Waweru v Republic (Criminal Appeal E013 of 2021)
[2024] KEHC 1008 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1008 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E013 OF 2021

RM MWONGO, J

FEBRUARY 8, 2024

BETWEEN

DEDAN BUNDI WAWERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of Hon. M.Kivuti (Senior Resident Magistrate) at Baricho on 15th September 2021 in Baricho Criminal Case Number 7 of 2020)

JUDGMENT

1. The trial court convicted and sentenced the appellant to 20 years imprisonment for defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. Dissatisfied with the judgment, the appellant appealed against both the conviction and sentence on the grounds that:

    1. The learned magistrate erred in law and fact in finding that the appellant was the perpetrator of the offence by making a general conclusion that the appellant was properly identified since the accused was known to the complainant.

    2. The learned magistrate erred in law and fact in failing to consider the appellant's *alibi* defence that he was in Murang'a county where he had gone to visit his aunt and that he returned home on 15th February, 2020 and finding that the *alibi* defence was an afterthought.

    3. The learned magistrate erred in law and in fact by convicting the accused and passing sentence against the appellant while the prosecution had failed to discharge the burden of proof as by law required.

    4. The learned magistrate erred in law and in fact in failing consider the mitigation tendered by the appellant during sentencing and imposing a harsh, oppressive and excessive sentence.

2. The state opposed the appeal.

3. Parties filed written submissions which were essentially as follows

Appellant's Submissions

As to whether the appellant was properly identified

4. The complainant testified that she was walking on the main road when a man wearing black clothes and had a scarf wrapped around his face leaving his eyes only visible. She further testified that the man dragged her to the bush and he was joined by another man that she has seen earlier in the first corner. She testified that she was able to recognize the assailant when the scarf fell off his man. She did not give sufficient details as to how she was able to identify the accused. She testified that she was attacked by two men and no evidence was produced by the prosecution that there was ever a search for the other assailant.

5. There was no other witness during the commission of the act who saw the accused committing the act and therefore the evidence of the complainant was uncorroborated.

6. Section 124 of the *Evidence Act* provides that;

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

7. The appellant submits that in the case of *Julius Kiunga M'birithia v Republic* [2013] eKLR the court held as follows;

> " Similarly, for a conviction to ensue under the proviso to section 124 of the *Evidence Act*, the trial magistrate must be satisfied that the child is telling the truth, and record the reasons for that belief. Accordingly, under the proviso, there is a sense of caution on the part of the trial court when convicting on the evidence of a single minor witness. "

The trial court failed to consider the appellant's *alibi* defence

8. The Appellant gave unsworn statement that on the alleged day of the incident on 9th February, 2020 he had travelled to Murang'a to visit his aunt and that when he returned on 15th February, 2020 his grandfather, Harrison Gachoki advised him that he had been reported at the police station and they later went to the complainant's home when they had a meeting with the complainant's parents, The court while convicting the appellant stated that the defence of *alibi* was an afterthought. The learned magistrate did not consider the defence of *alibi* raised by the appellant against the prosecution evidence adduced and only made a general finding that the same was an afterthought.

The trial court failed to consider the mitigation tendered by the appellant

9. The court sentenced the appellant to twenty years in prison which is the maximum term provided under Section 8(3) of the *Sexual Offences Act*. The Court did not consider the mitigation raised by the Appellant and that he was a first-time offender had went on to impose the maximum sentence which was a harsh sentence.

Respondent's submissions

Whether the Appellant/applicant was positively identified

10. The respondent submits that from the evidence of PW1, JWK, then aged 14 years that she was on her way home on the 9th February 2021 at about 6pm when he met up with the appellant.

11. It was her evidence that she was coming from Runda Shopping Centre while walking on the main road. She entered a short cut with bushes when she sighted the man seated on the edge of the road. She bypassed him without uttering a word. She met another man who emerged from the bush and had covered his face with a scarf but leaving his eyes visible.

12. He grabbed her and covered her mouth while he dragged into the bush and he was then joined by the person had bypassed. The one who had covered his face removed her trouser and started defiling her. The scarf fell off while facing her and she saw his face clearly and I saw his face very well. She had seen him severally within Runda Shopping Centre and once visited her brother Zakayo Munene who was his classmate at Kiaga Secondary School.

13. According to the respondent, the evidence of the complainant was firm and unshaken during cross examination.

14. Accordingly, the state submits that the appellant was positively identified.

Whether his {{term{refersTo |title a claim or piece of evidence that one was elsewhere when an act, especially a criminal one, is alleged to have taken place.} alibi}} defence was ignored

15. The Appellant gave sworn statement and never called any witness. The appellant stated that on the material day, he was in Muranga County and never called any witness to confirm and collaborate his evidence.

Whether Prosecution failed to prove its case beyond reasonable doubt

16. The prosecution was able to prove the following items conclusively.

    a. The age of the Complainant.

    b. The identity of the Appellant/Applicant.

    c. Actual penetration.

Whether the sentence was harsh and excessive

17. The Appellant was sentenced to serve 20 years from 15th September 2021. According to the state Section 8(1) as read with Section 8(3) states as follows.

> " A person who commits an offence of defilement with a child is guilty of an offence termed defilement"

18. Further, the state argued that Section 3(3) provides the penalty as follows:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

19. The respondent submit that the appellant has not challenged the mandatory sentence.

20. This court as the first appellate court is obliged to review the entire evidence on record and to come to its own conclusions taking into account the fact that it did not hear the testimony or see the demeanour of witnesses

21. The evidence on record was essentially as follows:

22. PW 1- JWK: The complainant testified that she was walking on the main road when a man wearing black clothes and had a scarf wrapped around his face leaving his eyes only visible. Further, she testified that the man dragged her to the bush and he was joined by another man that she has seen earlier in the first corner. She testified that she was able to recognize the assailant when the scarf fell off the face off the man as he defiled her. They walked away after defiling her. She went home but did not inform anyone. She was taken to Sagana Sub-County Hospital the next day for medical examination.

23. In cross-examination, she confirmed that she knew the accused person as he had visited her brother at home.

24. PW2- Leah Wangu testified that she was a clinical officer at Sagana Sub County Hospital. She examined the complainant who complained of being defiled by a person known to her. Her hymen was freshly broken and she had bloody discharge from her vagina. There was laceration at the vulva. She filed the complainant's PRC form on 10/02/2020. She produced the P3 Form and PRC as exhibits Pexh1 and Pexh2.

25. PW2 concluded that there was penetration due to the freshly broken vagina.

26. PW3- LW: testified that the complainant (PW1) was her niece. PW1 informed her that she had been defiled by Bundi, her neighbour. She took the complaint to Sagana Sub-County Hospital where they were advised to report the matter to the police.

27. They were issued with a P3 Form at Sagana Police Station, and returned to the hospital where she was examined. The doctor confirmed that PW1 had been defiled. She knew the accused as her neighbour. The complainant's birth certificate was marked as MFI 3.

28. In cross-examination, she said that the complainant had refused to identify the accused as she was scared.

29. PW4 PC Fredrick Okello: testified that he took over the filed from PC Nicholas Musyoka on 22/7/2020, who had been transferred to Kiambu County. He acquainted himself with the file. He noted that the complainant was born on 13/03/2006. He produced her Certificate of Birth as an exhibit- Pexh3.

30. The Defence Case was made up of the unsworn testimony of the Appellant. In his statement he said that on the alleged day of the incident on 9th February, 2020 he had travelled to Murang'a to visit his aunt and that when he returned on 15th February, 2020 his grandfather, Harrison Gachoki advised him that he had been reported at the police station and they later went to the complainant's home when they had a meeting with the complainant's parents. He was later arrested by the village headman and taken to Kimaciri Police Station.

Issues for Determination

31. The following are the issues that this court finds necessary for determination.

1. Whether the Appellant/applicant was positively identified and the evidence properly corroborated.

2. Whether the appellant's defence of *alibi* was ignored by the trial court.

3. Whether the trial court failed to consider the mitigation tendered by the appellant

Analysis and Determination

32. The charge against the appellant is defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on the 9th February, 2020 at Mwea West sub-county within Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate the vagina of J.W.K, a child of 14 years.

Whether the Appellant was positively identified and the evidence properly corroborrated

33. The evidence of PW1 was that she was able to recognize the appellant when the scarf fell off his face. Further, she said she had seen the appellant on several occassions within Runda Shopping Centre and henonce visited her brother Zakayo Munene.

34. The appellant submitted that the complainant testified that she was attacked by two men and no evidence was produced by the prosecution that there was ever a search for the other assailant. There were no other witnesses during the commission of the act who saw the accused committing the act and therefore the evidence of the complainant was uncorroborated.

35. The appellant argued that Section 124 of the *Evidence Act* provides that if the only evidence is that of the victim then the court can convict subject to the court being satisfied of the truthfulness of the victim's evidence. The presumption is that in such situation there will be no other direct evidence to support the victim's allegation that a sexual offence has been committed.

36. The fact that the appellant had covered his face with a scarf is suggestive that he did so because the complainant knew him. In the meantime, his partner had not covered his face and did not participate in defiling the complainant, nor did she know him.

37. I find nothing in the evidence to suggest that the complainant was unable to identify the appellant as her defiler. The question, therefore, is whether the complainant's evidence, without corroboration, could properly be relied upon by the trial court.

38. The general position in law is that where the only evidence against an accused person is that of a single identifying witness, the court should exercise great care in relying on it.

39. Sedction 19 of the *Evidence Act* provides:

> "(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance withsection 233 of the Criminal Procedure Code

(Cap. 75), shall be deemed to be a deposition within the meaning of that section.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment".

40. In addition, Section 124 of the *Evidence Act* provides that;

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

41. Thus, where the evidence is that of a child of tender years, it must be corroborated. In *Njoki v Republic* [1988] eKLR

> " ...a child of tender years seems to us to be a child who is legally immature and incapable of being responsible for own actions. According to section 14 (1) of the *Penal Code* all children under the age of eight years are said to be immature, are not a criminally responsible for any acts or omissions. Such persons can in our view be properly said to be children of tender years. It is therefore our view that section 124 of the *Evidence Act* only applies to children under the age of 8 years upon whose uncorroborated evidence no conviction can be based. We also believe that other considerations ought to be applicable to children who are not of "tender years".
>
> In the case before us, the complainant was aged about 12 years. He was therefore not a child of "tender years" whose evidence required corroboration as a matter of law. In our view however as he was not over 14 years age and his evidence still needed corroboration as a matter of practice and the court must caution itself on the dangers of convicting on uncorroborated evidence of such a child (as against a child of tender years) before acting on such evidence." (Emphasis added).

42. In the case of *G D B v Republic* [2017] eKLR Chitembwe J stated:

> " Section 124 does not require that the other evidence must be that of an eye witness. Who in his sane mind would defile a child in public or in the presence of witnesses?"

43. In this case the complainant was 14 years old and is therefore not a child of tender years. Accordingly, section 124 does not, strictly, apply to the facts of this case.

44. Was there any other evidence of defilement? Yes. The clinical officer did confirm that on medical examination, she found that the complainant had been defiled; her hymen was broken and there were traces of spermatozoa.

45. As to the evidence of the child, the trial court stated:

> " ... the complainant stated that she recognised the accused when the scarf fell off his face in the process of defiling her....

.....He was properly identified by the complainant and they were not strangers"

46. I do not think that the trial court committed any error in relying on the evidence of the complainant.

Whether the appellant's *alibi* defence was ignored

47. The Appellant in his defence gave unsworn statement that on the alleged day of the incident on 9th February, 2020 he had travelled to Murang'a to visit his aunt and that when he returned on 15th February, 2020 his grandfather, Harrison Gachoki advised him that he had been reported at the police station. Later, they went to the complainant's home when they had a meeting with the complainant's parents. He was later arrested by the village headman and taken to Kimaciri Police Station.

48. The respondent submitted that the appellant stated that on the material day, he was in Muranga County and never called any witness to confirm and corroborate his evidence.

49. The trial court held that the defence of *alibi* was not introduced during trail to enable the prosecution call for further evidence or investigate the case further.

50. It was held by the Court of Appeal (Azangala, Gatembu and Kantai, JJA.) in *Kossam Ukiru v R.* (2014) eKLR that:

> " the defence of *alibi* may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established."

51. In addition, Section 309 of the *Criminal Procedure Code* provides that:

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

52. The trial court held that the *alibi* defence was an afterthought and proceeded to dismiss it. In the case of *Erick Otieno Meda v Republic* [2019] eKLR it was held:

> " In order to dislodge the *alibi* defence, the prosecution should have led evidence to place the appellant at the scene of crime between 2.00 pm and 4.00 pm. In the absence of such evidence, the *alibi* defence is probable and casts doubt on the prosecution case."

53. A defendant wishing to rely on a defence cannot suddenly say: I was intoxicated; or mentally incapacitated or, was not at the scene, and expect to be believed without supporting evidence which can be tested. Here, not only was there no evidence of *alibi*, but there were no questions by the appellant in cross examination of prosecution witnesses that tended to suggest he was not at the scene.

54. In this case, I therefore agree with the trial court that the assertion of the defence of *alibi* was made in the defence statement at defence hearing. There was no opportunity for the state to lead evidence on the issue of *alibi*, as it was raised at the last minute. The defence was thus asserted as an afterthought.

Whether the trial court failed to consider the mitigation tendered by the appellant.

55. The appellant did not attend court on 15th September when the judgement was read. The record clearly shows that the judgement was delivered in camera in the absence of the appellant. The court issued a warrant for his arrest.

56. The court then went straightaway into meting sentence. Hence, the appellant did not tender his mitigation before he was sentenced. He was sentenced to 20 years imprisonment and his cash bail of Kshs 20,000 forfeited to the state.

57. The court did not give reasons for reading the judgment in the absence of the accused. The appellant was not given a chance for mitigation before sentencing. Hence, to that extent, the trial court violated his right to fair trial.

58. In *Republic v Wilfred Lerason Tapukai* [2021] eKLR Bwonwonga J stated:

> "First, the succeeding magistrate should have read the judgement in open court in the presence of the respondent. This would have enabled the respondent to know the reason upon which his conviction was based. Second, the succeeding magistrate should have set aside the order on sentence so as to give the respondent the opportunity to mitigate before being sentenced."

59. The failure to give the appellant an opportunity for mitigation flies against the authority in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR that a person's right to mitigation is sacrosanct.

Conclusion and disposition

60. In light of all the foregoing, the only element of the trial court's judgment that I consider to have been improper was the delivery of the judgment and sentence in the absence of the accused. The proceedings at the time of reading of the judgment show it was done "in camera".

61. There is nothing in the record of proceedings to explain the trial court's decision to deliver the judgment in camera, and to immediately mete sentence both in camera and in the absence of the accused.

62. Accordingly, I would allow the appeal on sentence and do hereby set aside the sentence. I further direct as follows:

    a. The appellant shall forthwith be sentenced afresh by the trial magistrate, and if not available due to transfer, by the Magistrate in-charge at Baricho Court.

    b. Prior to sentencing, the appellant shall be given a full opportunity to tender his mitigation, with a counsel if he so chooses.

63. In all other respects the appeal fails and is dismissed.

64. Orders accordingly

DELIVERED AT KERUGOYA THIS 8TH DAY OF FEBRUARY, 2024

.....

R MWONGO

JUDGE

In the presence of:

Dedan Bundi Waweru the Appellant - Present at Nyeri Maximum Prison

Ndungu - holding brief for Makworo for Appellant

Mamba for the State

Murage, Court Assistant