Tanui v Republic (Criminal Appeal 144 of 2004)
[2006] KEHC 3487 (KLR) (22 February 2006) (Judgment)

Paul Tanui V Republic [2006] EKLR

Neutral citation: [2006] KEHC 3487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 144 OF 2004

LK KIMARU, J

FEBRUARY 22, 2006

BETWEEN

PAUL TANUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

Following the amendment of section 124 of the Evidence Act, the evidence of a child of tender years need not be corroborated provided the court was satisfied that the said child was telling the truth.
The appellant challenged his conviction stating that it was based on insufficient and uncorroborated evidence adduced by the complainant and her witnesses. The court held that there was no need for corroboration of the complainant's evidence even though she was of tenders. That was because following the amendment of section 124 of the Evidence Act by Criminal Law (Amendment) Act (Act No 6 of 2003) the evidence of a child of tender years needed not be corroborated provided that the court was satisfied that the said child was telling the truth.

Reported by Moses Rotich

Criminal Practice and Procedure *- appeal - appeal against conviction and sentence on a charge of defilement - re-evaluation of the evidence by the first appellate court - whether the evidence supported the conviction - whether the sentence was proper - Penal Code (cap 63) sections 144(1), 145(1)*

Evidence *- child/minor - evidence of a child of tender years - corroboration of such evidence-whether there was need for corroboration where court was satisfied that the child was telling the truth - Evidence Act (cap 80) section 124*

Brief facts

The appellant had been charged with defiling the complainant, a ten year old girl. In his defence, the appellant denied that he had raped the complainant and stated that he had been arrested by the police having committed no offence. After trial, he was convicted on the main charge and sentenced to serve twenty years imprisonment with hard labour. The appellant being aggrieved by his conviction and sentence appealed. It was his contention that he had been convicted on insufficient and uncorroborated evidence adduced by the complainant and her witnesses. He was further aggrieved that he had been sentenced to serve a very harsh and excessive custodial

sentence. The point for determination by the appellate court was whether the prosecution had proved its case against the appellant to the required standard of proof.

Issues

Whether the evidence of a child of tenders required corroboration to be relied on to arrive at a conviction.

Held

1. The court being the first appellate court was mandated to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision on whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its decision, the court was required to put in mind the fact that it neither saw nor heard the witnesses as they testified.

2. The complainant's evidence relied on by the prosecution was corroborated by the witnesses and could sustain the conviction of the appellant. There was no need for the complainant's evidence to be corroborated even though in law she was a girl of tender years. After the amendment of section 124 of the Evidence Act by Criminal Law (Amendment) Act (Act No 6 of 2003) the evidence of a child of tender years needed not be corroborated provided that the court was satisfied that the said child was telling the truth.

Appeal dismissed.

Orders

i. *The conviction and the sentence by the trial magistrate was con*firmed.

Citations

East Africa

1. *Okeno v Republic* [1972] EA 32

Statutes

1. Criminal Law (Amendment) Act, 2003 (Act No 6 of 2003) - in general
2. Evidence Act (cap 80) section 124
3. Penal Code (cap 63) sections 144(1); 145(1)

JUDGMENT

1. The appellant, Paul Tanui was charged with defilement of a girl contrary to section 145(1) of the *Penal Code*. The particulars of the charge were that on the November 29, 2003 at 11.00 am at Keringet Centre Molo Nakuru District, the appellant unlawfully had carnal knowledge of [name withheld] (hereinafter referred to as the complainant), a girl under the age of sixteen years. He was alternatively charged with indecent assault of a girl contrary to section 144(1) of the *Penal Code*. The particulars of the charge were that on the same day and at the same time in the same place, the appellant indecently assaulted [name withheld], a girl under the age of fourteen years by touching her private parts. The appellant pleaded not guilty to the charges and after a full trial he was convicted on the main charge. He was sentenced to serve twenty years imprisonment with hard labour. The appellant being aggrieved by his conviction and sentence appealed to this court.

2. In his petition of appeal, the appellant raised several grounds faulting the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had convicted him without putting into consideration the evidence adduced by the doctor. He faulted the trial magistrate for convicting him based on insufficient and uncorroborated evidence adduced by the complainant and her witnesses. He was further aggrieved that he had been sentenced to serve a very harsh and excessive custodial sentence. During the hearing of the appeal, the appellant presented to this court his written submissions in support of his appeal. He further made oral submissions urging this court to allow his appeal. Mr Gumo Learned Assistant Deputy Public Prosecutor submitted that the prosecution had established

the charge against the appellant to the required standard of proof. He urged this court to disallow the appeal. Before giving reasons for my decision, I will briefly set out the facts of this case.

3. On the March 29, 2003 at 11.00 AM, PW3 [name withheld] left her home to go to a local shopping centre to buy some foodstuff. She left her sister, the complainant, at home. When she came back from the shops she did not find the complainant. The house was locked. She went round the village looking for her but was unable to find her. At about 4.00 PM, she met with the appellant who asked her if the complainant had come back. She answered in the negative. Because her house was locked, the appellant offered to break the door of the house with a hammer. It appears that PW3 did not take up this offer. At 6.00 PM she again met the appellant who inquired if she had been able to trace the complainant. She answered in the negative. When PW3 went home, she found the complainant. She asked her where she had been. The complainant narrated how she had been taken to the forest called Baraget and defiled. PW3 examined her and saw blood and a whitish discharge on her vagina. PW3 testified that the complainant identified the accused as the person who had raped her.

4. PW3 accompanied by PW4 AN immediately decided to report the incident to the police. The report was made to PW5 PC Isaiah Kiptoo, a police officer based at Keringet Police Post. PW5 advised PW3 and PW4 to take the complainant to the hospital so that she could be examined and treated. PW1 Julius Koech, a Clinical Officer, recalled that on the November 29, 2003 he examined the complainant a girl then aged about ten years who had been taken to the Keringet health centre. He established that her labia had been bruised and the hymen was slightly deformed. There was a whitish discharge on her vulva. PW1 took a specimen and upon laboratory examination established that there were red blood cells, pus cells and spermatozoa. The complainant had been infected with a venereal disease. PW1 treated her and filled the P3 form which was produced in evidence as prosecution exhibit No 1.

5. In her testimony PW2 (the complainant) testified that she was ten years old. She recalled that on the material day she had been left home by her sister, PW3. While at home, a person whom she did not name, came and told her that her sister had sent him to tell her to go and fetch some books at Baraget. She testified that she agreed to follow the person. The person took her to the appellant. PW2 knew the appellant. She testified that the appellant was a neighbour to her sister and was known to her prior to tire incident. It was her testimony that the appellant took her to the forest grabbed her and threw her to the ground. When she resisted the appellant slapped her across the face, removed all her clothes and then raped her. After raping her he dressed her up and abandoned her at the forest. The complainant walked out of the forest and managed to trace her way back to her sister's home. PW2 was emphatic that it was the appellant and no one else who had raped her. When the appellant was put on liis defence he denied that he had raped the complainant. He testified that he had been arrested by the police having committed no offence.

6. This being a first appeal this court is mandated to reconsider and reevaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified. (See *Okeno v Republic* [1972] EA 32). The issue for determination by this court is whether the prosecution has established its case against the appellant to the required standard of proof beyond reasonable doubt. I have considered the written submission presented to this court by the appellant. I have also considered the oral submissions that the appellant and Mr Gumo made during the hearing of this appeal. Having carefully re-evaluated the evidence and considered the said submissions, it is this court's view that the evidence that the prosecution relied on to sustain the conviction of the appellant is that of the complainant as corroborated by PWI and PW3.

7. According to the complainant she was raped by the appellant, a person whom she knew as a neighbour to PW3, her sister. She testified how she was hired out of the house of her sister by a person whom she did not name and taken to the appellant who took her to a forest defiled her and then abandoned her there. The complainant disappeared from her sister's house from 11.00am in the morning until 6.00pm in the evening when PW3 found her in the house. The complainant testified that after the appellant had defiled her and abandoned her in the forest, she was able to trace her way back to her sister's house where she was able to narrate her ordeal.

8. PW3 and PW4 immediately reported the incident to the police at Keringet Police Post. PW5 received the report and referred the complainant to PW1 a Clinical Officer who examined the complainant and confirmed that indeed the complainant had been defiled. The P3 form that PWI filled was produced in evidence by the prosecution.

9. On re-evaluation of the said evidence by the prosecution, it is clear that the only evidence that connects the appellant to the crime is that of the complainant, a girl then aged ten years. The complainant in law is a girl of tender years. Prior to 2003 her evidence required corroboration. But after the amendment of section 124 of the *Evidence Act* by Criminal Law (Amendment) Act (Act No 6 of 2003) which came into effect on July 25, 2003, the evidence of a child of tenderyears need not be corroborated provided that die court is satisfied that the said child is telling the truth.

10. In this case, having re-evaluated the said evidence, it is clear that the complainant was telling the truth. She knew the appellant very well prior to the rape incident. She narrated how she was lured out of her sister's house having been told a false story that her sister had sent for her to collect some books in a place called Baraget. At the time this allegation was made the complainant's sister, PW3 was not at home. The complainant was lured from her sister's house by another person who took her to the appellant. The appellant tiien took her to the forest, defiled her and abandoned her there. When die complainant retraced her way home about seven hours later, she narrated to PW3 the ordeal that she had undergone at die hands of the appellant. She identified the appellant. She was taken to the hospital on the same day and examined and it was indeed confirmed that she had been defiled. Laboratory tests revealed that there were spermatozoa present in her vagina. The evidence of the complainant as corroborated by that of PW3 has a ring of truth in it.

11. In the circumstances therefore, having carefully re-evaluated the evidence.

12. I do find that die prosecution proved its case on the charge of defilement against the appellant to the required standard of proof beyond reasonable doubt. The appellant defence was just but a mere denial. I have read his written submissions and also considered his oral submissions. Nodiing has been raised indie said submission that would dent die otherwise strong prosecution case against die appellant.

13. His appeal on conviction therefore lacks merit. I dismiss it. His appeal on sentence is similarly dismissed. The appellant deserves to serve every year that he had been sentenced. The punishment meted out fitted the crime. The conviction and the sentence by the trial magistrate is therefore confirmed. It is so ordered.

DATED AT NAKURU THIS 22ND DAY OF FEBRUARY 2006.

L. KIMARU

JUDGE