Kamau v Republic (Criminal Appeal 71 of 2015)
[2017] KEHC 6247 (KLR) (13 April 2017) (Judgment)

Elikana Mburu Kamau v Republic [2017] eKLR

Neutral citation: [2017] KEHC 6247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 71 OF 2015

CW MEOLI, J

APRIL 13, 2017

BETWEEN

ELIKANA MBURU KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 2544 of 2013 of the Chief Magistrate's Court at Naivasha – P. Gesora, CM)

JUDGMENT

1. The Appellant herein was tried for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars in the amended charge sheet stated that on the diverse dates between 17/8/2013 and 17/10/2013 at [particulars withheld] in Gilgil District within Nakuru County, he intentionally caused his penis to penetrate the vagina of J W G a child aged 15 years. Following a full trial, the Appellant was found guilty and convicted. He was sentenced to serve 20 years imprisonment.

2. Aggrieved by the outcome he preferred an appeal to this court. His amended grounds of appeal filed on 13/6/2016 contain five grounds as follows:-

> " 1) That the learned trial magistrate erred both in law and fact when she convicted me in the present case while relying on a fatally defective charge sheet.
>
> 2) That the pundit trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find the trial process was irregularly conducted.

3) That the learned trial magistrate erred both in law and fact when he convicted while relying on evidence adduced by hostile witnesses.

4) That, the learned trial magistrate erred both in law and fact when he convicted by putting reliance on information gathered from shoddy and faulty investigations.

5) That, the pundit trial magistrate erred both in law and fact when he rejected my truthful plausible defense." (sic)

3. He also filed written submissions in support of the grounds. Before restating these submissions, I will set out the respective cases in the lower court trial.

4. The prosecution evidence was as follows. In the material period the Appellant was a lover to and cohabiting with the mother of J W G (PW1) at Morindat. PW1 was then aged 15 years. She had a younger male sibling identified as G M (PW2). Apparently, PW1's mother E W G (PW3) had at the time separated from the biological father of PW1 who resided in Nyeri. PW3 had moved from Nyeri and joined the Appellant at Morindat. She had taken her children PW1, PW2 and one G with her.

5. On 17/8/2013 PW3 travelled to Nyeri. On return, she was informed by PW2 that while she was away, PW1 had shared a bed with the Appellant. It seems that PW3 did not take action, as in her words she was fearful and conducting her own inquiries, while the Appellant was away, possibly underground. She questioned the complainant who denied PW2's report. The Appellant similarly defiled PW1 on 17/10/2013 by which time, it became evident that PW1 had conceived a child.

6. The matter was then reported by PW3 to police at Gilgil Police Station on20/10/2013. The age assessment and medical exam confirmed that the complainant was aged between 14 – 16 years as at 2nd December 2013 and that she was 13 weeks pregnant. The Appellant was arrested and charged.

7. In his defence, the Appellant elected to make an unsworn statement. To the effect that, he resided at Gilgil where he farmed. He confirmed that his "wife" PW3 travelled to Nyeri on 17/8/2013 for the purpose of selling a cow and returned after a few days. Although he was unhappy that PW3 sold the cow at a lower price than agreed they settled the matter. He later learned that police were looking for him. Having spent a night at a friend's house, he learned from PW1 that PW3 had entertained another man. He went back home and chased PW3 away. He was then arrested and charged. He claimed PW1 procured an abortion to conceal the truth as to the identity of the person responsible for her pregnancy.

8. He submitted on the first to third grounds that the charge brought against him was defective for failing to indicate that the charge fell under Section 8 (1) and read with Section 8 (3) of the *Sexual Offences Act*; further that in light of the evidence by PW1 and PW3, the more appropriate charge was incest contrary to Section 20 (1) of the *Sexual Offences Act*. Thus in his view the charges against him were defective. He also faults the court for failing to conduct a *voire dire* examination in respect of PW1, and to note alleged contradictions between the evidence of PW1 and PW2 concerning the time and date of the offence.

9. On the question of age and date of offence, he submitted that the evidence by PW1 and PW3 was inconsistent and "hostile;" and the investigations undertaken were shoddy. He took issue with the alleged 13 week pregnancy which he saw as inconsistent with the dates of the defilement. And further that, because the pregnancy was terminated, there is no DNA evidence to connect him to the offence.

10. On grounds 4 to 5 the Appellant questions PW3's delayed report to police in respect of the offence allegedly committed on 17/8/2013 and the alleged involvement of PW1 with another man. Citing

inconsistencies and discrepancies in the oral and documentary prosecution evidence, the Appellant asserts that he put forth a solid defence which was not given satisfactory consideration by the trial court.

11. Representing the Director of Public Prosecutions, Mr. Koima opposed the appeal by restating the prosecution evidence at the trial. He urged the court to dismiss the appeal.

12. In *Pandya v Republic* [1957] EA 336 the Court of Appeal of Eastern Africa set out the duty of the first appellate court by stating that:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

13. I have, as mandated to do, considered the evidence adduced at the trial and the matters canvassed on appeal. Concerning the question of the framing of the charge, nothing turns thereon. The failure by the prosecution to insert the words "as read with" in between Section 8 (1) and 8 (3) of the *Sexual Offences Act* in the Statement of the Offence does not render the charge defective. Similarly, the relationship between the complainant and the Appellant being what it was admitted to be, a charge of incest could not hold.

14. The Appellant herein clearly understood the charges facing him and robustly defended himself. No prejudice has been occasioned by the omission. Section 134 of the *Criminal Procedure Code* states that a charge shall

> "be sufficient if it contains, a statement of a specific offence or offences with which the Appellant person is charged, together with such particulars as may be necessary for giving reasonable information as the nature of the offence charged."

15. Grounds 2 – 4 deal with the question of the adequacy and credibility of the prosecution evidence in relation to the offence. Firstly, the Appellant's assertion that the evidence of PW1 was voided by the failure of the court to conduct a voire dire examination before reception is not sustainable. At the assessed age of 14 - 16 years PW1 did not qualify as a child of tender years. Evidence was tendered to show that she was aged between 14 – 16 years at the time of the offence. That evidence must be taken to be the correct age of the complainant and not her own stated age of 13 years.

16. In the case of *Maripett Loonkomok v Republic* [2016] eKLR Court of Appeal stated regarding the requirement of voir dire examination:-

> "The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of *Kibageny Arap Kolil v Republic* (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the

age of 14 years. The only statutory definition of a "child of tender years" is Section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v Republic*, Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimiv Republic* Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

> In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

See *Athumani Ali Mwinyiv Republic* Cr.Appeal No.11 of 2015.

17. The evidence of PW1 was that she was defiled twice by the Appellant, on 17/8/2013 while her mother was away in Nyeri, and on 17/10/2013, a second time. As the Appellant correctly noted, PW1 said that she was defiled during day time (about 5.00pm) on the first occasion. It seemed however that PW2 was also referring to that occasion, his reference also being to the time when according to PW3 she had travelled to Nyeri. PW3 told the court that upon return, PW2 informed her that PW1 had spent the night on the Appellant's bed. However when questioned PW1 denied the assertion. Later PW1 informed PW3 what had happened after the Appellant went to Naivasha.

18. PW3 admitted in cross-examination that she knew about the defilement in August but fearing violence from the Appellant opted to "investigate" first. That is, until PW1 informed her in October 2013 that she was carrying the Appellant's child. It was PW1's evidence that she had sexual intercourse with the Appellant again in October 2013. By this time PW3 said she noted that PW1 had not used sanitary pads (for her periods) in September 2013.

19. What seems to have broken the camel's back is the confirmation by PW1 to PW3 in October 2013 that she was pregnant by the Appellant whom she referred to as "uncle". It is true therefore as the Appellant has pointed out that there was some discrepancy as to the exact dates and time when the two defilements occurred. This was possibly the reason why the charge details were amended. But whatever the case, the complainant's evidence was clear that the first defilement incident occurred around 17/8/2013 while PW3 was away.

20. Not every discrepancy or inconsistency destroys a witness' credibility. The Court of Appeal stated in *Erick Onyango Ondeng v Republic* (2014) eKLR:

> " As noted by the Uganda court of appeal in *Twehangane Alfred v Uganda*, Criminal Appeal No. 139 of 2001, (2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it: with regard to contradiction in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

21. Possibly, PW1 subsequently shared a bed with the Appellant in the material period, which PW2 witnessed. The discrepancy on dates alone does not affect, the credibility of the evidence by PW1 – 3 in the circumstances of this case. In dealing with the evidence of PW1 the trial court states in its judgment that:

> " PW1 gave a graphical account of what transpired during the period in question and I have no doubt in my mind that she was truthful. There were no allegations of malice and frame up alleged and proved. In fact the family was living happily although Accused was the complainant's step father." (sic)

22. The trial court clearly believed PW1's evidence in particular. For my part, I am of the view that it did not matter whether the Appellant had had sex once or twice with the victim. The fact proven is that his dalliance with the victim in the material period resulted in a pregnancy which was 13 weeks old at the time of PW1's examination in October 2013. I believe that the period of 13 weeks was based on an estimation by the doctor and it is too late now for the Appellant to start nitpicking on the age of the pregnancy relative to the offence. He had every opportunity to question the doctor on the matter but did not. Besides even in the absence of the medical evidence, the court was entitled to base its conviction on the evidence of PW1 alone if it believed her testimony (see Section 124 of the *Evidence Act*).

23. Secondly, the Appellant's allegations that another man was responsible for the complainant's pregnancy were not put to her during cross-examination. PW3 disputed the involvement of PW1 with a boy in her school, which allegation was also not put to PW1. The neighbour who allegedly gave a phone to PW1 to talk to the Appellant (while apparently underground) was said by PW3 to be a lady and not a man.

24. Similarly, the Appellant's defence to the effect that he had a quarrel with PW3 because she entertained another man was not put to her in cross-examination. I cannot see how PW3 could have made up the entire story of defilement including the confirmed pregnancy of her daughter to get even because the Appellant had sent her away from home. The witness (PW3) may have appeared stubborn or evasive in court but her evidence and that of PW1 and PW3 tie up. The court ultimately believed PW3. Indeed it seems that Appellant had been carrying on a clandestine relationship with the minor while acting as her step father, which relationship continued even after PW3 was notified of it. Hence PW3's angry response to him in cross-examination:

> " You cannot marry me and marry my daughter."

25. The question of PW1's age was settled through the age assessment form which placed her age in the material period at 14 – 16 years. The doctor who had examined her in October 2013 assessed her age as 15 years. The basic fact is that the complainant was aged under 18 years of age. It must be recalled that under the *Sexual Offences Act* the age of the victim determines the severity of the sentence meted out on the offender.

26. In *Bakari Ndoro v Republic* [2016] eKLR the Court of Appeal stated that: -

> " Under Section 8 of the Sexual Offence Act, the gravity of the offence is determined by the age bracket of the victim. The first age bracket is a child aged eleven years and below, followed by the age bracket between twelve and fifteen years and lastly sixteen and eighteen years."

27. The trial court correctly directed itself by accepting the age assessment report placing the minor's age between 14 – 16 years. This evidence was more reliable that PW1's own estimate made without

reference to date of birth. Ditto PW3. The trial court was entitled in this case to dismiss the alleged frame-up put up in the Appellant's defence, noting as it did, that the family was a happy one until the fateful events. The Appellant's own evidence revealed that he had good relations with the wife at the time she travelled to Nyeri and returned.

28. The allegation that she made up the case in order to fix him for throwing her out over her infidelity were not put to PW3, or PW1 whom the Appellant claimed had notified him of PW3's alleged infidelity. Therefore, the defence appeared an afterthought which was totally displaced by the prosecution evidence.

29. Reviewing the entire evidence on my own, I am satisfied that the Appellant was properly convicted and that his grounds of appeal have no merit. The appeal is dismissed.

DELIVERED AND SIGNED AT NAIVASHA, THIS 13TH DAY OF APRIL, 2017.

In the presence of:-

Mr. Mutinda for the DPP

Appellant in person

C/C – Barasa

Appellant – present

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C. MEOLI

JUDGE