Nyakundi v Republic (Criminal Appeal 97 of 2023)
[2024] KEHC 5117 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 97 OF 2023

DR KAVEDZA, J

MAY 6, 2024

BETWEEN

DAVID OMWENGA NYAKUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. A. Mwangi (CM) on 9th May 2023 at Kibera Chief Magistrate's Court Sexual Offences No. 25 of 2016 Republic vs David Omwenga Nyakund)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* (*the Act*). The particulars were that on 06.03.2016 within Nairobi County, he intentionally and unlawfully committed an act which caused his Penis to penetrate the Vagina of MWW, a child aged 13 years old. He was sentenced to serve 20 years' imprisonment.

2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his memorandum of appeal dated 23rd May 2023. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He complained that the vital prosecution witnesses were never called to testify. That the trial court failed to comply with section 200 of the *Criminal Procedure Code*. Finally, the sentence imposed was harsh and excessive.

3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. With the above, I now proceed to determine the substance of the appeal. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the *Act* means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. The prosecution case was as follows. The Complainant (PW1) provided sworn testimony after *voir dire* examination. She told the court that she was 14 years old. She testified that on 06.03.2016, she had gone to her friend's place to watch a movie. On her way back home in the evening, she came across one, Davy, who called her from the fence. She refused to go but they said Davy forcefully pulled her into his house. While in the house, Davy asked her to undress herself and she complied. Davy also removed his trousers and in the words of PW1, had sex with her. During the act, he warned her that should she shout, she would get pregnant. PW1 did not therefore shout, since she was scared.

6. After the act, Davy escorted her to the gate. He immediately saw PW1's grandmother and he took off. PW1 proceeded to the house where she was later confronted by her grandparents, her uncle, and aunty about the incident.

7. In her testimony, PW1 gave clear and graphic testimony of the ordeal. She remained steadfast that it was Davy, the appellant, who took her into his house and subjected her to the act of sexual assault. Besides, the appellant was well known to PW1. He was a neighbour and their gates were next to each other. She confirmed having known the appellant before the incident, as they would often greet each other. I therefore hold that the Appellant is the one who committed the act of sexual assault.

8. PW1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the child was telling the truth. In this case, the trial magistrate recorded in his judgement that PW1's narration of what happened was consistent even on cross-examination by the appellant. It was also his finding that there was no evidence of bad blood or a grudge between PW1 and the appellant that would warrant her to falsely testify against him. As such, PW1 met the provisions of section 124 of the *Evidence Act*. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through.

9. Regarding additional corroborating evidence, the prosecution called JM (PW2), who is PW1's aunt. She recounted that on the material date, she received a distressing call from her father-in-law (PW3) notifying her that PW1 had been escorted by a man to the gate but the man ran away on seeing the father-in-law. PW2 proceeded to her father-in-law's place where she interrogated PW1 about the incident. PW2 recounted the events as narrated by PW1. This account strengthens PW1's assertion that the appellant accosted her along her way home and forcefully pulled her into his house where he sexually assaulted her.

10. Additionally, the prosecution called PMN (PW3), the grandfather to PW1. He recounted that on the material date, PW1 had delayed returning home so he got worried. He, together with his wife, proceeded on a search for PW1. Towards 7.00 pm, they were going back home when they noticed two people who they could not identify. One of them ran away upon seeing him while the other got inside the house. They proceeded home and found that it was PW1 who had entered the house. They confronted her about what happened but she refused to tell them. Later, a neighbour was called and she persuaded PW1 to open the door to her room. She narrated that it was PW1 who had entered the house. This account corroborates PW1's testimony that the appellant was the perpetrator.

11. The prosecution also called Simon Nzamhu (PW4), a clinical officer at Nairobi Women's Hospital, who produced the medical report on behalf of Dr. Caro Nthiwea, his colleague. He stated that when

PW1 was examined on 07.03.2016, there was a whitish dry semen on the external genitalia. Urinalysis was further conducted and it revealed an average of 10 to 15 pus cells, which was higher than normal, and was an indication of an infection. Further examination revealed that the hymen was perforated. Despite finding that no fresh penetration was indicated, it was concluded that the dry semen on the external genitalia was evidence of defilement. The perforation of the hymen was also an indication of loss of virginity.

12. On cross-examination, PW1 clarified that there was no fresh penetration as PW1 was examined a day after the incident. He further added that the bacterial infection could be a result of sexual exposure. The medical evidence as presented by PW4 corroborates PW1's testimony regarding the incident and conclusively proves penetration.

13. On the age of PW1, the trial court considered her testimony that she was 13 years old at the time of the material incident, a fact that was corroborated by her birth certificate. She was born on 12.03.2003, meaning that she was 6 days short of turning 13 years old at the time of the offence. There is therefore no doubt that PW1 was a child.

14. The appellant also complained that section 200 of the *Criminal Procedure Code* was not complied with. However from the record, on 25th November 2021 Hon. A. Mwangi (C.M) took over the matter from Hon. Gandani (C.M). The court explained Section 200 of the *Criminal Procedure Code* (*CPC*) to the applicant and it was indicated that he wished to start the case de novo. However, the court noted that the witnesses who already testified including the complainant testified in 2016 which was about five (5) years prior. At the time, the accused was represented by an advocate. As such, the court declined for reasons that it was not in the interest of justice to start the matter afresh.

15. This Court has previously held that Section 200 of the *Criminal Procedure Code* should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. The Court of Appeal in *Joseph Kamau Gichuki v Republic* held as follows:-

> " This Court has previously held that section 200 of the *Criminal Procedure Code* should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

16. Even though the provisions of section 200 (3) cited above are couched in mandatory terms, it is important to examine the circumstances of each case, whether or not the accused was materially prejudiced, how far the trial had proceeded, whether or not the circumstances of the case would warrant a retrial or an absolute acquittal, and effective utilization of judicial time. In the circumstances, as enumerated by the trial magistrate, the appellant was not prejudiced in the trial continuing.

17. The appellant also contended that crucial prosecution witnesses were not called to testify. However, in his submissions, he failed to submit which specific witness was not called by the prosecution to testify. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an

adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).

18. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.

19. On the sentence, section 8(3) provides that a person who commits an offence of defilement with a child between the age of twelve years and fifteen years is liable upon conviction to imprisonment of not less than twenty years. The prosecution proved that the child was just about to turn 13 years old hence the court imposed the sentence of twenty years imprisonment.

20. However, this court is guided by the Supreme Court's decision in *Francis Karioko Muruatetu another v Republic* [2017] eKLR and the decision of the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR where the court held the mandatory minimum sentences were no longer applicable.

21. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the trial court's sentence in this case was lawful, the appellant, being a first-time offender still has a chance for rehabilitation and a full life ahead. Therefore, the sentence was manifestly harsh and excessive.

22. For the above reasons, I hereby set aside the sentence of twenty (20) years imposed on the charge of defilement and substitute it with a sentence of ten (10) years' imprisonment. The sentence shall be computed from the date when the appellant's bond was cancelled, 24th October 2022.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Gladys Omurokha for the Respondent

Mr. Mark Mwendwa for the Appellant

Naomi Court Assistant