony.

    c. Whether the appellant is entitled to the prayers sought in the petition for appeal.

9. The age of the complainant was not disputed following production of the Birth Certificate.

10. On the question of penetration, it was urged that there was no proof of the same as none of the prosecution witnesses saw the appellant defiling the complainant. That the child born died at the age

of three (3) years but no paternity test was conducted to establish if indeed the appellant was the father of the child. That no DNA test was conducted to establish if indeed the appellant's semen was present in the complainant's body.

11. Further, that there was no identification parade held which was an injustice to the appellant. That the Investigating Officer was not called to testify so as to clarify shoddy investigations conducted. That the prosecution did not rebut evidence adduced by the defence that it was a scheme of the family of the complainant to extract money from the appellant.

12. That the trial court fell into error in not considering the appellant's case and thus condemned the appellant unfairly.

13. The appeal was opposed by the state/respondent. It was urged that there was proof of penetration since the hymen was broken and had tears and that the appellant did not challenge evidence adduced. On identification, it was submitted that it was positive and the allegation of the case having been fabricated was an afterthought.

15. This being a first appellate court it is duty bound to analyze and evaluate evidence adduced at trial afresh so as to draw its own conclusions while bearing in mind that it neither saw nor heard witnesses who testified. This was stated in the case of *Okeno vs. Republic* [1972] EA 32, where the court delivered itself thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424."

16. The complaint against the appellant was contravention of the law as provided in section 8(1) of the *Sexual Offences Act* that enact thus:

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

16. This called upon the prosecution to prove each and every ingredient of the offence. In the case cited by the appellant of *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013. It was stated that:

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

16. On the question of age, evidence adduced by the prosecution which proved that the complainant was born on the 28th August 1998, as proved by evidence tendered by her father, and documentary evidence of a birth certificate is not in dispute.

16. The act of penetration has been disputed. The argument raised by the appellant is that the evidence of PW3 and PW4 connote that there was no proof of penetration. The offence in issue was stated to

have been committed on the 7th day of May, 2012. PW4 Peter Wanyama a Clinical Officer at Nairobi Women Hospital adduced in evidence a medical report dated 30/5/2012. Laboratory tests carried out indicated that the complainant was pregnant. Subsequently, the complainant was examined by Dr. Zephaniah Kamau, of Nairobi Surgery who filled the P3 form. He concluded that the complainant's hymen had old tags and old tear.

17. Penetration is defined by section 2 of the Sexual Offence Act as:

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

16. It is argued by the prosecution that the complainant was violated sexually, she conceived and afterwards bore a child who ultimately passed on, therefore, an act of penetration occurred. It is possible for pregnancy to occur without penetration in cases where sperms come into contact with the vagina or vulva of the complainant, but there having been no evidence to contradict what the complainant stated, there was an act of penetration.

17. The most important ingredient the prosecution had to prove was positive identification of the perpetrator of the act. The appellant herein was known to the complainant. She told the court that he used to be a friend to his late uncle J, a fact not in dispute. In his defence the appellant told the court that J was an uncle to the complainant. He said that he found the complainant selling clothes but they disagreed over the price. This established the truth that the complainant knew him prior to the fateful date. A Police identification parade is usually carried out in a case where the suspect of a crime is not known to the victim. In such a case a group of similar looking people are exhibited in the course of investigations for the witness to identify the actual perpetrator. In the instant case, it was not necessary.

18. In his defence the appellant came up with a theory of the family of the complainant having fabricated the story as they wanted to extort money from him. The act of penetration was alleged to have been committed on 7/5/2012. And the complainant did not tell her parents. She testified that she went to collect money for the items taken by the appellant between 7.00 - 8.00 pm when the appellant requested to have sex with her but she refused. However, he forcefully took her to the mattress that was on the floor, undressed and defiled her. She added that he committed the act without using a condom. Then on the 21/5/2012 when she met him near the 'mandazi' stall he gave her Ksh. 80/- and told her to go for a pregnancy test. She did so and learnt that she was probably pregnant. PW2 JO, her father was told by Lydia a lady at the Chemist of PW1's action of having gone to the chemist seeking to buy E-Pill, a contraceptive pill that is taken after unprotected sex to prevent pregnancy. That was when he confronted the complainant who confirmed having engaged in coitus and named the appellant as the culprit.

19. A report was made immediately to the police which culminated into the appellant being arrested on 10/6/2012. When the complainant testified, it was not suggested to her that the charges were brought for purposes of extorting money from the appellant. It was not even alleged that her uncle J was living in the same house with J whom the appellant made to leave. And, that at the time he occupied the same house the appellant lived in. Although there is no statutory requirement obligating an accused person to disclose what is to be alleged in his defence, disclosing the facts in the course of cross examination gives the witness an opportunity to respond hence the demeanor and/or response being tested by the court. Otherwise remaining mum as the appellant herein did and bringing up the issue belatedly goes to the credibility of the defence hence being in question.

20. The prosecution is also faulted for not allowing the Investigating Officer to testify. In the case of *Jeremiah Gathuku vs. Republic* Cri. Appeal No. 73 of 2008 it was held that:

> " For the proposition that failure to call police officers involved in a criminal trial, including investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrates"

16. The prosecution called five (5) witnesses and proceeded to close the case without notifying the court of the whereabout of either the Arresting Officer or Investigating Officer. This conduct was not questioned by the court. However, if the case is proved to the required standard the absence of the Investigating Officer's testimony is inconsequential.

17. In the case of *Kassim Ali Vs. Republic* (2006) eKLR the Court of Appeal stated that:

> " The fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

16. It is contended that no DNA test was conducted. This was a case where for reasons not known the Investigating Officer did not testify therefore it was silent on whether an attempt was made for DNA profiling. But since the issue was not paternity of the child but defilement of the minor, it was not mandatory for a DNA test to be conducted in order for the case against the appellant to be proved.

17. The trial court is faulted for not considering the defence raised. The learned trial Magistrate did consider the defence put up by the appellant which he dismissed and believed the complainant whose evidence was sufficient to prove the case. From the foregoing I find the prosecution having proved the fact of the appellant having been the perpetrator of the act of defilement.

18. On the question of sentence, section 8(3) of the *Sexual offences Act* provides that:

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

16. Having been born on 28/8/1998 the complainant was 13 years old. In the premises, the sentence would not call for interference. Consequently the appeal lacks merit and is accordingly dismissed.

17. A re-consideration of the record of the trial court shows that the appellant having been arrested on 10/6/2012 was held in remand custody until 21/12/2021 when he was released on bond. Pursuant to section 333(2) of the *CPC* the court was obligated to consider time spent in custody, yet, there was no such indication.

16. Secondly, after conviction and sentence on the 12/4/2019, the appellant served sentence for a duration of six (6) months prior to being released on bail pending appeal, on the 29/10/2019. Therefore, he was incarcerated for a period of one (1) year.

16. The upshot of the above is that the appellant will serve nineteen (19) years imprisonment with effect from today the 19th day of May 2022.

16. It so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF MAY 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Bosire for Appellant

Mr. Kiragu for ODPP

Court Assistant – Mutai