Kinoti v Republic (Criminal Appeal E090 of 2021)
[2022] KEHC 12255 (KLR) (23 June 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E090 OF 2021

EM MURIITHI, J

JUNE 23, 2022

BETWEEN

STANLEY KINOTI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J. Irura PM in Nkubu Criminal Case No. 18 of 2020 on 8/4/2021)

JUDGMENT

Introduction

1. The appellant Stanley Kinoti ('the appellant') was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between 2nd and May 4, 2020 at Mikumbune location in Imenti South sub-county within Meru County, he intentionally caused his penis to penetrate the vagina of EM a child aged 5 years old. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006, whose particulars were that on the same date and place, he intentionally touched the breasts of EM a child aged 5 years old with his penis. He was convicted upon full trial on the main charge of defilement and sentenced to life imprisonment.

The appeal

2. The appellant lodged this appeal setting out 6 grounds of appeal as follows:

    a. "The learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

b. The learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances.

c. The learned trial magistrate erred in law and fact by failing to note that the case was a frame up because of a grudge.

d. The learned trial magistrate erred in law and fact by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.

e. The learned trial magistrate erred in law and fact by failing to consider the report of the clinical officer.

f. The learned trial magistrate erred in law and fact by rejecting the appellant's defence without giving cogent reasons."

Submissions

3. The respondent filed its Submissions to the appeal on November 1, 2021 urging that it proved all the three elements of defilement as set out in *George Opondo Olunga v Republic* (2016) eKLR beyond reasonable doubt. It concluded that the appeal should be dismissed in its entirety and the conviction and the sentence be upheld, because they was lawful. It also relied on *Kaingu Elias Kasomo v Republic* (2010) eKLR, *Joseph Kiet Seet v Republic* (2014) eKLR, *Francis Omuroni v Uganda Court of Appeal* Criminal Appeal No 2 of 2000 and *Anjononi & others v Republic* (1989) KLR in support of its submissions.

4. The appellant in this first appeal is entitled, on the authority of *Okeno v R* (1972) EA 32, to a reconsideration and re-evaluation of the evidence presented before the trial court, as well as deal with any question of law raised on the appeal, to determine whether the offence charged has been proved to the required standard of beyond reasonable doubt and therefore whether the judgment fo the trial court should be upheld.

Evidence

5. PW1 Moses Baiyenia, a clinical officer attached at Kanyakine Sub County Hospital produced PW2's P3 form as PEx 3, Lab request form as PEx.1 and PRC form as PEx 2. When they examined the complainant, her hymen had a small tear, the vaginal walls were red in colour, bruised with swollen external vaginal organs and there no discharge which was noted. The laboratory investigation revealed presence of red blood cells which were indicative of bleeding probably from the bruises. There were also pus cells, and he opined that the presence of blood in the urine, bruises and inflammation together with mild broken hymen were suggestive of forceful vaginal penetration. He relied on the PRC form and the laboratory request form to fill the P3 form on May 15, 2020.

6. The good doctor was not subjected to any cross examination, as the accused said he had no questions for the witness.

7. PW2, the complainant after voire dire gave unsworn testimony that she lived with her mother namely Kanana, Mandela and Mama Angel. She knew the appellant and he did bad manners to her. The appellant put his organ for urinating in her place for urinating while they were in his house. There was no other person present when the appellant inserted the organ in her private part. She then told her

mother, who was at home, what the appellant had done to her. On *voire dire* examination, the trial court had found that –

> " Court- I have examined the minor and find that she is of tender years and not intelligent enough to understand the meaning of giving evidence on oath. She will thus tender unsworn testimony."

8. The trial court directed that the complainant would not be cross examined due to her tender age, ruling as follows:

> " Due to the age of the complainant and noting that she is a child of tender age she will not be subjected to cross-examination by the accused."

9. PW3 Philomena Kanana Ngania, the complainant's mother testified that her daughter was aged 5 years, having been born on August 3, 2015. She knew the appellant as they lived in the same plot with him. There were five houses in that plot and the appellant had at one time insulted her when she was very new in the plot. She knew what happened on the material dates on May 5, 2020. She was seated in the kitchen when the appellant came. The appellant sat outside the kitchen and called her daughter "Nyanya". When she asked him why he was calling her daughter "Nyanya", he told her that what her daughter did for him she could not do. She took her children inside the house and started beating them. Devin Mwenda, aged 8 years told her that the appellant usually called the complainant and they went to his house. She removed her daughter's clothes and saw that she had been defiled as she had some discharge on her private parts. She asked her daughter who said that the appellant would usually give her chapati and his mobile phone as he was defiling her. She immediately got out of the house screaming and went to inform the owner of the plot namely Lilian Kiende. On May 6, 2020 they took the complainant to Nkubu where they were referred to Kanyakine hospital.

10. On cross examination, she stated that the appellant almost stabbed her when she told him to stop insulting another lady who was living in that plot. She and the landlady had heard the appellant calling her daughter "Nyanya". The witness said that the mobile phone which the appellant had given to the complainant was with the investigating officer.

11. PW4 Denis Mwenda, a child in primary school level PP2 who did not know his age, gave unsworn statement upon voire dire assessment by the court finding as follows:

> " Court – I have examined the minor and am not satisfied that he is intelligent enough to give evidence on oath. He will thus give unsworn evidence."

He said that he stayed at home with his mother and small sister, the complainant. He was a PP2 pupil at [particulars withheld] Primary School and he knew the appellant, as he lived in their plot. The appellant took his sister to his house and removed her clothes. The appellant had not closed the door completely so he was able to see him put his organ for urinating into the complainant's place for urinating. When he went to call the complainant, the appellant pushed him with the door. Their mother had gone to the hospital and there was no other person in the plot. The appellant called his sister on two days, and even on the second day, the appellant put his organ for urinating in the complainant's place for urinating. It was during the day and he told their mother what happened.

12. On cross examination, he reiterated that he saw the appellant inside the house removing his sister's clothes.

13. On re-examination, he restated that he saw the appellant remove his sister's clothes and then he inserted his organ for urinating in the complainant's place for urinating.

14. PW5 Lilian Kiende Riungu, testified that she knew PW3 and the appellant. Both PW3 and the appellant worked in her farm and they lived in her houses at the tea farm. The said tea farm had 5 houses. On May 5, 2020, she was at Mikumbene when PW3 called to inform her that her daughter had been defiled. When she came back, PW3 told her that she (PW3) had learnt from her children that the appellant had defiled her daughter on 2nd and May 4, 2020. Since it was at night, they waited until the following morning when she, PW3 and the complainant went to Nkubu police station to report the matter. They were referred to Kanyakine Hospital where the complainant was examined and treated. The appellant was later arrested at Nkando police post and she recorded her statement at Nkubu police station. She had known the appellant for about 1 1/2 months and she had no grudge with him.

15. This witness was not cross examined, as the accused is shown on record as saying "I have no questions for the witness."

16. PW6 Naomi Njuguna attached at Nkubu police Station and the investigating officer in this case was on May 6, 2020 around mid-day called at the OCS's office where she found the complainant, her mother and the land lady. They reported that the complainant had been defiled by their neighbour who was well known to her. She interrogated the complainant who confirmed that she had been defiled by the appellant on 2nd and May 4, 2020. She recorded the statements of the witnesses, escorted the complainant to the hospital and arrested the appellant on May 22, 2020. She produced the complainant's health care booklet as PEx.4.

17. On cross examination, she stated that she was not at Mikumbene and that "the witnesses recorded their statements of what had happened."

18. When placed on his defence, the appellant stated that, "I wish to remain silent. I leave the matter to court to decide."

Analysis and Determination

19. The issues for determination from the grounds of appeal are whether ingredients of the offence of defilement were proved beyond reasonable doubt; whether there were contradictions on the evidence on record and whether the report by the clinical officer was considered; whether the case was a frame up due to a grudge; and whether the sentence was excessive in the circumstances.

20. Before getting into the evidence, a question of law arises as to the correctness of the procedure followed by the trial court in taking the evidence of the children of tender age. Although the question was not specifically raised by the appellant in his petition of appeal, it arises from the record of evidence in the proceedings and the court in the interests of justice and its duty under Article 165 (6) and (7) of the *Constitution* is required to satisfy itself as to the legality of the proceedings "to ensure the fair administration of justice." Article 165 (6) of the *Constitution* provides as follows:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate."

Evidence by child of tender years to be subjected to cross-examination

21. Section 19 of the *Oaths and Statutory Declarations Act* deal with the reception of children of tender age and the consequences thereof as follows:

> " 19. Evidence of children of tender years
>
> (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understands the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap 75), shall be deemed to be a deposition within the meaning of that section."

22. With respect, the trial court used the wrong test in allowing the reception of the evidence of the two children in the trial.

23. The correct test for reception of evidence of a child of tender years is two-fold:

i. Sworn, on oath (or affirmation) where the child "understands the nature of an oath"; or

ii. Unsworn, where the child "is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

24. In this case, with respect to PW1 the court upon voire dire examination merely found that:

> "she is of tender years and not intelligent enough to understand the meaning of giving evidence on oath. She will thus tender unsworn testimony."

25. With respect to the PW4 who was said by PW3 to be 8 years old, the trial court on voire dire found that the minor:

> " not intelligent enough to give evidence on oath. He will thus give unsworn evidence."

26. In both cases the court did satisfy itself that the children were "possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth". The reception of their evidence was contrary to the provisions of section 19 of the *Oaths and Statutory Declarations Act*, and the trial proceedings, therefore, defective to that extent.

Want of cross-examination

27. The trial court has no discretion to allow or disallow cross-examination of a child witness whose evidence is admitted pursuant to section 19 of the *Oaths and Statutory Declarations Act*. The general rule under section 151 of the *Criminal Procedure Code* is that "Every witness in a criminal cause or matter shall be examined upon oath" and subject to cross-examination (see sections 150, 155, 211, 214 and 302, 307 of the *Criminal Procedure Code*). However, for an accused person, consistently with his right "to refuse to give self-incriminating evidence" under Article 50 (2) (l) of the *Constitution*, who

elects, to give unsworn statement in defence he shall not be cross-examined. See under section 211 for the *Magistrate's Court* and 306 (2) of the *Criminal Procedure Code* for the High Court.

28. However, for a child witness whose evidence is taken unsworn, cross-examination must be allowed. This must be so because such a child is a witness presenting evidence against the accused and the accused has a constitutional right to "adduce and challenge evidence" presented against him. See Article 50 (2) (k) of the *Constitution*. This position has been underlined in the Kenya Judiciary Criminal Procedure Bench Book 2018 at paragraph 96, observing that cross-examination is a requirement for sworn or unsworn evidence of a child:

> " 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK"

Defective trial

29. In disallowing cross-examination of the child complainant, the trial court fell into error. The court relied on the evidence in addition to the brother's PW4 and mother's PW3 that of the complainant herein PW1, which had not been tested on cross-examination and said in its Judgment:

> " The offence of defilement was said to have occurred at the one room the accused person had rented though in the same plot as the complainant was residing in and was during broad day light. The accused person was their close neighbor hence not a stranger to the complainant and her family. The complainant's, her brother's and mother's evidence was not contradicted by the accused person hence can be said to have been satisfactorily beyond reasonable doubt." (sic)

30. The accused simply had no opportunity to challenge evidence of the complainant PW1 and could, therefore, not have contradicted that prosecution evidence. If the complainant was in the words of section 19 of the *Oaths and Statutory Declarations Act* possessed of sufficient intelligence to justify reception of her evidence, she was could also withstand cross-examination, and in any event it is always the court duty to protect any witness from unnecessarily argumentative and harassing questioning; Indecent or scandalous questions and Insulting or annoying questions. See sections 159 and 160 of the *Evidence Act*. And where a vulnerable witness has given evidence through an intermediary, cross-examination will be done through the intermediary but must be done if the trial is to be fair to the accused and accord to his right to challenge evidence.

31. If the accused could be convicted on the evidence for which cross-examination has not been permitted, it would be an instance of judicial lynching rather than a fair trial.

32. There was a clear breach of the appellant's trial right to challenge evidence adduced against him in terms of Article 50 (2) (k) of the *Constitution*. The appellant was clearly prejudiced by the defective procedure as he suffered a conviction and a sentence of life imprisonment, and the provisions of section 382 of the *Criminal Procedure Code* cannot cure the defect in view of the prejudice occasioned. Section 382 of the *Criminal procedure Code* provides as follows:

> " 382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings
>
> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on

account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. [Act No 33 of 1963, First Sch.]"

For the accused who was unrepresented, his no objection to the refusal by the trial court of an opportunity to cross-examine the complainant, in breach of his constitutional right to challenge the evidence adduced against him, cannot be taken against him.

33. This court must find the trial before the trial court defective and declare a mistrial.

Retrial

34. A retrial is the usual remedy for a defective trial as observed by this court in *CK (A Minor) v Republic* [2018] eKLR:

" Principles for retrial

The primary considerations for an order of retrial are that a retrial will usually be ordered where the trial was procedurally defective, and not for want of sufficient evidence and the Appellate Court must consider that if the trial is had afresh, there is evidence upon which a court may properly convict the accused for the offence charged and, further, that retrial shall only be ordered where the interests of justice so demand. See, *Fatehali Manji v Republic* (1966) EA 343; Muiruri v R (2003) KLR 552 and *Mwangi v R* (1983) KLR 522.

The Court is mindful of the observation in *Opicho v R (2009) KLR 369* that in serious charges such as, involving child abuse as in the case, public interest and justice would demand the prosecution of defilement cases, the court saying:

"The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all circumstances of this case to order for retrial."

35. Similarly, the present charge of defilement of a 5year old child is a serious matter which ought to be prosecuted in a fair trial and the accused, if guilty convicted and punished, and if innocent acquitted.

36. In order not prejudice the retrial, this court does not discuss the merits of the charges facing the accused. It is only observed, however, in the words of the court in *Fatehali Manji v R* that "on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial".

ORDERS

37. Accordingly, for the reasons set out above, the conviction and sentence of the appellant for the offence of defilement contrary to section 8(1) as read with 8 (2) of the *Sexual Offences Act* is quashed and set aside, respectively.

38. The accused shall be retried before the Principal Magistrate's Court at Nkubu, differently constituted.

39. The case shall be mentioned before the Principal Magistrate at Nkubu on June 30, 2022 for directions as to the retrial.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD JUNE DAY OF JUNE, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the Prosecution.