Wangiya v Republic (Criminal Appeal 16 of 2020)
[2022] KEHC 17261 (KLR) (19 December 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL 16 OF 2020

SN MUTUKU, J

DECEMBER 19, 2022

BETWEEN

WILLIAM ARTHUR WANGIYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of Hon. P. Achieng SPM of the Ngong Senior Principal Magistrates Court Criminal (SO) Case No. 7 of 2019)

JUDGMENT

1. William Arthur Wangiya, the Appellant, was charged with Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on March 13, 2019 at [Particulars Withheld] Restaurant in Karen within Nairobi County, he intentionally touched the vagina of EWM a child aged 9 years old with his hand.

2. He was tried and found guilty. He was sentenced to serve a jail term of 10 years. He is aggrieved by the conviction and the sentence and has filed the instant appeal. He has raised the following grounds of appeal:

    i. The Learned magistrate failed to take into account the evidence of the complainant was not corroborated.

    ii. The Learned magistrate failed to take into account the Appellant's state of mind and lack of requisite mens rea and whether it was impaired on account of being drunk.

    iii. The Learned magistrate failed to take into account the Appellant's defence and version of what transpired on the material day.

Submissions

3. The Appeal was canvassed through written submissions. Both parties have filed their submissions. In his submissions, the Appellant has argued that there was inconsistency between the evidence adduced by PW2, PK, the mother of the complainant and PW3, WM, the minor as to what happened in the washrooms; that PW3 never stated that she screamed at any one point and that no evidence was adduced to proof beyond reasonable doubt that he actually touched the vagina of PW3.

4. He further argued that in his defence he stated that he had a drinking problem and produced documents to support that allegation which fact the trial court ignored.

5. On sentence he argued that the trial court sentenced him to the minimum mandatory sentence of 10 years despite the fact that he was a first offender and in mitigation he was found to be a family man. Further that minimum mandatory sentence is unconstitutional as shown in various cases among them *Amedi Omurunga v Director of Public Prosecution* Petition No 22 of 2016.

6. The Respondent opposed the appeal on the grounds that there is evidence proving the case beyond reasonable doubt; that the evidence of the minor and her mother is supported by that of PW1 who heard screaming from the washrooms and that the Appellant in his defence confirmed he was at the scene and that he mistakenly entered the ladies' washroom.

7. The Respondent argued that the sentence was lawful as provided by section 11(1) where it provides for a sentence of not less than 10 years and that this is the minimum sentence which is lenient.

Analysis and Determination

8. I have subjected the entire evidence in the lower court to fresh scrutiny, analysis and evaluation with a view to arriving at an independent finding.

9. The evidence is very clear that on March 13, 2019, PW2 and her daughter PW3 the complainant in this case went to have refreshments at Java in Karen. Inside the same restaurant was PW1, Naomi Njuguna, who was also having refreshments. PW2 told her daughter PW3 to go to wash her hands in the washrooms. Shortly thereafter, PW2 heard screams coming from the directions of the washrooms. PW1, too, heard the screams as well as Ruth Njeri Nderito, PW4, an employee of Java Karen. They all rushed towards the washrooms. They found that it was PW3 screaming. PW3 pointed at the Appellant who was walking away from the washrooms and said that the Appellant has touched her private parts while inside the washrooms.

10. The Appellant was arrested by members of the public and later handed over to the police from Karen Police Station. He was charged with this offence.

11. The Appellant in his defence before the trial court admitted going to the ladies' washrooms at Java in Karen to relieve himself. He testified that he was drunk at the time and mistook the washrooms. He admitted that he found the complainant inside the washrooms and that she started screaming and that as he went out of the washrooms he met a crowd that attacked him and started beating him. I have noted that the Appellant did not, at any stage of his defence and cross-examination, deny indecently touching the complainant.

12. The *Sexual Offences Act* defines "an indecent act" as follows:

> " indecent act" means an unlawful intentional act which causes-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or display of any pornographic material to any person against his or her will."

13. The offence charged is defined under Section 11(1) of the *Sexual Offence Act* as follows:

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."/

14. The Appellant accuses the trial magistrate for not taking into account that the evidence of the complainant was not corroborated. I have read the judgment of the lower court and note that the trial magistrate stated as follows in the judgment delivered on July 29, 2020:

> " In the present case, it was the evidence of the complainant that the accused touched her private parts with his hand. I wish to point out that the evidence of all the prosecution witnesses was taken by my colleague Hon. Ithuku (CM), and I did not therefore have the opportunity to observe the demeanour of the said witnesses. Looking at the evidence of the complainant, coupled with that of PW1, PW2 and PW4 however, I find that the same form a chain of events which point without a doubt that the accused person was at the washroom area with the complainant. There is no evidence to show that there was any other person in that area."

15. It is therefore not true that the evidence of the complainant is not corroborated. And even though PW1, PW2 and PW4 did not witness the Appellant committing the act, they described the scene and all said that they heard the screams from the girl, all went to scene and found the Appellant leaving the washroom area. He was identified by the complainant as the person who had touched her private parts. PW2 also told the court that her daughter looked shaken.

16. On my own analysis of the evidence I find that the evidence of the complainant corroborated. The Appellant equally admitted to have gone into the ladies' washrooms and finding the complainant inside. He also admitted that the girl started screaming although his evidence seems to suggest that the girl was screaming because he had entered the wrong washrooms.

17. I am convinced beyond doubt that the Appellant entered the ladies' washrooms and found the complainant inside. Although there is no other evidence on the actual sexual indecent act, I have considered the evidence of PW3 and the fact that she is a minor whose evidence would have required corroboration. However, I find her evidence credible although I did not observe her testifying. She seemed clear in her mind what had happened from the recorded evidence and the clarity of the same. I have also taken into account the proviso to section 124 of the *Evidence Act* that states that:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

18. The law is clear as to what constitutes indecent act. From the testimony of the complainant the Appellant touched her private parts with his hand. This therefore falls under the definition as

constituted in section 2(1)(a) of the *sexual offences Act*. There is also proof that the complainant was a child aged 9 years. The birth certificate was produced as exhibit 1 showing that the child was born on July 6, 2009.

19. I hold the view that the evidence on what happened is sufficient to prove the indecent act beyond reasonable doubt. I find this ground of appeal without merit.

20. The Appellant accuses the trial court of failing to consider his state of mind therefore lacking mens rea. This is not true. On page 4 last paragraph of the judgment the trial magistrate narrated the defence of the Appellant based on his intoxication and concluded that "There is no evidence to show that the accused had received any treatment relating to a drinking problem close to the time the offence was committed."

21. Further, on page 5 of the judgement, the trial magistrate stated as follows:

> "I do not find any merit in the defence of the accused that he was mistaken on the washroom he entered. The complainant is a young child who did not know the accused person prior to the incident. Her birth certificate was produced indicating that she was born on July 6, 2009. There is no evidence to suggest that she could have told lies against the accused to the effect that he touched her private parts. She could not have screamed for no apparent reason. The witnesses who saw her after the incident said that she was shaken or frightened at the time, meaning that something bad had happened to her. I therefore believe her evidence that the accused touched her private parts."

22. On my own account, after subjecting the evidence to scrutiny, I find that there is no merit in this ground of appeal and the same must fail.

23. The Appellant claims that the learned trial magistrate failed to take into account the Appellant's defence and version of what transpired on the material day. From my analysis above, I find this ground lacking in merit. It must equally fail.

24. On the issue of sentence, the Appellant has argued that the minimum mandatory sentences are unconstitutional. I have read through the authorities attached by the Appellant on this issue and I note that the court abandoned the mandatory sentences and exercised its discretion in re-sentencing the accussed persons.

25. In *Dismas Wafula Kilwake v Republi* [2019] eKLR the Court of Appeal stated as follows:

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

26. Although the Court of Appeal was discussing section 8 of the *Sexual Offences Act*, it is my view that the reasoning is applicable to all provisions of the law in that Act where mandatory sentence, whether

maximum or minimum. It is my view that the application of mandatory sentencing as provided in the *Sexual Offences Act* should be based on the circumstances of each case.

27. The Appellant was sentenced to 10 years imprisonment for an offence of committing an indecent Act with a child. The circumstances of this case are unfortunate and ought not to happen. Appellant in this case entered into the ladies' washroom at a public place and touched the private parts of a 9-year-old girl, an innocent girl who had gone to wash her hands in the washrooms with no idea that the safety of the ladies' washrooms could turn into a traumatizing ordeal. Evidence shows that the washrooms were clearly marked for ladies. It turned out not to be an innocent mistake in the washrooms but the Appellant committed this indecent act when he ought to have turned back quickly and out of the washrooms if indeed he had entered there mistakenly.

28. I find the sentence deserving and I have no reason to disturb it. Consequently, I dismiss this Appeal, uphold the conviction and sentence imposed by the trail court. The Appellant shall continue serving the sentence imposed.

29. Orders shall issue accordingly.

Dated, signed and delivered this 19th day of December, 2022.

S. N. MUTUKU

JUDGE