Wanjiru v Republic (Criminal Appeal 1 of 2019)
[2024] KEHC 1460 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 1 OF 2019

AK NDUNG'U, J

FEBRUARY 7, 2024

BETWEEN

ROBERT MAINA WANJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 39 of 2018– L Mutai, CM)

JUDGMENT

1. The Appellant in this appeal, Robert Maina Wanjiru was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. On 25/01/2019, the Appellant was sentenced to ten (10) years imprisonment.

2. The particulars were that on 24/06/2018 at around 0430 hours in Laikipia Central Sub-County within Laikipia County intentionally and unlawfully caused his penis to penetrate the vagina of FWN a child aged 16 years.

3. Being dissatisfied with the conviction and the sentence, the Appellant appealed to this court challenging the conviction and the sentence vide a petition of appeal filed on 08/02/2019. He filed amended ground of appeal accompanying his submissions and sought leave of this court pursuant to Section 350(2)(v) of the Criminal Procedure Code. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred in convicting the Appellant without appreciating that penetration of the complainant was not corroborated by medical evidence.

    ii. The trial court failed to accord the Appellant the defence provided under section 8(5) and 8(6) of *Sexual Offences Act*.

iii. The trial court erred by failing to accept his unequivocal plea of guilty which showed his sincerity having been found in company of the minor.

iv. The learned magistrate erred by failing to guide him on his constitutional rights to challenge evidence by cross examination as provided under Article 50(2)(k) of *the Constitution*.

v. The learned magistrate erred sentencing him to 10 years imprisonment without considering his mitigation.

4. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the medical evidence exonerated him since the doctor did not find proof of penetration and the court failed to invoke Section 124 of the *Evidence Act* which states that the evidence of a victim of sexual offences is admissible even without corroboration as long as the court record the reasons for believing the victim. That according to the doctor's report, there was no proof of penetration on the material day he was arrested in company of the complainant. The doctor's evidence was more credible than that of PW1 evidence whose character was questionable and therefore susceptible to lie. He urged the court to adopt the doctor's' report and quash the conviction. Further, PW1 was a person of questionable character who was behaving like an adult as she would sneak to men's houses on her own.

5. He submitted that the age assessment report was not challenged by cross examination and it was not produced by its maker hence, it was not validated. That he was naïve on legal matters and the trial court failed to promptly inform him of his right to legal counsel and he was not warned of his failure to cross examine witnesses which is his right to fair trial as provided under Article 50(2)(k) of *the Constitution* and he was not warned that failure to cross examine witnesses weakened his case since the false evidence remained uncontroverted. Therefore, he was not accorded a fair trial. Further, the court went ahead to convict him despite the fact that medical evidence exonerated him and any matter of earlier defilement of PW1 by Appellant was hearsay evidence.

6. In rejoinder, the Respondent's counsel submitted that the Appellant's amended grounds of appeal which were filed without leave of the court should be disregarded in accordance with Section 350(2) of the Criminal Procedure Code. Therefore, the submissions on alleged violation of Article 50 of *the Constitution* are irregular and ought to be disregarded since it was not raised in the initial petition of appeal. Further the charge sheet was not duplex as alleged by the Appellant in his initial petition of appeal since he was charged under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* with Section 8(1) being the definitive of defilement and 8(4) prescribing the punishment.

7. As to the age assessment report, the counsel submitted that the age assessment was produced procedurally by PW6 who produced it on behalf of the maker who was on annual leave and when the prosecution applied for PW6 to produce it, the Appellant did not raise any objection, hence, he cannot take issue with its production. Further, the age of the complainant was corroborated by PW2 and PW5. As to penetration, she submitted that PW5 stated that there was no evidence of penetration and based his conclusion on the fact that there were no spermatozoa and that the hymen was old broken however, medical evidence is not mandatory to prove penetration in line with section 124 of the *Evidence Act*. That there was no doubt in PW1's mind on what had transpired and the P3 form was filled a day after the incidence. Appellant had defiled the complainant on other occasions which explained the old broken hymen. The counsel argued that the fact that PW5 did not find proof of penetration could not dispel the evidence of PW1.

8. As to the defence under Section 8(5) of the *Sexual Offences Act*, she submitted that the evidence revealed that the complainant was a class 8 pupil and a neighbour to the Appellant therefore, the Appellant knew the complainant was a pupil. That in his defence, he did not allude to any steps he made to

establish the age of the complainant and never cited any conduct on the part of the minor that suggested that she was an adult. That he admitted in his defence that he had sex with the complainant on the material night before they were interrupted which falls within the definition of penetration which states that even partial penetration is sufficient to prove the offence.

9. On the sentence, she submitted that the Appellant did not cite any circumstances that would have attracted leniency. That the aggravating factor was that the Appellant was a neighbour and he had a social duty to ensure that the minor was not violated. Further, he had defiled the complainant on previous occasions. She submitted that sentencing is a discretion of the trial court and the appellate court can only interfere when there is evidence that the discretion was exercised injudiciously, was manifestly harsh or court omitted to consider material factors and the Appellant did not allude to any of those factors therefore, the sentence meted out was justifiable.

10. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

11. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

12. The evidence before the trial court was as follows. The complainant testified as PW1. She stated that on the material night while asleep, she felt a stick being pushed between their timber house. She went out, relieved herself and somebody took her by her hand and led her to a house. He laid her on the bed and removed her pants. He wore a shirt, coat and inner wear. It was the Appellant who was their neighbour and she was able to see him since his house was well lit with electricity. The Appellant pushed his thing for urinating between her legs and pushed it inside her thing for urinating. They had sex. Her father found her in the Appellant's house and the Appellant was arrested. She stated that the Appellant had defiled her before and he was warned by the village elders.

13. On cross examination she maintained that the Appellant had defiled her before and that she never used to go to the Appellant's house since her mother had warned her and she never sent her brother to the Appellant.

14. PW2 was the complainant's father. The court did not indicate whether the testimony was unsworn or whether the witness was sworn, but what is evident is that the witness was not sworn. He simply proceeded to give his statement. This was in violation of Section 151 of the Criminal Procedure Code which states inter alia that every witness in a criminal cause or matter shall be examined upon oath. Therefore, his statement is worthless.

15. PW3 was the village elder. He testified that he was called by the Assistant chief to go to the scene in his neighbourhood where he found the accused brother and the complainant's father. The Appellant's house was locked from outside. Police arrived and opened the house where the Appellant and the complainant were. They were taken away by the police.

16. PW4 was the investigating officer. He testified that he was informed of the incidence by the assistant chief. He went to the scene and the Appellant was arrested while in his house in company of the complainant. He established that the Appellant had defiled the complainant there before. He stated that the complainant's home neighbours the Appellant's house. On cross examination, he stated that the complainant informed him that it was the Appellant who went for the complainant on the material night.

17. PW5 was the clinical officer who examined the complainant. He testified that on examination, the genetalia was normal, there was no discharge or bleeding and the hymen was broken. Urinalysis and other tests were negative, there were no presence of spermatozoa. The complainant revealed that she was in a relationship with the Appellant for one year. He testified that his findings were that there was no proof of sexual intercourse due to normal genetalia and the absence of spermatozoa. The hymen scar was also old. He stated that he examined the complainant a day after the incidence and there was no evidence that the complainant had been defiled on the material date. He further stated that if one had sexual intercourse today and examined a day after, one would tell that there was such intercourse. He produced the P3 and PRC form as Exhibits

18. PW6 though listed as PW5, Tony Juma was a medical doctor from Nanyuki Teaching and Referral Hospital. He produced the age assessment report on behalf of a colleague who was on annual leave. He stated that he had worked with the doctor for five years and stated that he was conversant with her signature. He testified that the complainant was found to be about 15 years old. He produced the age assessment certificate as Pexhibit3.

19. The Appellant in his unsworn defence, denied committing the offence. He stated that the complainant had been warned from going to his house and on the material night, she was the one who went to his house and demanded for sex. He refused and warned her. She insisted and when they started, he heard her father calling out for her. He explained that the complainant took herself to his house and insisted on having sex with him. He stated that he was set up by the complainant and her father.

20. That was the totality of the evidence before the trial court. The Respondent's counsel raised a preliminary point of law in that the Appellant did not seek leave to amend his petition of appeal in line with section 350(2) of the Criminal Procedure Code and urged the court to disregard the Appellant's amended grounds of appeal. The said section provides that;

> "A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:"

21. The Appellant in his written submissions informed the court that he wished to amend the earlier grounds of appeal and prayed for the leave of the court pursuant to section 350(2)(v) of the Criminal Procedure Code which states that;

> "(v)notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court."

22. The Appellant sought leave to amend the grounds though he did not argue the application in court. I will therefore, consider the amended grounds raised in the submissions as this is a procedural technicality. Article 159(2) (d) of *the Constitution* provides:

> "Justice shall be administered without undue regard to procedural technicalities."

23. Moving on, it is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

24. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

25. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

26. In the present appeal, the Appellant position is that the age of the complainant was not proved to the required standard on account that the age assessment report was not produced by the maker and it was not challenged on cross examination.

27. As per the record, the charge sheet indicated that the complainant was 16 years. PW5 testified that the complainant was 15 years old. PW6 produced the age assessment report that indicated that the complainant was approximately 15 years old.

28. It is trite law that in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense (see the case of Thomas Mwambu Wenyi v Republic Criminal Appeal No. 21 of 2015 [2017])

29. What emerges is that whilst the best evidence of age is the birth certificate followed by age assessment, other evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. In the instant case, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as 15 years. The Appellant had no objection of the production of the age assessment by PW6 who produced it on behalf of Dr Macharia. PW6 testified that he had worked with the said doctor for a period of 5 years and was conversant with her signature. It therefore follows that the age assessment report was procedurally produced and therefore there was proof that the complainant was a minor.

30. As to penetration, the Appellant submitted that the same was not proved as the complainant's evidence was not corroborated by the medical evidence. Further, the trial court failed to invoke Section 124 of the *Evidence Act*.

31. The complainant testified that when she went out to relieve herself, someone took her by her hand and led her to a house. He laid her on bed and removed her pants. He wore a shirt, coat and inner wear. It was the Appellant who was their neighbour and she was able to see him since his house was well lit with electricity. The Appellant pushed his thing for urinating between her legs and pushed it inside her thing for urinating. They had sex. Her father found her in the Appellant's house and the Appellant was arrested.

32. PW5 the doctor who examined the complainant stated that her genetalia was normal, there was no discharge or bleeding and the hymen was broken. Urinalysis and other tests were negative and there was no presence of spermatozoa. His findings were that there was no proof of sexual intercourse due

to normal genetalia and the absence of spermatozoa. The hymen scar was also old. The examination was done a day after the incident and there was no evidence that the complainant had been defiled on the material date. He further stated that if one had sexual intercourse today and examined a day after, one would still tell that there was such intercourse. He produced the P3 and PRC form as Exhibits which corroborated his statement.

33. It is apparent from the above evidence that the medical evidence produced by PW5 did not corroborate the complainant's evidence on penetration. The doctor testified that everything was normal pertaining to the complainant's genetalia. Nothing unusual that could have suggested that the complainant was defiled on the material day. He further clarified that even though the complainant was examined a day after the incident, the subsequent examination on the following day would still show that there was penetration.

34. It is however trite law that the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence (see Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported)

35. This is in line with the proviso to section 124 of the *Evidence Act* which provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the trial court believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief. The said section provides;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > 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."

36. To my mind, Section 124 of the *Evidence Act* can only be complied with if the "reasons" are "recorded in the proceedings" indicating that the "Court is satisfied that the alleged victim is telling the truth".

37. I have perused the judgment of the learned magistrate and note that she based the conviction on the fact that it was stated that the Appellant had previously defiled the complainant. The trial court did not address on the findings of the doctor on the defilement that was alleged to have been committed on 24/06/2018 but concentrated on previous allegations that the Appellant had defiled the complainant and relied on that to convict the Appellant.

38. She stated that the fact that the Appellant had previously defiled the complainant was corroborated by the evidence of PW5 who confirmed that her hymen was broken but had old tears. She further held that the fact that PW5 never found something substantial on the material day of examination does not negate the fact that the accused had penetrated the complainant previously since this was corroborated by the fact that her hymen was found to have been perforated.

39. The trial magistrate did not comment on the complainant's testimony but heavily relied on previous allegations of penetration that the Appellant was not charged with.

40. The correct legal position was stated in the case of Chila v. Republic [1967] E.A 722 thus:

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

41. It is therefore my findings that since the medical evidence exonerated the Appellant, it means that the medical evidence did not corroborate the complainant's evidence. In such a scenario, the trial court was obliged to treat the complainant's evidence in line with section 124 of the *Evidence Act* and record the reasons for believing that she was telling the truth. This was not done. It therefore follows that penetration was not proved to the required standard.

42. Having found that penetration was not proved, I see no need to delve into other grounds raised by the Appellant. The upshot is that the Appellant's appeal succeeds to that extent.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 7TH DAY OF FEBRUARY 2024.

A.K. NDUNG'U

JUDGE