Nyambura v Republic (Criminal Appeal E011 of 2021)
[2022] KEHC 12721 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E011 OF 2021

GWN MACHARIA, J

JULY 27, 2022

BETWEEN

STEPHEN NDUNGU NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Naivasha in Cr. Case No. 95 of 2018 delivered by Hon. E. Kimilu (PM) on 10th March, 2020)

JUDGMENT

1. The Appellant, Stephen Ndungu Nyambura was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on diverse dates between the 1st and the 3rd day of November, 2018 at [Particulars Withheld] Village in Naivasha Sub-County within Nakuru County, unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of AMW a girl aged 13 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. The particulars were that on diverse dates between the 1st and the 3rd day of November, 2018 at [Particulars Withheld] Village in Naivasha Sub-County within Nakuru County, unlawfully and intentionally caused his genital organ namely penis to come into contact with the genital organ namely vagina of AMW a girl aged 13 years old.

2. He pleaded not guilty to both charges. Upon trial, he was convicted of the offence of the principal charge of defilement and sentenced to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

3. The Appeal is based on the following five (5) grounds contained in the Petition of Appeal.

    1. The learned magistrate erred in law by not promptly informing and explaining to the appellant his right to an advocate contrary to Articles 50 (g) and 50 (h) of the *Constitution* considering the Appellant was facing a serious offence.

    2. That from the time of his arrest and charging in court, the Appellant has all along been in custody and had no opportunity to seek legal counsel or consult any legal expert regarding his rights and evidence, which is a contravention of Articles 49 and 25 of the *constitution*.

    3. The learned magistrate erred both in law and fact by failing to appreciate that the Prosecution evidence was full of inconsistencies and gaps particularly the inconsistencies that emerged between the medical records and testimonies of PW2 and PW3.

    4. The learned magistrate erred in law by convicting and sentencing the appellant herein based on contradicting, inconsistent and uncorroborated evidence.

    5. The learned magistrate erred in law by convicting and sentencing the appellant in the absence of testimony from the key witnesses that were never called to testify.

    6. The learned trial magistrate erred in both law and fact by convicting and sentencing the appellant herein by relying on the evidence from the Investigating Officer devoid of investigation(s) as it emerged that the Investigating Officer did not visit the crime scene, did not interview independent witnesses, neither did he interview neighbours.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See: *Okeno v Republic* (1972) EA 32).

5. The prosecution's case can be summarized as follows: On November 1, 2018, the complainant PW2, AWM was living with her grandmother. One evening, she went to collect firewood in the company of her cousins PW2, PN and PW2's brother M. While collecting firewood, Ndung'u, the Appellant herein, called her into a green house where he had been employed at the time. He told her to lie on her back and spread her legs. He inserted his urinating thing which in her vagina and defiled her while her friends waited for her. Thereafter, he gave her Kshs 50/- and told them to go to his house while he remained in the green house. They went to his house and prepared pancakes and tea. After eating, PW2 and Macharia cleaned the utensils and while Purity cleaned the house. The Appellant went to his house after a while and sent PW2 and Macharia to the shop. When the two of them returned, they found that the Appellant and Purity had locked themselves in the house. They knocked and when the door was opened, they found Purity dressing up. PW3 told PW2 that the Appellant had inserted his fingers in her vagina and touched her breasts.

6. As it was around 9.00 pm, they had supper in the Appellant's house and spent the night there. PW2 and PW3 slept in the same bed with the Appellant while Macharia slept on the seat. The Appellant kept touching their breasts throughout the night and defiled both PW2 and PW3 in turns. He then gave them money and warned them not to disclose to anyone what had happened. They stayed in the Appellant's house for two days and two nights. He told them that in case anyone asks them who he was to them, they should say he is their uncle. He gave PW2 and PW3 some clothes, shoes and earrings and told them that his wife had since died.

7. Meanwhile, the minors' grandfather PW4, FM had been searching for them in vain and had made a report to Karati area chief. On November 2, 2018, PW4 got a tip off from an informer that the minors had been spotted in the Appellant's house. On November 3, 2018, PW4 woke up very early and proceeded to the Appellant's house in the company of his two sons namely PM and JK. They knocked the door and the Appellant refused to open at first. When he eventually did, he walked out in his inner wear and PW4 saw PW2 and PW3 on the bed while M was on the seat. Upon enquiry, the Appellant told PW4 that the minors told him they had been chased away and he decided to accommodate them. They took the Appellant and the minor to Karati Administration Police Camp. PW2's mother PW5, MMN was informed about the incident on that day. She had left PW3 with her grandmother and went to Karagita to look for a job.

8. At Karati Administration Police Post, they found PW6, PC Robert Mbugua Njau and PW7, PC Edna Aboya. They explained to the officers what had happened and the officers escorted them to Naivasha Police station for further interrogation. The Appellant was locked up in the cells. On November 5, 2018, the investigating officer PW8, PC Benjamin Njuguna attached to the gender and child protection unit at Naivasha Police Station took the Appellant and the minors to Naivasha County Referral Hospital for examination.

9. They were examined by a clinical officer called Benjamin Kuria. Upon genital examination, PW2's vagina was intact, she had no discharge but her hymen was broken. As for the Appellant, he tested positive for syphilis and his urine had pus cells. The P3 forms for the Appellant and PW2 as well the PRC forms for both PW2 and PW3 were produced in evidence by PW1, Jane Wambui Njoroge, a clinical officer attached to Naivasha County Hospital. PW1 also produced an age assessment certificate for PW2 dated February 11, 2019 showing that she was aged thirteen years.

10. Upon being placed on his defence, the Appellant gave an unsworn statement. He stated that he used to work in a green house. He had lived with the family for two years as he had a relationship with PW5 after his wife passed on in 2017. He used to call PW5 for casual work in the green house and she would visit him with the three minors found in his house. A year into their relationship, PW5 changed her mind and in 2018, he learned that PW5 had gotten married and they completely lost touch but the children continued to visit him. On November 1, 2018 in the evening when heading to work, he met PW5's children along the way. They told him that they had been chased away by their grandfather. He told them to go to his house. He reported to work and tried calling PW5 but she refused to pick his calls. He asked his colleagues to hold the fort for him so that he could go and check on PW5. He went to their home but did not find her. He met her brother who told him that PW5 had moved to Karagita to live with her husband. He explained to him about the children and he had no issue. As such, he went back to work.

11. On November 2, 2018, he went to his house in the morning and found the children safe and they took breakfast. The children told him they would wait for their mother in his house. They stayed together and prepared lunch. He even sent them to the shop which was near PW4's homestead and nobody questioned them. In the evening he went to work and left the children playing with neighbours. On the

morning of November 3, 2018 after his night shift, he found four men waiting for him at the gate of his residence. One was the father to PW5 while two others were her brothers. They told him they had come for the children and insisted on taking him to the chief's office. They went to the Chief's office and found Administration Police officers who escorted him together with the children to Naivasha Police Station. PW4 claimed that he was a stranger to him and he was booked in for living with PW2 in his house. He denied having defiled PW2 and claimed that PW4 framed him with the offence as he had a grudge against him because he was unhappy about his relationship with PW5. He stated that PW4 used to go to his place of work to demand for money but he never gave him because he was still getting to know PW5.

Analysis and Determination

12. The Appeal was canvassed by way of written submissions which this court has duly considered alongside the evidence tendered before the trial court. The only issues for determination are:

    (i) Whether the Appellant's constitutional rights were violated.

    (ii) Whether the prosecution proved its case beyond a reasonable doubt.

Whether the Appellant's Constitutional Rights Were Violated

13. On this, Counsel for the Appellant submitted that the Appellant's right to a fair trial under Article 50(2) (g) and (h) of the *Constitution* were violated as the trial court completely failed to inform the Appellant of his right to legal representation. He submitted that under Article 25 of the *Constitution*, the right to fair trial is among the rights that cannot be compromised/limited. Counsel asserted that since the offence of defilement attracts a heavy punishment, it was incumbent upon the trial magistrate to ensure that the Appellant is assigned an advocate to prevent substantial injustice from occurring. Reliance was placed on the cases of Joseph Kiema Philip v Republic [2019] eKLR and Chacha Mwita v Republic [2020] eKLR in which the courts nullified trials where the Appellants were not promptly informed of the right to legal representation under Article 50(2) (g) of the *Constitution*. In counsel's view therefore, the consequence was that the trial proceedings were null and void and should be set aside.

14. Further, Counsel contended that since the investigating officer did not testify as to whether the Appellant was informed of his right to remain silent and the consequences of not doing so as well as his right to communicate with an advocate, it can be inferred that the same was never done. The advocate submitted that had the above been done, it is possible that the Appellant would not have agreed to be subjected to medical examination and thus would have refrained from giving evidence that may incriminate him. According to the counsel therefore, the Appellant's rights under Article 49(1) (a) and (b) and (c) of the *Constitution* of an arrested person were violated and this brought him substantial prejudice which rendered the trial a nullity.

15. On the other hand, the Respondent through Ms Serling, learned State Counsel submitted that the Appellant's right to a fair trial was not violated as he had a right to appoint an advocate of his own choice and if he never had any, he was to inform court that he needed to have an advocate appointed for him on pro bono basis. Counsel asserted that not once did the Appellant inform court that he needed legal representation and the right was denied. Rather, he informed the trial court that he was ready to proceed with his case and defended himself accordingly.

16. To begin with, Article 49 (1) of the *Constitution* provides that an arrested person has the right:-

    "(a) to be informed promptly, in language that the person understands, of—

i. the reason for the arrest;

ii. the right to remain silent; and

iii. the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;"

17. There is no evidence on record to show whether or not the Appellant was informed of the above rights upon arrest. However, it is evident from the trial court's proceedings that this issue was never raised in the trial court. Had that been done, I have no doubt that the arresting and/or investigating officer would have been questioned on the issue. This ground therefore lacks merit and cannot be entertained as a basis for quashing the trial.

18. Moving on, legal representation is a constitutional right envisaged under Article 50 (2) (g) and (h) of the *Constitution* which provides as follows:

" Every accused person has the right to a fair trial, which includes the right-

g) to choose, and be represented by an advocate and be informed of this right promptly;

h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly...."

19. It is also provided for under the *Legal Aid Act*, 2016. Section 43(1) (a) of the Act requires that an unrepresented accused be promptly informed of his or her right to legal representation. Further, Section 43(1) (b) of the *Act* provides that where substantial injustice is likely to result, an unrepresented accused person should be promptly informed of the right to have an advocate assigned to him or her.

20. I have carefully perused the trial court's record. At no point during the trial did the learned magistrate inform the Appellant of his right to legal representation. The question that arises therefore is whether this was fatal to the trial.

21. I am alive to the fact that it is not in all cases where an accused person is not represented that a trial will be vitiated. Indeed, Section 43(6) of the *Legal Aid Act*, 2016 clearly stipulates that lack of legal representation cannot bar the continuation of proceedings against a person unless substantial injustice is likely to occur. (See also *Republic v Karisa Chengo & 2 others* [2017] eKLR).

22. The question as to whether substantial injustice may occur depends on the circumstances of each case. In determining this, Section 43(1A) of the *Legal Aid Act*, 2016 requires the court to take the following into consideration:

(a) The severity of the charge and sentence;

(b) The complexity of the case; and

(c) The capacity of the accused to defend themselves.

23. In the present case, there is no doubt that the offence with which the Appellant was charged is a serious one. Notably however, it is clear that he was able to properly conduct the trial on his own and defend

himself against the prosecution's case. The record clearly shows that he was able to cross examine the prosecution witnesses accordingly and to give his defence. In the premises, I am not persuaded that his right to legal representation was violated or vitiated his capacity to conduct the trial in person and this ground therefore fails as well.

Whether the prosecution proved its case beyond a reasonable doubt.

24. The Applicant's advocate submitted that there are significant inconsistences in the Prosecution's evidence whose effect is that this element was not proved. He contended that PW1's testimony that PW2's vagina was intact but the hymen was broken does not support PW2's testimony that the Appellant penetrated her with his genitalia. Further, he submitted that if at all no condom was used as indicated on the PRC report, PW2 would have tested positive for syphilis as the Appellant's P3 Form showed that he had tested positive for the disease. Further, he faulted the learned magistrate for finding in the judgment that the medical record had corroborated penetration because the PRC Form clearly showed penetration was by finger. In addition, he took issue with the fact that the learned magistrate noted that pus cells had been found in PW2's urine while the PRC Form showed that no pus cells or spermatozoa were present in PW2's urine.

25. Additionally, the Appellant's advocate complained that crucial witnesses namely Macharia, the neighbours who saw the children in the Appellant's house and those who tipped off PW4 were not called to testify. He argued that Macharia having been present during the time of the alleged defilement could have provided clarity on the evidence of PW2 and PW3. Relying on the case of *Halkano Mata Bagaja v Republic* [2015] eKLR, counsel contended that the learned magistrate ought to have ruled that the evidence which the other key witnesses would have given would have been adverse to the prosecution's case.

26. It was further contended that the evidence of the investigating officer had no corroborative value because he did not visit the crime scene nor question neighbours around the house where the alleged defilement occurred but solely relied on the eyewitnesses' accounts of PW2 and PW3 to prefer charges against the Appellant. Moreover, counsel faulted the trial magistrate for sentencing the Appellant under Section 8(3) of the *Sexual Offences Act* yet he had been charged under Section 8(1) and 8(4).

27. On the other hand, the learned State Counsel submitted that the prosecution proved its case beyond reasonable doubt as all the elements of the offence were established to the required standard. It was also her submission that under Section 143 of the *Evidence Act*, no particular number of witnesses is required for proof of any fact and that in any event, the witnesses presented in court gave sufficient evidence to establish the offence. Lastly, Ms Serling submitted that the sentence is lawful as per the *sexual offences Act*.

28. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:

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

29. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard: penetration, age of the victim and the positive identification of the Appellant as the perpetrator of the offence.

30. As regards the age of the victim, PW1 produced an age assessment certificate which approximated her age as thirteen years as at February 11, 2019 when she was examined for the said purpose. I therefore find that the prosecution sufficiently proved PW2's age.

31. As regards the element of penetration, the same was based on the evidence of PW1, PW2 and PW3. PW1 testified that the Appellant called her into a greenhouse when they were collecting firewood. He told her to remove her pant, lay down and spread her legs then inserted his urinating thing which looked like a thick wood in her thing for urinating. When the Appellant finished, he gave her Kshs 50/-. It was her testimony that they spent that night in the Appellant's house with PW2 and Macharia at the Appellant's house. She and PW2 slept on the bed with the Appellant and he touched both hers and PW2's breasts. The Appellant defiled PW3 at night then defiled her again towards dawn.

32. PW3 corroborated PW2's testimony that they slept in the Appellant's house. She stated that she saw the Appellant inserting his urinating part in PW2's urinating part while they were on the bed at night. She testified that the Appellant did the same thing to her. In her evidence, PW1 the clinical officer told the court that besides the broken hymen, PW2 had no discharge, her vagina was intact and all her laboratory tests were negative. She also noted that PW2's urine had no pus cells or spermatozoa.

33. I have perused the PRC Form. It shows that PW2 was examined on November 3, 2018 which was just a day after her last alleged defilement by the Appellant. It confirms that her outer genitalia was normal, she had whitish discharge, her hymen was not intact but no vaginal lacerations or bruises were noted. It also confirmed that the high vaginal swab and urinalysis tests revealed no pus, spermatozoa or epithelial cells. I have also perused the P3 Form filled on November 5, 2018, which is consistent with the PRC Form. It shows that there were no injuries on her labia majora and minora although her hymen was broken.

34. In my view, the above evidence does not support the claims by PW2 and PW3. PW2 was a child and if indeed she had been defiled by the Appellant just a day or two to the date of medical examination, the penile penetration would have left her with other visible external injuries to her genitalia in addition to the broken hymen. The high swab lab tests would also have most likely revealed either epithelial cells caused by friction or spermatozoa.

35. Courts have held that a broken hymen alone is not conclusive evidence of penetration as hymen can be torn by other things which are not related to penetration. In *PKW v Republic* [2012] eKLR, Maraga J and Rawal J (as they then were) stated with regard to absence of hymen that:

> " [15]. In their analysis of the evidence on record, the two courts below...appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
>
> [16].Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen v Manuel Vincent Quintanila* [1999] AB QB 769."

36. The Court of Appeal in *David Mwingirwa v Republic* [2017] eKLR also had the following to say where an Appellant had been convicted of incest on the basis that the complainant's hymen had been broken:

> "From that reasoning of the learned judge, it would seem that the certainty or confidence with which she asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor was there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen." [Emphasis mine]

37. In view of the above authorities coupled with my evaluation of the medical evidence on record, I am unable to agree with the trial court that the prosecution proved the ingredients of penetration beyond reasonable doubt. Having determined that here was no evidence of penetration, I see no need of considering whether the Appellant was positively identified save to note that there was no dispute that he was known to PW2.

38. In view of the foregoing, I find that the prosecution did not prove the offence of defilement against the Appellant beyond all reasonable doubt. The trial court therefore erred by convicting the Appellant of the said offence. Having held so, it automatically follows that the sentence imposed on the Appellant whether lawful or otherwise must be set aside.

Disposition

39. Accordingly, the appeal is allowed. The Appellant's conviction is quashed and sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF JULY, 2022.

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G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr.Sudi for the Appellant.

2. Miss Maingi for the Respondent.