Mwaniki v Republic (Criminal Appeal E034 of 2021)
[2024] KEHC 7508 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7508 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E034 OF 2021

SM MOHOCHI, J

JUNE 12, 2024

BETWEEN

JOSEPH MWANIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Joseph Mwaniki together with Julius Ham, on 5th November, 2018 were charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, 2006 in Nakuru CMCC SO 208 of 2018. The particulars of the offence were that on diverse dates between 30th October, 2018 at area Njoro District within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of MN a child aged 15 years which caused penetration.

2. They faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 30th October, 2018 at area Njoro District within Nakuru County, unlawfully and intentionally committed an indecent act to MN a child aged 15 years by touching her genital organ namely vagina with their male genital organ namely penis.

3. On 5th November, 2018 the prosecution sought to amend the charge sheet. The charge sheet was amended and the 2 were charged with Gang Rape contrary to Section 10 of the *Sexual Offences Act*, 2006 on 8th November, 2018. The particulars were that on diverse dates between 30th October, 2019 to 1st November, 2018 at Njoro Sub-County within Nakuru County, jointly and in association with each other unlawfully and intentionally committed an act by inserting a male genital organ of Joseph Mwaniki namely penis into a female genital organ (vagina) of MN a girl child aged 15 years which caused penetration.

4. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 30th October, 2018 to 1st November, 2018 at Njoro Sub-County within Nakuru County, unlawfully and intentionally committed an indecent act to a child namely MN a child aged 15 years by touching her genital organ namely vagina with their male genital organ namely penis.

5. The Appellant and his co-accused pleaded not guilty to the charges and the case went to full trial in which the prosecution called four (4) witnesses.

Prosecution's Case

6. PW1 MN testified that she recalled being in the house alone and the Appellant went and told her about love, called her from home and he took her to his house. He told her to lie down. He forced her to lie on the bed. He told her that he would beat her if she did not comply and she decided to lie down. He removed his trouser, inserted his thing for urinating in her thing for urinating. He then took her to the 2nd accused persons' house and left her there. The 2nd accused told her to fetch her clothes and be his wife. The Appellant too told her he wanted to marry her.

7. That the 2nd accused told her to lie down facing up and she declined. She slept on the chair and the 2nd accused person on the bed, nothing else happened between them. He did not do anything to her. Police found her on the chair although she did not remember the period she was in the house. She stated she never slept with the 2nd accused person.

8. In her testimony, she also stated that while asleep, the 2nd accused person said they go to bed but she declined. He threatened that if she did not undress he would do something bad to her. He pulled her dress and panty and did bad manners to her. He put his thing of urinating in my thing of urinating and when he finished he said he would tell her parents that they should live together.

9. In cross examination by the Appellant, she stated she knew the Appellant who went to their shop told her about love and that he wanted to marry her. He took her to his house and something happened. He carried her to the Appellant's house in a motorbike. Cross examination by the 2nd accused person, she stated that she found him there when the Appellant left her there. He asked her to be his wife. At the time of the arrest, he was present.

10. PW2 Jane Wamaitha, mother to PW1 testified that the victim was 16 years. That on 30th November, 2018 at 9am she left PW1 at home with her grandchild. At noon when she came back, she called out for PW1 and her father stated that she had left. She looked for her but couldn't find her. On 1st November, 2018 while at work, the Appellant came and told her that he had seen PW1 at a man's house. She knew the Appellant as he was a neighbour. She told PW1's elder sister to accompany the Appellant as she lodged a report at Njoro Police station. She knew both the Appellant and the 2nd accused person. They took PW1 to the hospital.

11. On cross examination by the Appellant, she denied knowing of any relationship between them. On cross examination by the 2nd accused person she stated that the 2nd accused was not present when they rescued PW1 and the door was locked from outside and that the Appellant together with PW1 were already at the police station upon his arrival.

12. PW3 Duncan Mungai testified that on 30th November 2018 PW2 told him that PW1 was missing and that if he saw he should take her home. That the girl was not very mentally stable. On 1st November, 2018 the father to PW1 told him that she had been spotted and to go to majengo. He was to stand near the 2nd accused person's house. The house was locked from outside. PW1 was inside. She came out and

told him not to allow the father to beat her. She opened the door. The police came after one hour. The window was open. No one else was in the house.

13. She told him that she was waiting for the 2nd accused person who was not at the scene but did not say what transpired in the house. The police came and broke the padlock and she was taken away. She stated that the Appellant took her to the 2nd accused's house and she identified the Appellant when he went to the scene.

14. PW4 No 11822 Dr. Mutai Kiplesoi a Clinical Officer attached to Njoro Sub-County Hospital testified that PW1 was examined on 2nd November, 2018. He filled the PRC form and noted that she had an infection, white discharge with broken hymen. All other tests were negative. The assailants were taken to hospital all tests came out negative. He produced the PRC form as PEx2. From the P3 form he stated she appeared confused, he observed white discharge and broken hymen. He made a conclusion she was defiled. He produced the P3 form as PEx1. He stated old broken hymen. He said that a freshly broken hymen is inflamed. In this case there was no freshly broken hymen. He produced the lab tests for the Appellant and the 2nd Accused as PEx4 and PEx3 respectively.

15. PW5 was No 101354 Naomi Kinaya stated that on 1st November, 2018, she received a report that a child had disappeared from home and a missing child report was made. On 1st November they were told that the child had been sited. The child was found in the 2nd accused's house. PW1 stated that the Appellant took her to the 2nd accused house. She was taken to hospital and it was noted that she was defiled. The 2nd accused was taken to the station by a group of people. The child stated that she was defiled by the Appellant and later by the 2nd accused. She took the police to the house of the 2nd accused and stated that she was defiled on the bed. PW1 was 14 years, he produced the clinic card PEx2. The Appellant presented himself at the station. The landlord confirmed the house belonged to the 2nd accused.

16. At the close of the prosecution's case, the trial Court put the Appellant and his co-accused on their defense. They gave sworn evidence and called no witnesses.

Defence Case

17. DW1, Joseph Mwaniki, the Appellant testified that on 1st November he was at work at AIC stage. While taking a customer to Majangwa he met a crowd where PW1 was among them. The child identified him by name. He dropped the customer and proceeded to the police station where he was apprehended and charged in Court on 5th November, 2018. He said the father to PW1 is the bodaboda chairman and he had not paid August 2018 fees. In cross examination he stated that he did not know the victim before that date and did not defile her.

18. DW2 Julius Ham stated that on 1st November, 2018 he left for work in the morning and on returning at 5pm, 5 people assaulted him and did not know the reason for the assault. He was taken to the police station where he found the Appellant and PW1. PW1 informed the police that he did not defile her. That the investigation officer was not able to verify the home belonged to him. He had not seen the child before.

19. By judgment dated on 23rd September, 202, the 2nd accused person was set at liberty as Appellant was convicted of the offence of defilement.

Pre-Sentence Report

20. A Pre-Sentence report was prepared by one Dorothy Ngigi, Probation Officer, on 25th November, 2010. From the victim's sentiments, the Appellant was the one who took her to the 2nd accused's house

and she also said that it was the Appellant who rescued her. She claimed to be the Appellant's lover something which was not proved. That the victim was found resting in the 2nd accused's house. On conducting a social enquiry from the village elder Leah Wambui, she stated that the victim had fallen for the Appellant and wanted him to marry her. That the victim's family is well known to her and the incident was not happening for the first time. The victim had been defiled several times and they would settle it at home over money. She believed that the Appellant suffered as he had no money. The area chief said he did not have much to say as he barely knew the accused but suspected jealousy from the father of PW1.

21. She concluded that the Appellant had a good record in the community and had been in the community during the time he was on bond. As for the victim who was then 18 years, she noted that the victim was a special needs child, who had never attended school but could communicate and understood everything. The parents wanted justice for their child and the Appellants family believe he was innocent.

22. The Court sentenced the Appellant to 20 years imprisonment.

The Appeal

23. Being dissatisfied with the decision of the trial Court, the Appellant preferred this Appeal against the conviction and sentence. He argued the Appeal in terms of the amended grounds of appeal filed on 11th November, 2021.

    i. That the learned trial magistrate erred in law when he failed to note that all the evidence adduced during the trial was false.

    ii. That the learned trial magistrate erred in law when he made a decision without conducting *voire dire*.

    iii. That the learned trial magistrate erred in law when he failed to note that prosecution did not prove the age of PW1.

    iv. That the learned magistrate erred in law when he relied on the prosecution's evidence and disregarded the Appellant's evidence adduced before Court.

    v. That the learned trial magistrate erred in law when he rejected the Appellant's defence in his sworn testimony.

24. The Court on 21st June, 2023 directed parties to file written submissions. The appellant filed his submissions dated 6th October, 2023. The prosecution filed submission dated 25th March, 2024.

Appellant's Submissions

25. In written submissions the Appellant combined the first three grounds of appeal. He argued that he was the one who took the parent of the victim to the house of the 2nd accused person but not the one that defiled her. On the issue of age, he submitted that there were varying testimonies as to the age of the complainant and relied on the authorities in *Peter Maina Njeri v Rep* 2106, *John Otieno Obwar v Republic* [2011] HCCRA 34B of 2010 and *Uganda v Joseph Mulindwa* 1975 HCB 2016 where the Courts held that age is a crucial factor and has to be proved by the prosecution

26. On the issue of voir dire, the Appellant submitted that it is a requirement for *voire dire* to be conducted before a minor gives evidence which was not the case. He added that PW3 stated that PW1 was not very mentally stable and *voire dire* was necessary.

27. He also questioned how possible it was for him to defile the victim then take the victim to another person's house then take the mother of the victim to the person's house and all that happened not at night. He argued that he took himself to the police station instead of running. He brought to the Court's attention to the testimony of PW1 where she said she was defiled by the 2nd accused person and then again said she was not defiled by the 2nd accused person. He argued that PW1 was not a credible witness he relied on the decisions in *Tekerali S/O Karongosi & 4 others v Rep* [1952] 19 EACA 259 as quoted in the case of *John Mutuku Kikuma v Rep* [2021] eKLR as well as the decision in *Paul Ndogo Mwangi v Rep* [2016] eKLR.

28. He then combined grounds four and five to submit that on the issue of sentencing he asked the Court to review the trial Court's sentence and give him a lesser sentence. He as well asked the Court to acquit him. He relied on the *Phillip Mueke Maingi & others v Rep* [2022] HC Pet No E017 of 2012 case and asked the Court to evaluate the trial Courts evidence and lower the sentence.

Respondent's Submission

29. The Respondent through Ms. Jackie for the state submitted on 5 issues. Firstly, that the age of the victim was proved by PW4 who produced an immunization card which stated the victim was born on 3rd June, 2003 placing her at 15 years at time of the offence. The age was corroborated by PW2. Reliance was place in *Mwalango Chichoro Mwajembe* [2016] to demonstrate that the age was proved under the required standards.

30. Secondly on identification, it was submitted that the Appellant was well known to the PW1 and PW2 as neighbours and customer and the evidence of recognition was presented. The Appellant was identified by name. Thirdly that the failure to conduct *voire dire*, the complainant did not fall under the definition of children of tender years under the provisions of Section 19 of the *Oaths and statutory Declarations Act*. Further in the decision in *Maripett Loonkomok v Republic* [2015] eKLR the Court held that *voire dire* in children of tender ages must be conducted but failure to do so does not per se vitiate the entire prosecution's case. It was the Respondent's argument that the victim being 15 years was not a child of tender years and that the Appellant was not prejudiced since he cross examined her.

31. As to whether the defence was considered, she submitted that the trial Court concluded that the defence did not cast doubt on the prosecutions case which means it was considered. Finally on the issue of the sentence, she submitted that the sentence was awarded considering the nature and circumstances of the offence, mitigation and the pre-sentence report. That it was not awarded in mandatory terms and that it was a lawful sentence. She urged the Court to dismiss the appeal for want of merit.

Duty of the Court

32. The duty of the first Appellate Court is to carefully and critically examine and analyze afresh the evidence presented in the trial Court and draw its own individual conclusion on the evidence. (See *Pandya v Republic* [1957] EA 336).

33. This Court is equally alive to the fact that it has not heard or seen the witnesses who testified in the subordinate Court.

Analysis and Determination.

34. I have refined the issues into two categories firstly the main category that *voire dire* was never undertaken fatally informing the conviction and secondly that the case was never proved beyond reasonable doubt.

35. The Appellant never argued his appeal against sentence and only invoked *Phillip Mueke Maingi & others v Rep* [2022] HC Pet No E017 of 2012 case to argue for review of sentence.

36. The Court record reveals that the victim was a child. The said witness was not subjected to *voire dire* examination to determine if she was possessed of sufficient intelligence to understand the importance of telling the truth as this aspect seems to have eluded the trial Court.

37. Subjecting a witness of tender age to *voire dire* examination is founded under Section 125 (1) of the *Evidence Act*, which states: -

> " All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

38. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides the procedure of receiving evidence of a child in the following terms:

> " Where in any proceedings before any Court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

39. In the leading case of *Kibangeny Arap Korir v Republic*, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

40. In a recent decision of; *Patrick Kathurima v Republic*, [2015] eKLR, the Court of Appeal held:

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

41. In addressing what age would be appropriate for a trial Court to conduct a *voire dire* examination, this Court considers the holding in the case of *Maripett Loonkomok v Republic* [2016] eKLR where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a *voire dire* examination and held that:

> " The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The Court reiterated the holding in *Patrick Kathurima v R*,Criminal Appeal No 137 of 2014 and in *Samuel Warui Karimi v R* Criminal Appeal No 16 of 2014 where it categorically stated that the definition in the

Children Act is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify."

42. The Court additionally stated that:

> "It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

43. From the foregoing decisions supported by the definition of a child of tender years to be 14 years, I have no good reason to depart from this well-trodden path, as I am persuaded that the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial.

44. Where the witness as in this case was a minor but not of tender years as is envisioned by law, she was 16 years old and that essential step was not taken in the criminal trial, that trial becomes problematic, however the same did not prejudice the Appellant in any way, he cross examined the witness and did not object to the testimony being adduced. In the circumstances, I find the evidence by the victim was properly received thus, the conviction of the Appellant was safe to sustain.

45. As for the issue as to whether the case was proven beyond reasonable doubt? This Court upon examination of the entire record of Appeal that the Age of the victim was determined by the Court to be 15 years old within the parameters of the charge, that the Appellant's defence case was considered in judgment.

46. I have considered whether to make an order of retrial on the basis that *voire dire* was not undertaken and respectively decline as I find that the evidence in question is uncontested and has not been said to be false, the Appellant has not showcase how he was prejudiced by the omission. I do find that the witness credibly presented her evidence that informed the conviction. This Court finds the conviction of the Appellant to have been safe and without fault.

47. With Regards to sentence, this Court is unpersuaded to disturb the discretion exercised by the Honorable Y.A Khatambi SRM in sentencing the Appellant as she administered the minimum term provided for in law. This Court finds no fault to warrant disturbance of the sentence of imprisonment for twenty (20) years which this Court confirms.

48. The Appeal as amended on 6th October 2023 is found to be without merit and the same is dismissed.

It is So Ordered

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF JUNE 2024.

MOHOCHI S.M.

JUDGE