Njagi v Republic (Criminal Appeal 44 of 2021)
[2024] KEHC 5629 (KLR) (21 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL 44 OF 2021

JN ONYIEGO, J

MAY 21, 2024

BETWEEN

HUMPHREY GITONGA NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Honourable D. W. Mbuteti (RM) delivered on 17th November 2021 in Garissa CM's court S.O. No.40 of 2018)

JUDGMENT

1. The appeal herein was instituted vide a Petition of Appeal filed in court on 15.05.2023 challenging the conviction and sentence in CM's Court at Garissa Sexual Offences Case No. 40 of 2018 where the appellant was convicted of the offence of defilement contrary to section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* and sentenced to serve life imprisonment.

2. The appellant raised four (4) grounds of appeal as enumerated here below:

    i. That the trial magistrate erred in law and fact by relying on the prosecution's evidence without considering that the act of penetration was not proved to the required standard.

    ii. That the trial magistrate erred in fact and law by being influenced with prosecution's evidence from witnesses who were not reliable.

    iii. That the trial magistrate erred in fact and law when he convicted and thereafter sentenced him while the aspect of age was not sufficiently proved by the prosecution.

    iv. That the trial magistrate erred in fact and law by rejecting the appellant's defence of alibi which defence was not displaced by the prosecution.

3. It was his prayer that the appeal be allowed, conviction quashed and sentenced set aside.

4. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the same.

5. The appellant filed his submissions on 15th May 2023 thus submitting that; the element of penetration wasn't proved to the required standards by the prosecution. He argued that the trial magistrate erred when the complainant stated that the appellant placed his 'thing' into her private parts. That it was not outright what 'thing' meant in the circumstances and therefore, the trial magistrate could not be absolutely sure on what the complaint referred to. That he had previously made an application for the matter to start de novo upon the new magistrate taking over the case to no avail.

6. Additionally, he submitted that PW3 did not absolutely state what caused the rupture of PW1's hymen. Further, that it was not established whether the same was fresh or not and therefore, the same made the prosecution's evidence non conclusive. He reiterated that the prosecution witnesses' evidence was not credible as the same was riddled with doubts.

7. That the age of the complainant was not determined and therefore, his sentence was not credible. He cited *inter alia* the case of *Denis Abuya v Republic* Criminal Appeal No. 164 of 2009 to buttress the fact that age of the victim cannot be gainsaid as the same had a bearing towards the sentence to be meted out.

8. On the ground that his defence was not considered, the appellant submitted that the trial court did not give any reason why his defence was not applicable yet the same was cogent. He relied inter alia on the case of *Victor Mwenda v Republic* [2014] eKLR where it was held that the burden of proving the falsity, if at all of an accused person's defence of alibi lies on the prosecution. He prayed that this court quashes his conviction and thereafter set aside the sentence.

9. Mr. Kihara for the respondent on his part submitted in his submissions dated 25.04.2023 that the grounds of appeal raised by the appellant were not merited in as far as they sought to contest the decision by the trial court to convict and sentence him. Reliance was placed on the case of *Hudson Ali Mwachongo v Republic* [2016] eKLR and *Francis Omuroni v Uganda* Criminal Appeal No. 2 of 2000 to buttress the importance of proving the age of the victim of defilement under the *Sexual Offences Act*.

10. Further, that apart from medical evidence, age may also be proved by a birth certificate, the testimony of the victim's parents or guardian or by observation or common sense. According to the respondent, the appeal was not only frivolous but also baseless and therefore ought to be dismissed. On sentence, it was submitted that the sentence invoked by the court was not only legal but also appropriate in the given circumstances.

11. The duty of this court while exercising its appellate jurisdiction (1st appellate court) was set out by the Court of Appeal in *Okeno v. Republic* [1972] EA 32 and re-stated in *Kiilu and another v R* [2005] 1 KLR 174. That duty entails that the court submits the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong legal principles [See *Gunga Baya & another v Republic* [2015] eKLR].

12. PW1, P.W stated that on 03.12.2018 at about 3.00 p.m., she had been sent by her mother to purchase ginger at Baba Kendi's shop. That upon reaching the said shop, she found Baba Kendi, the appellant herein sitting on a chair. She stated that the appellant placed his thing for urinating into her thing and upon finishing, she put on her clothes then left for her home.

13. PW2, RW testified that on the material day, she sent PW1 to the shop to buy ginger and upon returning, PW1 did not tell her of any problem. She stated that PW1's father noticed that PW1 had a problem and upon being asked, she replied that she was feeling pain. She further stated that she did not desire to be dressed in a dress for she feared the appellant putting his hands inside her. It was her evidence that upon prodding PW1, she told her that the appellant had sat her on a chair and then tried to insert his penis into her. That she reported the matter to the police wherein they were referred to the hospital for examination.

14. PW3, Macdonald Kidambi testified that he examined the complainant who was aged 5 years. That he examined and thereafter treated her as she had sustained injuries. It was his evidence that she presented with a ruptured hymen, redness of the vaginal opening and that there were no tears nor bruises. That there was no vaginal revealed discharge and no bleeding was seen. He further stated that high vaginal swap revealed that there was bleeding.

15. He concluded from the evidence that the complainant was defiled and thereafter produced the P3 Form and C-P Card, lab investigation and prescription form as Pex 1 and 2. On cross examination, he stated that there were no tears nor injuries. He however reiterated that the vagina showed some redness thus implying that there was penetration. He stated that the cause of bleeding may not be caused by penis alone. He further stated that the tear was not recent.

16. PW4, Lawi Kiplangat testified that he was the investigating officer in the case herein having taken over from Josephat Ombati who was transferred. He reiterated the evidence of the prosecution witnesses. It was his evidence that PW2 in company of her daughter reported the matter to the police and he issued them with a P3 Form and thereafter accompanied them to Garissa Provincial Hospital. He testified that after examination, he started his investigations leading to the arrest and thereafter charging of the appellant herein.

17. Via a ruling dated 06.11.2020, the trial court found that the prosecution had established a prima facie case against the appellant warranting him to be placed on his defence.

18. DW1, Humprey Gitonga Njagi gave a sworn testimony thus stating that on 18.03.2018, PW2 had an argument with his wife who had alleged that he was in a relationship with PW2 a fact which PW2 admitted. That as a consequence, PW2 threatened that he would retaliate via something that would injure his whole family. It was his evidence that on 03.12.2018 he was in his shop when a child went there after passing Mama Josphine's shop.

19. That the child shouted that she wanted *tangawizi* and so he proceeded to sell her and thereafter watched the child cross the road to Mama Josphine's shop. He was surprised to see police officers in his shop on 4-12-2018 claiming that he had defiled a child. He stated that he was urged to settle the issue by paying PW2 Kes. 150,000.00 which idea he turned down. He blamed the previous investigating officer for trying to extort money from him in order to interfere with the case herein. It was his case that there was no way he could have committed the offence as his assistant, Peninah was present all the while the child was at the shop. He denied ever committing the offence.

20. On cross examination, he stated that the complainant was well known to him as she was his neighbour. He reiterated that PW2 wanted Kes. 150,000.00 in order to settle the case, an idea he did not welcome.

21. DW2, Pius Kirimi stated that on 03.12.2018, the appellant had sent him to buy him goods at a wholesale shop and so he delivered the goods at 3.30 p.m and at that very time, there were customers at the said shop. It was his case that he saw the said girl at the appellant's shop as she wanted some *tangawizi*. That upon passing at the appellant's shop the following day, he was shocked to learn that the appellant had been arrested and charged with the offence herein. It was his testimony that he was

aware that there existed a dispute between the appellant and PW2. Additionally, that he also heard that the appellant had to part with Kes. 150,000.00 if the charges herein were to be dropped.

22. On cross examination, he stated that he took the money from the appellant at 2.00 p.m. in as much as he delivered the goods at around 3.00 p.m. That the girl was unknown to him and that he only saw him once on the very day when she went to the shop seeking to be sold *tangawizi*.

23. DW3, MSA testified that on the very day, she was at the said shop as she had gone to buy cabbage. That as she was waiting for the cabbage to be cut, a young girl arrived seeking to be sold for *tangawizi*. She further stated that the appellant gave the girl *tangawizi* and thereafter the girl left. On cross examination, he stated that on the very day, the appellant's assistant was present and that it was the appellant who sold the girl *tangawizi*. That the boda boda guy was also present at the very time.

24. The prosecution recalled DW1 for cross examination when he stated that DW3 was his neighbour. That when the complainant arrived, he simply sold her the *tangawizi* and then she left. It was his evidence that the complainant did not enter his shop and all the while, Peninah concentrated cleaning the shop. Ms. Okwiri, a counsel watching brief in the matter cross examined the appellant further and the appellant stated that previously, there was a rape allegations arising from the cousin of the complainant and the appellant herein. That the case was heard and thereafter, he was acquitted.

25. The trial court thus convicted the appellant with the offence of defilement contrary to section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* and sentenced to serve life imprisonment.

26. I have considered the grounds of appeal and the submissions by both the appellant and the prosecution. The only issues that arise for determination are; whether the victim was defiled on the material day; If so, who defiled her; Whether the prosecution tendered sufficient evidence to prove its case to the required standards (beyond reasonable doubts).

27. The prosecution under Section 107(1) of the *Evidence Act* bears the burden of proof on every element in a criminal charge beyond reasonable doubt. [See *Woolmington v DPP* 1935 AC 462 and *Miller v. Minister of Pensions* 2 ALL 372-273].

28. The Appellant was charged with the offence of defilement contrary to section 8(1) as read together with Section 8(2) and an alternative charge of indecent act with a child contrary to section 11(1) of the Act. 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."

As it was correctly held in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, the critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

29. The question which needs to be answered is whether the above elements were proved to the required standards.

30. In regards to the age of the victim, the Malindi Court of Appeal in Criminal Appeal No. 504 of 2010 - *Kaingu Elias Kasomo v Republic* held that

> " Age of the victim of the 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."

31. In this case the victim said she was 10 years while the mother said she was six years old. An age assessment report was produced in court and the same showed that the complainant was eight years at the time of examination whereas the alleged offence happened on 03.12. 2018.In the same breadth, PW3 also testified that the complainant was five years old at the time the alleged offence was committed.

32. The age assessment document and the oral testimonies were never controverted nor challenged by the defense. It is my view that the prosecution was able to prove that the victim was a child of tender age. Proof of age need not be exact. In fact, even the court while conducting voire dire examination confirmed that the victim was of tender age such that she did not understand the nature of an oath.

33. As to penetration, section 2(1) defines "penetration" to mean

> the partial or complete insertion of the genital organs of a person into the genital organs of another person.

PW1 a minor aged about 6 years old according to the mother (PW2), she was sent to a shop nearby to buy Ginger.

34. That she proceeded to the appellant's shop where she found the appellant seated on a chair. That the appellant touched her but did not remove her clothes. That the appellant removed her clothes and put his thing in hers. That after finishing she left and went home where she proceeded to shower. She however did not disclose to anybody. She claimed that she disclosed to the mother later.

35. On her part the mother confirmed that when pw1 came back from the shop, she did not disclose anything nor did she notice anything strange. That in the evening, her husband asked pw1 what the problem was with the girl. That is when the complainant allegedly disclosed that she feared putting on a dress as "*baba Kendi*(appellant)" could insert his fingers. That PW1 told her how the appellant tried to insert his penis into her thing.

36. On the other hand, PW3 testified that PW1 was penetrated into as evidenced by her ruptured hymen and also redness of the vaginal opening which meant that there was penetration. The same clinical officer stated that there was no tear nor bruises on her genetalia and that the rapture was not recent. Here is a child aged six years' old who is alleged to have been penetrated by a 42year old man yet there is no tear nor bruise on her genetalia.

37. Nevertheless, PW1's mother in her evidence in chief insisted that her daughter's genetalia was torn. Worse still, pw3 said that the alleged rapture on her genetalia was not recent. What that means, the rapture was not at all connected with the alleged act otherwise it would have been fresh being a day after the alleged incident. The question is, could there have been a tear without bleeding and therefore staining the clothes? Where did the clothes the girl was wearing go if at all there was bleeding? The mother did not observe any blood on her daughter's private parts. In my view, the medical evidence herein was not conclusive enough in so far as the standard of proof of penetration was concern.

38. It is not practically possible for a 42year old man to penetrate into the genetalia of a girl aged six years without causing damage or injury that would have affected even her walking style. In a nutshell, I do not find any sufficient evidence to prove the element of penetration. Having held as such, I am convinced that the offence of defilement was not proven to the required degree. With that finding, am left with the alternative count of indecent assault.

39. The *sexual offences Act* defines the offence of committing an "indecent act" as any unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

40. In the instant case, the only evidence available to connect the appellant with the offence is the testimony of the complainant who gave a detailed testimony on how the appellant inserted his thing in her thing after convincing her to enter inside his shop wherein he closed the door and had her remove her clothes and after the act warned her not to disclose. The trial court did praise the witness for being so brilliant and truthful in her testimony.

41. From her evidence in chief, and vigorous cross examination, she was so consistent that the appellant placed his thing in her thing. The testimony by PW1 was too detailed such that it was not reasonable to conclude that she was couched. It is trite law that under Section 124 of the *evidence Act*, the evidence of a child of tender age can be relied on to convict without calling for corroboration in asexual offence. See the case of *J.W.A. v Republic* [2014] eKLR, where the Court of Appeal observed;

> "We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

42. A similar position was taken in *Mohamed v Republic* [2006] 2 KLR 138 where the court stated;

> "It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

43. The trial court having been satisfied that the victim was honest and truthful, section 124 of the *evidence Act* shall come to play and therefore no need for corroboration. There was definitely some attempt made to penetrate the girl but it was not achieved. That is the reason why there was no partial nor full penetration. By touching the girl on her genetalia with fingers and later placed his penis on her vagina was itself an indecent act. The claim by the appellant that the case was fabricated due to differences between PW2 and his wife is far fetched as it was not raised on cross examination of PW2.

44. The evidence of the defence witnesses was not tallying with the time the victim went to the shop. In any event, the only shop assistant in the appellant's shop one Peninnah who was alleged to have been present did not testify to corroborate the testimony of the appellant. Since the incident was alleged to have taken place inside the shop, it was possible some people including DW1-DW3 may not have witnessed what transpired. In my view, the evidence of PW1 was unshaken and therefore credible in proving the offence indecent assault.

45. On whether identification was proper, PW1 narrated how upon being sent to the shop, Baba Kendi got hold of her, removed his short and then told her to remove hers before telling her to sit on him. From the record, the trial court noted that PW1 demonstrated before the court on how the appellant directed her to sit on him when the appellant inserted his thing into her private parts. It turns out that the appellant and the family of PW1 were neighbours.

46. The same was evident from the evidence of PW1 and PW2; equally, the appellant also conceded the same when he reiterated that he knew PW2 as she was his neighbour and further knew PW1 at least

by appearance. As such, I am of the considered view that the prosecution proved its case beyond any reasonable doubt thus grounds 1,2, and 3 thus fail.

47. On whether the alibi defence of the appellant was considered, the record does not show that the appellant indeed raised such a defence. In the case of *Ali Mkaro Mwero v Republic* (Mombasa Criminal Appeal No. 50 of 2007), it was held that the defence of alibi was an afterthought which could not and should not be considered by the court. Besides, the appellant's defence was time barred because it did not give the prosecution a chance to rebut or cross-examine in order to establish its truthfulness. In my view, I adopt the finding of the above case for the reason that the same was raised as an afterthought. It did not feature during the hearing process and was only raised as a ground of appeal as an afterthought. I proceed therefore to dismiss the same.

48. Although not challenged directly that the sentence meted out by the trial court was harsh, the appellant did submit that the sentence should be quashed and set aside. Section 8 (2) of *Sexual Offences Act* stipulates that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

49. The Court of Appeal in the case of *Evans Nyamari Ayako v Republic* Criminal Appeal No. 22 of 2018 at Kisumu, proceeded to set aside the life imprisonment upheld by the High Court with a sentence of 30 years. The appellant had been charged with the offence of defilement contrary to section 8(2) of the *Sexual Offences Act*.

50. However, having found the appellant guilty of indecent act, the sentence applicable is an imprisonment term not less than 10years. Section 11(1) provides-

    (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".

51. However, courts are no longer bound by the minimum sentences hence a court has discretion on which sentence to mete out.

52. In view of the above finding, it is my finding that the trial court should have convicted on the alternative count instead of the main count. Accordingly, I am inclined to substitute the conviction on the offence of defilement with that of the alternative count of indecent act. To that extent, the sentence of life imprisonment is substituted with that of seven years imprisonment to be calculated from the time of sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2024

J. N. ONYIEGO

JUDGE