Wanyonyi v Republic (Criminal Appeal E083 of 2022)
[2025] KEHC 2296 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2296 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E083 OF 2022

REA OUGO, J

FEBRUARY 7, 2025

BETWEEN

BENSON PROTUS WANYONYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon G. Adhiambo (PM) delivered at Kimilili Magistrate's Court in Criminal Case No E056 of 2021 on 27th July 2022)

JUDGMENT

1. The appellant, was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on 11th December 2021 in [particulars withheld] within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of CNM a child aged 8 years old.
2. The appellant denied the charges and the prosecution called 6 witnesses to support its case. The appellant gave sworn testimony when placed on his defence,
3. The subordinate court found that the prosecution had proved his case to the required standard, beyond reasonable doubt. The trial magistrate sentenced the appellant to life imprisonment.
4. The appellant dissatisfied with the finding of the lower court had filed a petition of appeal challenging the conviction and sentence on the following grounds:
    1. That the appellant pleaded not guilty to the said charges.
    2. That the learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant.

3. That the learned trial magistrate erred in law and fact in arriving at a decision based on evidence that were full of contradictions and without analyzing the same.

4. That the trial magistrate erred in law and fact in considering extraneous factors in the decision making.

5. That I wish to raise more grounds of appeal when the same comes up for hearing.

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence before the trial court to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify. (Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123).

6. CN (Pw3) testified that she lives with her grandmother, ENT (Pw1). On 11/12/2021, LWT (Pw4) wanted salt in the kitchen. Initially, A was sent to the main house to get salt but there was none. The appellant then asked Pw1 to send one of the children to his home to get salt as his door was unlocked. Pw3 testified that her grandmother sent D who asked Pw3 to accompany him. As they walked to the appellant's house, the appellant requested D to go back and that he would go with Pw3.

7. Pw3 testified that they arrived at the appellant's house at around 6:00 p.m. The house was one-roomed with both a cooking and sleeping area. Pw3 got into the house and took the salt, however, as she was about to leave the appellant stood by the door. He then held her, covered her mouth, and threw her on his mattress which was on the floor. Pw3 recalled wearing a green skirt, a white blouse, and an inner pant. The appellant held Pw3's mouth with one hand as he used the other to pull her pants to her knees. The appellant then "...inserted his urinating thing into mine".

8. Pw3 and D knocked on the door and called her name but she could not respond as the appellant covered her mouth. The appellant told them that he had given her fifty shillings so that she could buy salt. A lit lamp was inside the house which the appellant put off. Pw3 testified that he saw the appellant. When Pw1 arrived and called her name, the appellant pushed her out of the house. She testified that there was fluid coming from her vagina which had come from the appellant's thing for urinating. They went to the police station and then the hospital.

9. ENT (Pw1) testified that on the material day, she was sick and sleeping on the couch. A had come to look for salt in the main house, and when they realised there was none, the appellant offered to give them salt. Pw1 sent D to get salt from the appellant's house as the appellant had indicated the house was opened. D left with Pw3, after 15 minutes Pw4 complained that Pw3 was not back. They went to the appellant's house; he did not open the door but told them he sent the complainant to the market. Pw1 called the village elder and told her that the appellant was killing her grandchild. After the appellant heard Pw1 make the phone call, he opened the door and pushed Pw3 out of his house. Pw3 could not walk and she carried her home. There was blood and semen on Pw3's vagina. They went to Wabukhonyi Police Station and then to Naitiri Sub-County Hospital.

10. JW (Pw2) testified that she received a call from Pw1 asking her to go to her house. When she arrived, Pw1 told her that the appellant had raped Pw3. Pw2 saw a whitish discharge flowing from the vagina to the thighs of Pw3. She asked the child to tell her how the appellant had done the act. The child demonstrated by lying on the seat while facing up. She accompanied Pw1 to report the matter at the police station and the child was then taken to hospital.

11. Pw4 testified that he was preparing supper, and it was running late after Pw3 went to the appellant's house. He went to the appellant's house and noted the door was locked from inside. Pw4 knocked, but there was no response, so he went home. He went back again and knocked, and the appellant told him he had given the child fifty shillings. Pw4 testified that he recognized the appellant's voice. He went

to the market in search of Pw3 but she was not there. When Pw4 went back home he learnt that the appellant raped the minor.

12. Desmond Wekesa Situma (Pw5), a clinical officer, testified that Pw3 was treated by his colleague Kennedy Etipo. The child had bruises on the labia minora; there was a freshly broken hymen with blood stains on the vaginal wall. There were deposits of seminal fluids on the vaginal wall. VDRL was negative; urinalysis revealed the presence of epithelial cells and red blood cells, no spermatozoa were seen on conducting a high vaginal swab, and an HIV test was not done because of lack of kits. The P3 form was filled out within 36 hours, while treatment was received after 14 hours. Pw3 was given antibiotics and post-exposure prophylaxis drugs. Pw5 confirmed that the minor was defiled and her hymen freshly broken by penile penetration.

13. No. 59400 PC Peter Sangalo (Pw6) testified that on 12/12/2021 at 9:47 hours, she received a report from Pw1 accompanied by her granddaughter that the child had been defiled. She booked the report and issued the minor with a P3 form. Pw6 took witness statements on 15/12/2021. The accused disappeared but was later arrested within Maliki Centre and charged with defilement.

14. In his defence, the appellant testified that he was married and had children. In 2015, Pw1 told her that her husband died and the man who also inherited her died. The appellant gave her a place to keep her building materials, and Pw1 constructed a home. The appellant's father died in 2016, and he left his wife at home after the funeral. In 2017 when his wife returned, she found Pw1 in their home and got angry that the appellant had another wife. The appellant's wife told him to vacate the place, and he complied. The appellant testified that Pw1 only brought up this case because he vacated the place and Pw1 wanted to frustrate him.

Submissions

15. In his submissions, the appellant argued that he was framed due to a misunderstanding with Pw1. There was no explanation for the delay in his arrest, which hindered forensic investigations as stipulated in section 36 of the *Sexual Offences Act*. He also alleged that he was not allowed to cross-examine Pw4. Therefore, the violation of this right should lead to an acquittal, or the case should start de novo.

16. He also submits that there was a contradiction in Pw3's and Pw1's evidence. While Pw3 testified that there was fluid from the appellant, Pw3 testified as to blood stains. He also questioned the medical report that noted a whitish discharge but found no presence of spermatozoa. There were contradictions in the testimonies of Pw1, Pw3 and Pw5.

17. There was also no evidence that the appellant had faced previous convictions. The trial court only considered hearsay evidence without proper investigations. He also blamed the trial magistrate for overlooking his defence of alibi. He also submitted that although he only understood Kiswahili, the witness statements were in English, a language that he could not understand.

18. The respondent submitted that all the key ingredients of the offence were proved. The charge was explained to the appellant in a language that he understood and his plea of guilty followed the correct procedure. He cross-examined witnesses and had sufficient time to prepare his defence. The witnesses testified that the minor was aged 8 or 9 years old. A baptismal card also proves the age of the child. The testimonies of Pw1, Pw2, Pw3 and Pw5 confirmed the key aspect of penetration.

Analysis And Determination

19. I have carefully considered the petition of appeal, the submissions by the parties and the issues raised in the appeal are whether it was fatal that samples from the appellant were not taken under section 36 of

the *Sexual Offences Act*; whether the appellant was not allowed to cross-examine witnesses; and finally, whether the prosecution proved its case to the required standard.

20. The appellant submitted that forensic evidence was not done to confirm the perpetrator of the offence. Section 36 (1) of the *Sexual Offences Act*, 2006 provides thus:

> " Evidence of medical, forensic and scientific nature.
>
> 1. Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

21. This is however discretionary as DNA evidence is not the only evidence that can prove that a sexual offence has been committed. In the case of Martin Okello Alogo Vs Republic [2018] eKLR, as cited in the case of Williamson Sowa Mbwanga Vs Republic the Court of Appeal stated:

> " .....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.....It is partly for this reason that Section 36 (1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

22. On the second issue, the record shows that the appellant requested to have the witness statement in respect of Pw4 before he could proceed with the hearing (cross-examination). When the matter came up for hearing, the prosecution sought an adjournment because witnesses were unavailable. However, the next time the parties appeared before the trial court, the prosecution proceeded with the testimony of the fifth and, subsequently, the sixth prosecution witnesses. The appellant, therefore, failed to cross-examine Pw4 as he was not afforded the opportunity.

23. In Paul Kinyanjui Kimauku v Republic [2016] eKLR, the Court of Appeal addressed the issue of cross-examination of unsworn witnesses as follows:

> " (23) Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of *the Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness."

24. The accused person is entitled to cross-examine all prosecution witnesses (see Court of Appeal in Isiaho *v Republic (Criminal Appeal 184 of 2016)* [2022] KECA 369 (KLR) (18 February 2022) (Judgment)).

25. In the circumstances, I find that the failure by the trial court to accord the appellant the right to cross-examine Pw4 fell short of the constitutional requirement.

26. Next issue is whether this is fir case for retrial. In the case of Fatehali Manji vs Republic [1966] EA 343 the Court of Appeal when dealing with the issue, gave the following guideline:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer v Republic [2015] eKLR)In Muiruri v R [2003] KLR 552, the Court held that:
>
> "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala v Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

27. I note that the appellant was charged with a serious offence and it is in the interest of justice to order a retrial. The appellant has been in custody for 3 years In view of the foregoing observations, I find that the appeal has merit. The same is allowed. The conviction is quashed and the sentence set aside and I order a retrial. The appellant shall take plea before the SPM at Kimilili Law Courts on or before 13.2. 2025.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 7TH DAY OF FEBRUARY 2025

R.E. OUGO

JUDGE

In the presence of:

Benson Protus Wanyonyi / Appellant - in person

Miss Matere -For the Respondent

Wilkister .C/A