Kareithi v Republic (Criminal Appeal 42 of 2023)
[2024] KEHC 8830 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 42 OF 2023

DR KAVEDZA, J

JULY 23, 2024

BETWEEN

EDWIN NJIINU KAREITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. P. Mutua (SPM) on 7{{^th}} July 2022 at Kibera Chief Magistrate's Court Criminal case no. 852 of 2020 Republic vs Edwin Njiinu Kareithi)

JUDGMENT

1. The appellant was charged with assault causing actual bodily harm contrary to contrary to section 251 of the Penal Code. The particulars of the offence are that on 9th August 2020 at Riara Valley Gardens along Riara road in the Kilimani area Nairobi County wilfully and unlawfully assaulted Teddy Murimi Njagi thereby occasioning him actual bodily harm. After a full trial, the appellant was sentenced to pay a fine of Kshs 50,000 in default to serve six (6) months imprisonment.

2. Being aggrieved, the appellant challenged his conviction and sentence. In his petition of appeal dated 19th July 2022, he raised 15 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court shifted the burden of proof to the defence and wrongly convicted him. He argued that the trial magistrate failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.

3. During the hearing of this appeal the respondent through learned prosecution counsel conceded this appeal. The respondent submitted that the evidence and that the evidence did not prove the case beyond reasonable doubt.

4. Be that as it may, before I embark on the evaluation of the evidence adduced I wish to make an observation that, although the respondent had conceded to the appeal that was done in the submission and there is no response to the appeal or grounds of appeal conceding to the appeal. I say so because the court is inclined to consider whether the respondent can concede to the appeal through submission without filing a formal response whatever the case may be, it is also sufficient to note that, the fact that, the respondent concedes to the appeal, is not a ground to allow it. The court is duty bound to evaluate the evidence afresh.

5. PW1 Teddy Murimi Njagi a minor aged 15 years testified that he was playing football with his friends when the appellant arrived and parked his car. After a few minutes, the appellant emerged from his vehicle, took the ball they were playing with, and hit him in the face with it. The appellant then grabbed him by the neck and pushed him against the wall. Additionally, the appellant hit him on his private parts with his knee and ordered the watchman to expel him from the compound. Other children who were playing intervened, leading him to stop. PW1's parent took him to the hospital and reported the incident to the police. He explained that the assault occurred because he was found playing football in the compound was prohibited.

6. During cross-examination, PW1 admitted that although the appellant hit him on his private parts, he was not injured. He denied that he was injured while playing football and maintained that the appellant had held him by the neck, not by the collar.

7. PW2, Sean Munene a minor aged 14 years testified that he and PW1 were playing football when the appellant arrived and assaulted PW1 by hitting him with the ball, pushing him against the wall, and striking him on his genitals with his knee. PW2 intervened and reported the incident to his mother and the police.

8. PW3, Terry Gakii PW1's aunt testified that PW1 reported being beaten by the appellant and had visible marks on his neck. She inquired about the incident from the appellant, and they had an exchange of words. According to the children who were playing football, the appellant had hit PW1 on the face with the ball, held him by the neck, and struck his genitals with his knee. The appellant claimed that PW1 had insulted him. The matter was reported to Kilimani Police Station, and PW1 was taken to the hospital.

9. During cross-examination, PW3 confirmed that she saw the marks on PW1's neck. She stated that the appellant admitted to causing these marks but was not cooperative resulting in the issue being escalated to the police.

10. PW4, Leo Limwar Samar a minor aged 13 years testified that while playing football with PW1 and others, the appellant arrived in his car. Shortly after, the appellant got out, took the ball, and struck PW1 with it. He also struck PW1's genitals with his knee and then called security to expel PW1 from the area. PW3 was called, and a confrontation with the appellant followed. The matter was subsequently reported to the police. He maintained that the appellant hit PW1 in the face with the ball, grabbed him by the neck, and scratched him.

11. PW5 Dr. Joseph Maundu produced a P3 form prepared by Dr. Kamau who was not available to give evidence but had examined PW1. The same showed multiple scratch marks on the neck and injuries sustained by PW1 were classified as harm. He maintained that although he could not specify how the injuries were sustained.

12. The investigating officer PC Miriam Mwende summarised the prosecution's evidence. She produced treatment notes from Aga Khan Hospital after PW1's examination and treatment. She told the court

that she visited the crime scene but did not examine the CCTV footage as the cameras were not operational.

13. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and called 6 witnesses including himself. DW1, Moses Emukule a security guard, testified that on the day of the incident, the appellant called him to remove PW1 from the area. He found the appellant holding PW1 and was instructed to get him out. He admitted he could not confirm whether PW1 was assaulted.

14. DW2, Robert Swahili, the caretaker at Riara Gardens, testified that a lady reported the assault allegations. He reviewed the CCTV footage the next day but did not witness any assault. The footage showed the appellant confiscating the football but did not capture the alleged assault. He stated that the CCTV did not cover where the children were playing or the alleged assault.

15. DW3, Monica Aoko, the chair of the Justice and Peace Commission, testified about the appellant's good character and interaction with children, emphasizing that the appellant is not a violent person.

16. DW4, Peter Ngugi Ndungu a board member of Riara Gardens and the appellant's neighbour, testified that the complainant initially reported sodomy, not assault. He told the court that he knew the appellant as a good person and explained that rules about football in the area had changed due to confrontations, with the new rules imposing charges on parents whose children were found playing. He produced the rules and by-laws as evidence. He confirmed that the rules changed after the incident and claimed the case was motivated by malice.

17. The appellant testified that he found boys playing football and, after being verbally abused, called the guards to remove them. He confiscated the ball according to by-laws. The appellant denied assaulting PW1 and claimed the incident was captured on CCTV. He also mentioned that two women accused him of hitting PW1 with the ball and that the case had been reported in the newspapers. He believed the case was motivated by malice. He stated that he had no prior dispute with PW1. He reaffirmed that the by-laws permitted the confiscation of balls from children found playing.

18. DW6, Dr. Consolata Mwangi testified that scratch marks could be caused by sharp objects rather than blunt ones and that football typically causes bruises, not scratch marks. She acknowledged that the P3 form was filled out by a qualified doctor and that she had not personally examined the victim.

19. After considering the grounds of appeal, submissions thereon, and evidence adduced in the trial Court, I find that the main issue is whether the appellant was properly convicted of the offence of assault causing actual bodily harm. The appellant submitted that the main witnesses who were minors and a voir dire examination was not conducted. There was therefore a possibility that they were manipulated in giving evidence against the appellant. Before I consider the ingredients of the charge, I must first determine the issue of the voir dire examination.

20. From the record of the trial court, key prosecution witnesses PW1, PW2 and PW4 were minors aged 15 years, 14 years and 13 years respectively. Before their examination in chief, a voir dire examination was not conducted. A voir dire examination is apreliminary examination to test the competence of a witness or evidence. (See Blacks Law Dictionary 8th Edition.) With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth and they understand the purpose of the oath to be taken.

21. The question is whether the failure to conduct the voir dire examination on the complaint and two key witnesses was fatal to the prosecution's case. The law is that absence of voir dire examination is not

automatically fatal to the evidence of a witness. This was the observation made by the Court of Appeal in *Maripett Loonkomok v Republic* [2016] eKLR where it was held that:

> "We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No 10 of 2014."

22. This position was echoed by the Court of Appeal in *Athumani Ali Mwinyi v Republic*, Criminal Appeal No 11 of 2015 where the court stated that:

> "In appropriate case where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

23. In *Sammy Ngetich v Republic* [2018] eKLR where the trial court took the evidence of a complainant in the case who was aged 13 years without conducting a voir dire examination, Mrima J. quashed the conviction and said that:

> "The Court of Appeal has also through a long line of cases held that voir dire examination of children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. However, 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 unless there is sufficient independent evidence to support the charge. (See *Maripett Loonkomok v Republic* (2016) eKLR)."

24. In *Samuel Warui Karimi v Republic* [2016] eKLR where the trial court failed to conduct a voir dire examination on a complainant aged 12 years, the Court of Appeal held that her evidence was not properly received and the conviction of the appellant was unsafe. In *Abdi Abdiraham & another v Republic* (2013) eKLR, the High Court at Garissa set aside a conviction and sentence of the appellant on account of failure on the part of the trial magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence.

25. In this case, the witnesses who gave evidence were aged 15, 14 and 13 years gave evidence on oath without voir dire examination being conducted on them. The trial magistrate in convicting the appellant did not indicate whether he observed the witnesses when they were testifying and noted their demeanour to suggest whether they were telling the truth or lying.

26. It is clear from the judgment of the trial magistrate that he did not place the evidence of the witnesses (minors) in their proper place. The court did not examine the children to ascertain whether they understood the meaning of an oath and the duty of telling the truth. The magistrate in the circumstances could not form a sufficient basis of their demeanour as he did not test their competency to give evidence on oath. The law is that where voir dire examination is not conducted the evidence of the child cannot be used as he basis of a conviction on an accused person unless there is some other independent evidence to support the charge. The question then is whether there was such evidence in this case.

27. The magistrate held that the evidence of the complainant was corroborated by PW5 who produced the P3 form testified that the complainant had injuries on the neck. Was this independent evidence in support of the charge? The independent evidence that was required in support of the charge is one

which affected the appellant by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the appellant committed it (see the case of *R v Baskerville* [1916] 2 KB 658)

28. In *Mukungu v Republic* [2002] 2 EA 482, the Court of Appeal citing *Mutonyi v Republic* [1982] KLR 2003, held that:

> " An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: (See *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61)"

29. 35.

30. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the appellant by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

31. In the instant case, there was no independent evidence to support that the appellant committed the offence. The evidence of the clinical officer was to the effect that the complainant had injuries in the neck but not that the appellant is the one who committed the offence. The evidence of the clinical officer thus was not independent corroborative evidence that the appellant committed the offence. His evidence could not corroborate the defective evidence of the minor witnesses PW1, PW2 and PW4. The conviction of the appellant on the basis of the evidence of the children was therefore not safe.

32. As earlier stated, the state conceded the appeal and it is my finding that they were right to do so. The upshot is that the appeal is allowed and the conviction and the sentence are hereby set aside.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JULY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutua for the Appellant

Mr. Mongare for the Respondent

Naomi Court Assistant