Wambua v Republic (Criminal Appeal 85 of 2023)
[2024] KEHC 6779 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6779 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 85 OF 2023

DR KAVEDZA, J

JUNE 11, 2024

BETWEEN

BENARD WAMBUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. M. Maroro (PM) delivered in Chief Magistrates' court (Kibera) S.O. Case No. 106 of 2019 on the 1st August 2022)

JUDGMENT

1. The Appellant was charged before the subordinate court for the offence of sexual assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were thatop on 26th November 2019 in Langata sub-county within Nairobi County intentionally and unlawfully caused his finger to penetrate the vagina of JM a girl aged 5 years old. In the alternative, he was charge with the offence of committing an indecent act on a child contrary to section 11(1) of the *Sexual Offence's Act*, No. 3 of 2006. After full trial, the appellant was convicted for the offence of defilement and sentenced to life imprisonment.

2. Being aggrieved, he challenged the conviction and sentence imposed by the trial court. He challenged the totality of the prosecution's evidence against which he was convicted. He maintained that he the trial court erred in convicting him for the offence of defilement. In addition, that the sentence imposed was harsh and excessive. The appeal was canvassed by way of written submissions which this court has considered.

3. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

> "(1) Any person who unlawfully:
>
> (a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

4. The Court of Appeal in the case of *John Irungu V Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

5. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

6. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

7. 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 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.

8. The prosecution's evidence was as follows: (PW2), JM the victim gave unsworn testimony after voire dire, and testified that on the material day, while playing with her friends P and C (names withheld), when the appellant who is their neighbour approached her. He took her to his house which was upstairs. He pulled her into the house switched off the lights, undressed and inserted his finger into her vagina. During the ordeal, she scratched her causing her to bleed from her vagina. She reported the incident to G who informed her mother (PW1) who in turn reported the incident to the police.

9. In her testimony, PW2 stated that the appellant before court was the neighbour he was referring to who had sexually assaulted her. He described him as tall and a 'mkamba'.

10. In her testimony, while PW2 gave clear and graphic testimony of the ordeal, at the hands of the appellant. That notwithstanding, PW2 was a child of tender years, aged 5 years at the time of the alleged incident, and despite voire dire being conducted, and her being affirmed to be intelligent appreciate the consequences of giving evidence on oath, he was not quite consistent with the happenings of the alleged incident. This is particularly perceivable when the trial magistrate noted that she was not clear as to what happened.

11. PW2'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 reasons to believe that the child was telling the truth. In this regard, the trial magistrate did not indicate why she believed the child victim

was telling the truth. While I acknowledge that PW2's testimony was tendered with the innocence of a child, her grasp of the events was not quite clear. For this reason, I find that there was need for corroborating evidence to ascertain the facts.

12. To this end, the prosecution called the child's mother who testified as PW1. She told that on 26th November 2019, she came home to breast feed her youngest child. She found the complainant in the house. She looked dull and refused to eat. She noticed blood stains in her panty. She inquired what had happened and she told her that fallen in the toilet. She did not believe her. Upon further interrogation, she informed her that the appellant who was their neighbour had inserted his fingers into her vagina. PW1 informed the complainant's father and they jointly reported the incident to the police. The complainant was also taken to hospital for examination and treatment. She also told the court that the minor was born on 24th April 2014.

13. PW3, the complainant's father reiterated the evidence of the complainant's mother (PW1) on the report made to the police and the appellant's arrest. He indicated that when police officers arrived, they complainant is the one who directed them to the appellant's premises where he was found and arrested.

14. Dr. John Njuguna gave evidence on behalf of Dr. Osiemo who examined the child victim but no longer worked at Nairobi Women's Hospital. He told the court that the victim was examined on 26th November 2019 after an alleged case of sexual assault. Upon examination, the outer genitalia were stained with blood, the hymen was present and the underpants had dried fresh blood. He produced the P3 and PRC forms which had been filled as exhibits.

15. Corporal Josephine Ajowi the investigating officer summarised the prosecution's evidence. She produced the complainant's panty which had blood stains and trouser that she was wearing on the material day. She also produced the complainant's birth certificate.

16. In his defence, the appellant opted to remain silent.

17. Given the particulars supporting the charge subject of the appellant's conviction in this case, the question I must now answer is whether the evidence adduced by the prosecution before the trial court proved beyond reasonable doubt that the appellant penetrated PW2's genitalia by inserting his finger as alleged.

18. According to the victim's unsworn statement, the appellant inserted his fingers in her vagina, causing her to start bleeding from the vagina. When confronted by her mother, the told her what had happened. According to PW1, the incident happened on 26th November 2019. PW1 recalled that after receiving PW2's report, she did not bath the complainant and reported the incident to the police on the same day. This was after noticing the complainant's pants being blood stained.

19. When PW2 was examined at Nairobi Women's Hospital on the same day, she had lacerations on the vaginal area (labia minora, vaginal walls and perineum) with fresh stains of blood. The hymen was however present. This was evidence of sexual assault. I find that the evidence as tendered corroborated the evidence of the complainant that indeed she was sexually assaulted.

20. The evidence of the complainant minor was that the appellant inserted his fingers into her vagina. The medical evidence was however that the hymen was intact. This expert evidence did not conclusively proof penetration as determined by the trial court.

21. On the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of SOA. Having found that penetration was not provide, the it is my finding that the ingredients of the alternative charge of indecent act with a child were proved beyond reasonable doubt.

22. From the record, I note that the appellant convicted the appellant for the offence of defilement yet he was charged with sexual assault and in the alternative, indecent act with a child. Section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The application of Section 179 was given by the Court of Appeal in the case of *Rashid Mwinyi Nguisya and Another v Republic* [1997] eKLR which it was held: -

> "In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the *Criminal Procedure Code* cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code."

23. In my view therefore, the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with. In this case, the trial court convicted the appellant for the offence of defilement which is not a minor offence to the offence of sexual assault. The trial court was in err in this regard. It is clear that the appellant understood the charge against him and participated in the trial. The appellant's claim that the error resulted in a miscarriage of justice is therefore baseless, and I reject it.

24. The upshot of the above is that I set aside the conviction imposed by the trial court. The appellant is hereby convicted for the offence of indecent act with a child contrary to section 11(1) of the *Sexual offences Act*, No.3 of 2006.

25. On sentence, the appellant was sentenced to serve life imprisonment. During sentencing, the court considered his mitigation, and that he was a first offender. The court noted that the appellant was remorseful. In addition, he deserved a deterrent sentence to rehabilitate him.

26. It is my view, that having substitute the charge against which the appellant is convicted, the sentence of life imprisonment is harsh and excessive. The appellant is hereby sentenced to ten (10) years imprisonment to run from the date of his arrest 17th December 2019 having spent the entirety of his trial in remand custody pursuant to section 333(2) of the *Criminal Procedure Code*.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11TH DAY OF JUNE 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant.