Wanjiku v Republic (Criminal Appeal E233 of 2022) [2024] KEHC 3573 (KLR) (Crim) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E233 OF 2022

LN MUTENDE, J

APRIL 11, 2024

BETWEEN

ANTHONY KAMAU WANJIKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Sexual Offences Case No. 227 of 2021 at the Chief Magistrate's Court Makadara, by Hon. L.K. Gatheru – SRM on 5th December, 2022)

JUDGMENT

1. Anthony Kamau Wanjiku, the appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 1st day of June, 2021 in Embakasi Division within Nairobi County he willfully and unlawfully committed an act by inserting his male genital organ namely penis into a female organ namely vagina of EWN a child aged 13 years which caused penetration.
2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars of the offence being that on the 1st day of June, 2021 in Embakasi Division within Nairobi County he intentionally touched the vagina of EWN a child aged 13 years with his penis.
3. Having denied the charges he was taken through full trial, convicted and sentenced to serve sixteen (16) years imprisonment.

4. Aggrieved, the appellant appeals on grounds that; the charge sheet was totally defective; there were glaring materiel contradictions as well as inconsistent testimony by witnesses; and the defence put up that was plausible was not rebutted.

5. Briefly facts presented by the prosecution were that on the 15th day of June, 2021, EWN was visited by a friend, F. At about 2-6 pm she escorted her and on her way back she encountered the appellant, an acquaintance who duped her into believing that she was to escort him to collect a sweater from a certain house. Upon arrival at the house he made her sit on a bed and proceeded to forcibly have sexual intercourse with her. She recollected herself, dressed up after the act and went to Jamii Medical Center. The Doctor at the facility called PW2 EWK the complaint's mother, who went to hospital with her father and they were referred to a Health Centre where she was examined and treated. The matter was reported to the Police who arrested the appellant, investigated the case and caused him to be charged.

6. Upon being placed on his defence the appellant denied having committed the offence. He stated that on the 6th day of September, 2021 his mother sent him to collect firewood and on returning home he found her not feeling well. She therefore asked him to go and operate her business of selling chips. That he worked and made Kshs. 1,340 then closed down the business and went to a funeral arrangement planning meeting in the neighbourhood of [Particulars Withheld] Girls School.

7. He explained that on the 1st June, 2021 he spent the day working at his mother's Kiosk and went home at 7.00 pm. That although he knew the complainant's mother as a person who used to buy water from him, he did not know the complainant.

8. The appellant called a witness DW2 DWK, his mother who testified that on the material date, she was unwell hence asked the appellant to make chips therefore he spent the day selling at her kiosk.

9. The Appeal was canvassed through written submissions. It is urged by the appellant, that being charged under Section 8(3) of the *Sexual Offences Act* was a fatal defect the he was charged with a non-existing offence. Reliance was placed on the case of *Omar Nache Uche vs. Republic* (2015) eKLR where the court stated that;

> " Briefly we may pause at the correctness of the charge although it was not raised both at the trial and in this court. The charge cites a non-existent section. In some instances, citing a non-existent
>
> section may be fatal to the prosecution case. The correct way of citing the section ought to have been: "... contrary to section 8(1) as read with section 8(3) ..."

10. That there were glaring contradictions in evidence of the victim who was not truthful; and evidence by other witnesses contradicted what was stated regarding her friend ship with the appellant. That proper investigations were not conducted to establish the actual place of arrest and where the incident was alleged to have occurred.

11. That the plausible *alibi* defence put up was not challenged and the ingredients of the offence were not proved to the required standard.

12. The appeal is opposed by the respondent who submits that the assertion that the appellant was charged under a provision that does not exist in law is unfounded. That having denied the charge and represented by Counsel who cross-examined all witnesses, tenents of fair trial were upheld. Reliance was placed on the case of *Thomas Aluga Ndegwa vs. Republic* (2018) eKLR where the Court of Appeal held that the error caused a miscarriage of justice as baseless.

13. That the prosecution through the six witnesses availed proof of all elements of the charge hence discharging its duty beyond reasonable doubt as provided under Section 107 of the *Evidence Act*.

14. This being a first appellate court, its duty is to evaluate and analyze evidence tendered at trial afresh bearing in mind that it did not have the advantage of seeing or hearing witnesses testify then reach its own conclusion (See *Okeno vs. Republic* (1972) EA 32).

15. An argument is raised by the appellant that the charge as drawn is defective. The manner in which a charge should be drawn is provided by Section 134 of the *Criminal Procedure Code* (CPC) that Provides thus:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

16. Further, the principle of law governing framing of charge sheets was stated in the case of *Sigilani vs. Republic* (2004) 2 KLR 480, thus:

> "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence"

17. The way the statement of the offence is framed is indicated to be contrary to Section 8(1) (2) of the *Sexual Offences Act*, indicating that one sub-section is to be read with the other. The particulars of the offence captured the age of the victim as 13 years. Evidence adduced confirmed that fact. This means that the charge should have been brought under Section 8(3) of the *Sexual Offences Act*. The question to be answered is if the charge was fatally defective as a result. Section 382 of the *CPC* Provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

18. The error was a technicality that cannot result into a conviction being quashed. It is apparent that the subsection is a penalty section and it can be considered so as to ensure an appropriate sentence is meted out. It has not been suggested that the appellant suffered prejudice, in the result that ground of appeal fails.

19. The prosecution is faulted for not establishing ingredients of the offence. Section 8(1) of the *Sexual Offences Act* provides that:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

20. To prove the age, the prosecution adduced in evidence a Birth Certificate. The mother of the child also confirmed that the victim was born on 22nd April 2008 as captured on the Birth Certificate. This was proof beyond doubt that she was thirteen (13) years old at the time. (Also see the case of *Francis Omuroni vs. Uganda*, Criminal Appeal No. 2 of 2000).

21. Penetration is defined by Section 2 of the *Sexual Offices Act* As:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person;"

22. Evidence of the act of coitus having occurred was adduced by a single witness, the victim who narrated how the appellant took her to a single room, forced her to sit on the bed and violated her sexually, she explained that he removed his penis and inserted it into her vagina. That despite her screaming nobody answered and he continued committing the act until 7.00 pm, having gone to the house between 5.00 pm – 6.00 pm.

23. The complainant was seen at Mukuru Health Centre by a Clinical Officer at about. 10.00 pm on the material night. It was established that she had tears at the posterior fourchette and there was presence of blood discharge. The hymen was torn at 3.0'clock and 6.0'clock positions. Vaginal swab conducted showed spermatozoa. The medical evidence adduced corroborated the fact of penetration as accounted by the complainant.

24. On the issue of identification the complainant described her assailant as a friend though not a close friend, a person that he knew too well. In his defence the appellant urged that he knew the complainant's mother and elder sister but not the complainant.

25. Section 124 of the *Evidence Act* Provides that;

> 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.

26. The appellant urges that the complainant was untruthful. The court considered evidence before it in totality and believed the complainant.

27. Contradictions emanated which this court must determine as to whether they were detrimental to the prosecution's case. In the case of *Alfred Twehangane vs. Uganda* Criminal Appeal No. 139 of 2001 (2003) UGCA 6 it was held that:

> " .... with regard to contradictions 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 minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

28. The alluded to contradictions/inconsistencies are that the complainant could not remember what she told the Doctor at the Health Centre yet what she alleged had been recorded verbatim. That the statement she made then contradicted what she told the court.

29. According to the narration of the survivor on the SGBV Medical Summary Sheet when the complainant encountered the appellant, subsequently she found herself naked in a house and Anthony (Appellant) was present. She dressed up and left. What was consistent is the fact of the appellant having been present and well known to the complainant. What was also consistent is the fact of the appellant having been a friend to both the complainant and her sister. The inconsistency was not fatal to the prosecution's case. It was not a contradiction that would create some doubt to the prosecution's case. Similarly, contradictions on the description of the house and whether there was a stool in the house or not; the *locus* in quo having been in the slum area with many houses around where she could have easily been rescued are immaterial as the account was of a single witness. Different accounts of how he was arrested are immaterial for the question of having been arrested is not in the doubt.

30. The appellant put up an alibi defence. He urged that he could not have committed the offence as he was at his mother's kiosk.

31. This was not a defence that was put forward to be interrogated by the prosecution witnesses. In the case of *R vs. Sukha Singh S/of Wazir Singh & Other*s (1939) 6 EAC 145 the court held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

32. The prosecution had the duty of displacing the alibi defence. Although the prosecution did not investigate the alibi that was not put forth at the outset, the appellant stated that he sold chips at his mother's kiosk until 7.00 pm, DW2 alleged that the appellant remained at the kiosk from 7.00 am to 7.00 pm but at the same time claimed to have been sick such that she could not go to the kiosk. The appellant on the other hand alleged that he ferried water in the morning, was sent to various places by his sick mother prior to going to the kiosk after midday. Evidence of DW2 was that her kiosk is situated near "Embakasi Girls" while the complainant said the house they went to was behind "Embakasi Girls". This placed the appellant at the *locus in quo*. The complainant must hence be believed. This evidence actually displaces the alleged *alibi* defence.

33. The sentence for the offence committed against the child aged 13 years is provided for by Section 8(3) of the *Sexual Offences Act* which provides thus:

> 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.

34. The trial court exercised discretion following the jurisprudence that had emerged and sentenced the appellant to serve sixteen (16) years imprisonment. (See *Edwin Wachira vs. DPP* (2022) KEHR 12795 (KLR) and *Joshua Guchuki Mwangi vs. Republic* Criminal Appeal No. 84 of 2015)

35. The appellant herein was twenty (20) years at the time. The presentence report indicate that the appellant did not take responsibility for the offence. For this reason, and looking at the circumstances that transpired, I confirm the conviction but set aside the sentence that I substitute with ten (10) years imprisonment, which will be effective from the date of arraignment, the 8th September, 2021.

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

In the presence of:

Appellant

Ms. Arunga for the Respondent

Mr. Mwangi holding brief for Mr. Mukuna for the Appellant

Court Assistant – Gladys