Wasike v Republic (Criminal Appeal 91 of 2023)
[2024] KEHC 5116 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 91 OF 2023

DR KAVEDZA, J

MAY 6, 2024

BETWEEN

BARTHOLOMEW WAFULA WASIKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 29th May 2023 at Kibera Chief Magistrate's Court Sexual offense No. 18 of 2015 Republic v Bartholomew Wafula Wasike)

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 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 14.06.2015 within Nairobi County, he intentionally caused his Penis to penetrate the Vagina of V.W., a child aged one (1) year and eight (8) months. He was sentenced to serve life imprisonment. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.

2. 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 that was before the trial court, and itself 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.

3. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal, the Appellant has raised fourteen grounds of appeal. In a condensed form, the appellant on grounds 1,2,3,5,6,7,8,9,11,13, and 14 complains that the prosecution failed to prove its case beyond reasonable doubt and that the prosecution's case was riddled with hearsay evidence. In ground 4, the appellant complains that his defence was not considered by the trial court. In ground 10, he complains that

the trial court, during sentencing, failed to take into account that he was a first offender. He further complained in ground 12 that material witnesses were not called to testify.

4. 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 called three witnesses to prove its case. CM (PW1), acting on behalf of the victim, V.W., her daughter, testified. V.W., being of tender years and unable to grasp the proceedings, relied on her mother's account. PW1 recounted that on June 14, 2015, she left for work at 2:00 PM, returning at 6:00 PM to find V.W. absent from their home. Upon inquiry, her house help informed her that the child was at Baba Joan's residence, the appellant in this case.

6. Initially unperturbed, PW1 grew concerned as the evening progressed. She dispatched her house help to retrieve the child. Upon arrival, the house help discovered the appellant and the naked child in bed. PW1's daughter entered the room to find the appellant attempting to diaper the child. Assuring them he would return V.W. himself, the appellant handed the child over, who was crying at the time.

7. PW1 examined the child and noticed a sticky whitish discharge beneath the child's diapers observing her swollen vagina, hurriedly sought medical attention at the nearest private hospital. The following morning, PW1 transported the child to Nairobi Women's Hospital for further examination.

8. The prosecution further called John Njuguna, a clinician at Nairobi Women's Hospital (PW2), who produced the medical report concerning V.W., which was prepared by Edwin Ochwang, who was at the time pursuing further studies. He stated that the minor was examined on 15.06.2015. On examination, her genitalia had bruises and pus-like discharge. The hymen was also torn.

9. The evidence of PW2 corroborated the evidence of PW1 who is the mother to V.W., and who testified that when she examined beneath the child's diapers, her vagina was swollen and there was a whitish discharge. It is my finding therefore that penetration was conclusively proven.

10. Regarding identification, it was only the evidence of PW1, which placed the appellant at the scene of the offence at the time it was committed. It was her evidence that the appellant personally handed the minor over to her. She further stated that her house help saw the minor and the appellant in bed.

11. The appellant in his defence intimated that he was not present at the scene at the time when the offence is said to have been committed. He did not dispute the fact that he resided in a room within the same compound where V.W. and PW1 resided, but rather claimed that he was only arrested on 16.06.2015 on false allegations of sexually assaulting the minor.

12. Whether the appellant was present at the scene at the time (or shortly thereafter) the offence was committed or whether V.W. had indeed been left in his custody before the incident is a matter that has been asserted by PW1 but denied by the appellant.

13. However, I see no reason why PW1, would fabricate the charge herein. PW1 and the appellant were neighbours who had resided in the same compound without any history, present or past, of any conflict or disagreement. The two were lovers before the incident, a fact that was confirmed by the investigating officer, PW3.

14. In the circumstances, I find the evidence of PW1 to be more credible, believable, and sufficient to prove that the appellant was at the scene of crime at the time it was committed.

15. It therefore follows that nobody else could have committed the sexual assault against V.W. except the appellant since there was nobody else at the scene before the incident save for the appellant and V.W.

16. The Appellant complains that essential witnesses were not called, including the house help who was sent to pick up the child, and some neighbours. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision of law, 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).

17. It is my finding that given the totality of the evidence, the medical evidence presented and the testimony of PW1 was sufficient to convict the appellant. Therefore, it was not necessary that the said witnesses be called to testify, as their evidence would neither add nor subtract from the prosecution case.

18. On the age of V.W., PW1, who is the biological mother of V.W. testified in court that the child was born on 04.10.2013 and was therefore one year and eight months at the time of the material incident. While PW1 did not produce a birth certificate or any other document to support her testimony, it was settled in *Edwin Nyambaso Onsongo v Republic* (2002) eKLR that age can be proven by the evidence of the parents or guardian. There is therefore no doubt that V.W. was a child within the meaning of the law. The conviction on the charge of defilement in the main count is affirmed.

19. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus:-

> " On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. v Republic*, Criminal Appeal No. 342 of 2008, this Court held,
>
> > " The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.'"

20. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.

21. On the appeal against the sentence, the appellant states the sentence was illegal in the circumstances. He relied on the Court of Appeal decision in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), where the court declared life imprisonment as illegal and unconstitutional and went ahead to substitute the appellant's sentence therein to 40 years imprisonment.

22. The appellant herein was sentenced to serve life imprisonment on the main count of defilement contrary to sections 8 (1) and 8(2) of the *Sexual Offences Act*. Section 8(2) provides that a person who

commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment.

23. However, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.

24. For the above reasons, I hereby set aside the sentence of life imprisonment on the main charge and substitute it with a sentence of thirty (30) years imprisonment. The sentence shall be run from the date of conviction, 29th May 2023.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Ms. Gladys Omurokha for the Respondent

Julius Nyatike for the Appellant

Naomi Court Assistant