Wangati v Republic (Criminal Appeal E006 of 2022)
[2024] KEHC 7716 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E006 OF 2022

DO OGEMBO, J

JUNE 20, 2024

BETWEEN

PAUL SHIKHAYA WANGATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the whole judgment, conviction and sentence in Kakamega Cm's Court, Cr. Case No. E085/2021 by the Hon. J. R. Ndururi, Principal Magistrate, delivered on 13/1/2022 and sentence on 17/1/2022)

JUDGMENT

1. The Appellant, Paul Shikhaya Wangati, was charged before the lower court with the offence of Defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on 25/4/2021 to 27/4/2021 in Kakamega Central Sub-County within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of JA, a child aged 15 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, No. 3 of 2006. That on the 25/4/2021 to 27/4/2021 in Kakamega County, he intentionally and unlawfully caused his penis to come into contact with the vagina of JA a child aged 15 years.

3. The appellant was tried and convicted of the main charge. On 17/1/2022, he was sentenced to serve 15 years imprisonment. He has now appealed to this court. In the petition of appeal filed herein on 27/2/2024, the appellant has raised the following grounds of appeal:-

    1. That the magistrate erred in law and in fact by failing to conduct a voire dire examination before PW1 testified, occasioning a reasonable doubt.

2. That the learned trial magistrate erred in law and in fact by making a blatant disregard in law by coming with a wrong principle by convicting and sentencing the appellant to serve 15 years with Section 8 (1) as read with (8)(3) in lieu of Section 8(1) as read with Section 8 (4) of the Act, leading to a misjudgment.

3. That the trial magistrate misdirected himself by failing to ascertain the age of the victim which is a variance not evaluated.

4. That the learned trial magistrate erred in law and in fact by not observing that the ingredients and elements of defilement were not properly proved.

5. That the learned trial magistrate erred in law and in fact by convicting basing on insufficient evidence.

6. That the trial magistrate erred in law by failing to observe that the application was not accorded a fair trial contrary to Article 50 (2) (g) (h) (j) as read with 50 (4) of *the Constitution* of Kenya 2010 hence prejudiced as a substantial injustice was occasioned.

7. That the trial magistrate erred in law by violating the dictates of Section 69(1) of the Criminal Procedure Code by stating the points or issues for determination, hence a misconception.

8. That the trial magistrate erroneously believed the evidence of PW3 regarding penetration without considering that the hymen did not specify whether it was freshly broken or not and no inquiries into the victim's boyfriend who had bought her touch screen hence a misapprehension of evidence of PW1 and PW3 leading to a miscarriage of justice.

9. That the trial magistrate erred in law and in fact by failing to consider the circumstances of the case which falls under Section 8 (5) (6) of the *Sexual Offences Act*.

10. That the trial magistrate erred in law and in fact by failing to evaluate the material contradictions and material discrepancies in the evidence that weakened and destroyed the inference of accused person's guilt.

11. That the trial magistrate erred in law and in fact by failing to observe that the prosecution failed to prove their case to the required standard of cogent proof beyond reasonable doubt, hence misguided as the prosecution failed to comply with Section 212 of the CPC to call for rebuttal evidence, but shifted the burden of proof on the appellant hence prejudiced.

4. The appellant has pleaded that his appeal be allowed, the conviction quashed, sentence be set aside and that he be set at liberty. The state opposes this appeal.

5. This court is sitting on this matter as a first appellate court. The jurisdiction of a first appellate court is well settled. In the case of Okeno –VS- R (1972) EA, it was held that it is to analyze and evaluate the evidence and to come up with its own conclusion. It is therefore mandatory that this court reconsiders the whole evidence that was before the trial court.

6. From the record of proceedings, the case of prosecution commenced with the evidence of PW1 Jenifer Akonya that she was born on 3/6/20006 and so was 16 years old at the time of giving evidence.

7. She produced her birth certificate (PMFI – 1). That she knows the accused/applicant as one who works in a carwash. That on 25/4/2021, she went to the house of the appellant after a quarrel with her father. That appellant was her boyfriend. They had sex. They had had sex before. That on 27/4/2021, she went back home when her father took her to the police. She stated that she had not told the accused her age. She denied that she had been pushed to him by her parents.

8. JWW was PW2. He is the father of PW1. His evidence was that she is 15 years old. He recalled that on 25/4/2021, PW1 disappeared from home. And when she returned the following day, he took her to the police post and PW1 led the police to appellant who was arrested. On cross examination, he confirmed that PW1 had disappeared from home from Sunday to Tuesday and he became suspicious when he saw her with a touch screen phone and he saw the photo of the appellant on the phone. He denied fixing the appellant.

9. PW3, Stephen Kinuthia, a clinical officer, recalled that on 28/4/2021, he filled in the complainant's P3 and PCR form (MFI-3). He examined her and noted that she had laceration of the vaginal wall, her hymen was broken and she also had a whitish discharge. He concluded that there was evidence of penetration. He produced the two forms as exhibits. And Pc Christine Kemunto, the investigating officer was PW4. Her evidence was that on 28/4/2021, she received the complainant and proceeded to escort her to hospital. She interrogated the complainant who told her she had left home on 25th to visit the appellant, her boyfriend, a worker at a car wash. That appellant took her to his rental house where they had sex for two days, only for her to go back home on 27/4/2021. She produced the birth certificate showing she was born on 6/3/2006 and so was 16 years old. That the complainant proceeded to identify the appellant who was duly arrested.

10. When the appellant was put to his own defence, he gave a short sworn defence in which he stated that he used to work in a car wash. He denied committing the offence and asked the court to weigh the evidence on record. He called no witness.

11. The appeal has been canvassed by way of written submissions. The submissions of the appellant were that the court failed to conduct a voire dire before taking the evidence of the complainant, and failure to do so occasioned an injustice. Secondly, that the court awarded him a mandatory minimum sentence. He relied on Phillip Mueke Maingi –VS- R (2023) eKLR where it was held that mandatory minimum sentences as stipulated by the *Sexual Offences Act* are unconstitutional.

12. He further submitted on Section 8 (5) (a) (b) (6) of the Act, that the complainant deceived him into believing she was over 18 years. That one cannot work without a valid identity card. He also challenged on whether she was 15 or 16 years.

13. Further, he challenged the evidence of the prosecution as full of material contradictions.

14. The prosecution, on the other hand, submitted that the appellant never raised the issue of representation and cannot raise the same at this stage and he was not shown how his constitutional rights have been infringed. That the said evidence was supplied to appellant in advance. Further, that the ingredients of the offence were proved by evidence. As to period spent in custody, it was conceded he took 8 months in custody.

15. I have considered the evidence on record as seen above. I have also considered the submissions made by the two sides. The offence of defilement for which the appellant was tried and convicted is defined under Section 8 (1) of the Act in the following terms:-

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

16. And at Section 8(3) of the Act, the sentence for the same is provided as follows:-

> "A person who commits an offence of Defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years."

17. The above definition of the offence declares the ingredients of the offence that the prosecution is under a duty of prove. The same are:-

    i. Age of the victim.

    ii. Proof of penetration.

    iii. Identification of the perpetrator or the accused. (See Daniel Maina Wambugu –VS-R, Kajiado, Criminal Appeal No. 22/2018).

18. On the first issue of age of the complainant, the prosecution called various witnesses who proved that the victim was born on 3/6/2006 and so was 15 years at the time of the offence. These witnesses included PW1, PW2, PW3 and even the investigating officer, PW4. The birth certificate of the complainant was produced as exhibit in the case.

19. To me there cannot be any better evidence of proof of age than the official certificate of birth. With this exhibit, there is no doubt as to the actual age of the complainant at 15 years at the time of the commission of the offence. I therefore find that the prosecution duly proved this element of the offence.

20. The 2nd element subject of proof by the prosecution is penetration. Regarding this, it was the evidence of PW1 that when she left home on 25/4/2021, she went to the rental house of her boyfriend, the appellant where she stayed for 2 days during which period they had sex. She went back home on 27/4/2021 where upon she was taken both to the police station and to the hospital. And on examination, PW3, noted that her hymen was broken. She also had laceration of the vaginal wall and she had whitish discharge. In the opinion of PW3, the clinical officer, there was evidence of penetration. This was a professional opinion of a medical officer. There is evidence on record to show that any other factor could have caused the penetration. The only explanation is that given by the complainant herself. That the two of them had sex. I am therefore convinced that the element of penetration was proved.

21. Lastly is the issue of identification of the accused as the perpetrator. It is on record in term of the evidence of the complainant, PW1, that they knew each other and that the appellant was her boyfriend. She knew his place of work at a car wash, a fact the appellant admitted in his defence. The complainant went further that they were lovers. For the event leading to the arrest of the appellant, they had been together in the appellant's rented house for two days. And it is the complainant who led the police to the appellant when he was arrested. There is therefore no doubt that the appellant, and no one else was the one who defiled the complainant. I so find.

22. When the appellant was put to his own defence, he made a short statement denying the offence. He had no specific defence to the allegations made against him by the prosecution witnesses. To say the least, his defence was a mere denial that did not challenge the prosecution case in any way. The same had absolutely no merit and I dismiss it.

23. Regarding sentencing, as already been seen above, Section 8 (3) of the Act under which the appellant was charged provides for a sentence of not less than 20 years imprisonment. The appellant herein was sentenced to serve 15 years imprisonment. This sentence was both legal and proper.

24. In the circumstances, this court is convinced that the prosecution proved its case against the appellant beyond any reasonable doubt as required by the law and that this appeal of the appellant lacks in any merit. I dismiss the same. I order that the appellant shall serve 15 years imprisonment as ordered by the trial court. In view of the fact that the appellant remained in custody during the duration of his trial, I order that this sentence shall run from 29/4/2021 when the appellant was first arraigned before court. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.

D. O. OGEMBO

JUDGE

20/6/2024

Court

Judgment read out in Court (Virtually) in presence of appellant (Kisumu) and Ms. Challa for State.

D.O. OGEMBO

JUDGE

20/6/2024