Macharia v Republic (Criminal Appeal E072 of 2023)
[2024] KEHC 8619 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8619 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E072 OF 2023

JM OMIDO, J

JULY 16, 2024

BETWEEN

KELVIN WANJOHI MACHARIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement and conviction of Hon. I. Gichobi, PM and subsequent sentence of Hon. P.M. Kiama, SPM in Kangema SPMCC No. E018 of 2022, Republic v Kelvin Wanjohi Macharia, rendered on 24th May, 2023)

JUDGMENT

1. Kelvin Wanjohi Macharia (hereinafter referred to as "the Appellant") was in the principal charge indicted for the offence of sexual assault contrary to Section 5(1)(b)(ii) of the *Sexual Offences Act* Cap 63A Laws of Kenya (erstwhile *Act No. 3 of 2006)*. It was stated in the particulars of the offence that on 28th April, 2021 at [particulars withheld] Forest in [particulars withheld] village in Mathioya Subcounty within Murang'a County, the Appellant unlawfully used his finger to penetrate the vagina of JWK (name withheld), a child aged 12 years old.

2. In the alternative charge, the Appellant was faced with a charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, Cap 63A Laws of Kenya. The particulars thereof were that on 28th April, 2021 at [particulars withheld] Forest in [particulars withheld] village in Mathioya Subcounty within Murang'a County, the Appellant intentionally touched the vagina of JWK a child aged 12 years old with his penis.

3. The Appellant denied both counts which then paved way for a trial. Upon conclusion of the trial, the Appellant was found guilty and convicted on the principal charge by the trial Court (Hon. I. Gichobi, PM) and subsequently sentenced by the succeeding court (Hon. P.M. Kiama, SPM) to serve ten (10) years imprisonment.

4. The Appellant now appeals to this court vide an undated Petition of Appeal filed in court on 9th June, 2023, proffering the following grounds of appeal:

    a. The learned trial Magistrate erred in law and in fact by failing to find that the elements of the charge were not proved beyond reasonable doubt.

    b. The learned trial Magistrate erred in law and in fact by failing to find that the charge was defective and that the evidence adduced was through coercion, threats and intimidation.

    c. The learned trial Magistrate erred in law and in fact by failing to find that the medical examination report was not produced in court by the medical practitioner to prove the alleged assault.

    d. The learned trial Magistrate erred in law and in fact by failing to find that the prosecution's evidence was tainted with material contradictions, inconsistencies and discrepancies.

    e. The learned trial Magistrate erred in law and in fact by failing to find that there existed a grudge between the Appellant and the victim's family and the probable reason for implication with the offence.

    f. The learned trial Magistrate erred in law and in fact by failing to find that the Appellant's alibi defence was plausible as the prosecution was unable to disprove it.

    g. The learned trial Magistrate erred in law and in fact by failing to consider the time that the Appellant spent in custody during the trial process as provided for under Section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

5. It was accordingly the prayer of the Appellant that this court allows the instant appeal and quashes the trial court's conviction and sets aside the sentence.

6. The court directed that the appeal proceeds by way of written submissions and both the Appellant and the Respondent filed their respective submissions.

7. I have perused the petition of appeal, the submissions by the two sides and the record in its entirety.

8. This court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify (see Okeno vs Republic [1972] E.A, 32 at 36;

9. The record of the lower court indicates that the trial Magistrate conducted voir dire examination to determine the competency of the Survivor, who testified as PW1, and the admissibility of her evidence.

10. With that, the survivor was sworn and tendered her evidence. She told the court that she was born on 3rd January, 2009 and was in class 6 at XY Primary School (particulars withheld).

11. The survivor explained that on 28th April, 2021, the Appellant, who was previously not known to her, visited her elder brother JM, (name withheld) at her home and found the survivor cooking. She was with her younger sisters JW, EN and MW (names withheld). She stated that the Appellant and her brother JM were friends. She told the court that it is her aunt (PW3) who told her that the assailant's name was Kelvin Wanjohi.

12. The witness stated further that the Appellant asked her to follow him so that she would take or show him the home of a named pupil who schooled at Mioro Primary School. The home was a distant away from the survivor's home and the two boarded a motorcycle and the rider took them to the home.

After concluding his business at the home, the Appellant asked the survivor to take him to Karandi Forest. The two then walked to and ingressed the Forest.

13. The survivor narrated to the trial court that the Appellant asked her to hug and kiss him but she resisted. At that instance, the Appellant touched her waist, pushed her to the ground, pushed his hand into clothes and started to touch her private parts using his fingers. The two then left the forest and met a woman that she knew, who then beat up both the Appellant and the survivor with a stick. The Appellant took to his heels, into the forest.

14. At that moment, the woman called the survivor's mother, who then made a report to the police and took the survivor to hospital where she was examined.

15. The second prosecution witness was PKM (name withheld), the survivor's mother, who testified before the trial court as PW2 and stated that the survivor was born on 3rd January, 2009.

16. PW2 stated that on 28th April, 2021 at about 1pm, she left the survivor at her home and went to pick tea. She was later informed on phone that the survivor had been seen in the company of two men aboard a motorcycle that was being ridden towards Karandi Forest. She went to look for her. After a while, PW2 saw the Appellant and her daughter emerging from the forest gate, walking side by side. The Appellant was at the time not known to PW2 but PW2 was informed that he had attended PW2's son's circumcision party. When she sought to interrogate the Appellant, he fled, leaving behind his keys, a jacket and a shoe.

17. Pw2 stated that she questioned the survivor who told her that the Appellant had touched her private parts using his fingers. PW2 informed the area Assistant Chief who advised her to report the matter to Nyakianga Police Station, which she did, after which she took her daughter to Nyakianga Health Centre for examination and treatment, in the company of a police officer.

18. The third witness that was called by the prosecution was GNM (name withheld), PW2's elder sister, who testified and told the trial court that she was called by PW2 on 28th April, 2021 and was told by PW2 that the Appellant had taken the survivor to Karandi Forest where he had sexually molested her. She then accompanied PW2 and the survivor to Nyakianga Health Centre where the survivor was examined.

19. PW3 stated that she knew the Appellant well as she was married in his family and the two hailed from the same village. She added that the Appellant had prior to the incident attended PW2's son's circumcision party.

20. The fourth prosecution witness that testified before the lower court was Police Constable Jamleck Miriti (PW4) of Gacharage-ini Police Post. The witness told the court that he arrested the Appellant on 28th April, 2021 following a defilement report that had been made to the station. He then took him into custody. The next day, he transferred him to Nyakianga Police Station where the report had been made. The officer did not explain how he knew that the person that he arrested was the assailant.

21. Police Constable Joyce Kerubo (PW5) was the fifth prosecution witness. In her testimony before the trial court, the witness told the court that she investigated the survivor's complaint. She escorted the survivor and her mother to Nyakianga Health Centre where the survivor was examined and attended to. She interviewed the survivor who told her that that a person by the name Wanjohi had inserted his finger into her vagina.

22. In her further evidence, PW5 told the trial court that the doctor's finding upon examining the survivor was that the survivor's hymen was missing and that the doctor confirmed that she had been sexually assaulted. She caused the accused person to be charged upon closure of investigations.

23. The witness produced the survivor's birth certificate as PExh1.

24. The last witness that the prosecution called before the trial court was Donnah Maithima, a Clinical Officer attached to Murang'a Hospital. Her evidence was that she examined and treated the survivor on 28th April, 2021.

25. The patient presented a history of having been sexually assaulted by an assailant who inserted his fingers into her genitals. Upon examination, she noted that the survivor had an old broken hymen. She had no lacerations, bruises or swellings. There was whitish discharge from her vagina. There was no spermatozoa noted.

26. The witness produced as PExh2, PExh3 and PExh4 the survivor's treatment notes, laboratory request form and P3 form, respectively.

27. Upon being cross-examined, the witness stated that it was possible for a finger to penetrate the survivor's vagina without inflicting injuries on her genitalia. She however added that from the examination of the Survivor, there was no conclusive evidence of sexual assault or penetration.

28. The prosecution closed its case at that stage and in the lower court's ruling delivered on 8th March, 2023, the Court found that a prima facie case had been established against the Appellant and he was placed on his defence.

29. The Appellant gave sworn evidence before the trial court and denied ever committing the offence that he was charged with. In his defence, the Appellant told the trial court that he worked as a bodaboda operator. The Appellant told the trial court that the charge against him was framed up. He stated that the survivor was not known to him and that the offence of sexual assault was in his view not proved.

30. The Appellant explained that on 28th April, 2021 while he was at work, he was arrested by a police officer and taken to Gacharage-ini Police post. He was not given the reasons for his arrest. The next day he was informed that he was a suspect of the offence of defilement and was transferred to Nyakianga Police Station. He was taken to court and charged with the offence of sexual assault on 3rd May, 2021.

31. The Appellant explained that the charge was withdrawn when he failed to attend court for a substantive period of time. He was rearrested and charged with the same offence on 23rd June, 2022. He questioned why the survivor gave the date of the offence as 28th April, 2021 while the investigating officer stated that the survivor was violated on 24th February, 2021. He also pointed out to the court that the exhibits that PW2 referred to – keys, a shoe, a blue jacket and a sweater – were not produced in court. He queries why the police did not conduct an identification parade in his respect.

32. In his further defence, the Appellant stated that PW3 admitted that she had a case with him in the year 2020 which involved allegations of the Appellant having hit PW2's mother with his motorcycle. He stated that the injured victim had demanded for Ksh.40,000/- as compensation for the injuries that she sustained, which the Appellant was unable to raise.

33. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety, I will deduce the issues that I am now tasked to determine which culminate in the question whether the Appellant's conviction was safe and sentence lawful, as follows:

    a. Whether the prosecution presented evidence that proved the elements of the offence of sexual assault beyond reasonable doubt.

b. Whether the prosecution presented evidence that proved beyond reasonable doubt that the Appellant sexually assaulted the survivor.

c. Whether the learned trial Magistrate correctly meted out the sentence against the Appellant.

34. Inevitably, on the first issue, this court must satisfy itself that the ingredients of the offence of sexual assault were proved against the Appellant beyond reasonable doubt, as is the requirement in law, for the conviction to be sustained.

35. The offence of sexual assault is provided for under Section 5 of the *Sexual Offences Act*, Cap 63A Laws of Kenya (formerly *Act No. 3 of 2006)* as follows:

> 5. Sexual assault
>
> (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.
>
> (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

36. From the provisions above, the offence of sexual assault is committed when the following ingredients are established:

a. The offender penetrates the genital organ(s) of another person with; any part of the body of another or that person; or with an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; or

b. The offender manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ(s) into or by any part of the other person's body.

37. In her evidence, the Survivor told the court the assailant took her into Karandi Forest and touched her private parts using his fingers. On her part, the clinical officer who examined the Survivor told the court that the Survivor had an old broken hymen and that she had no lacerations, bruises or swellings. She stated that there was no conclusive evidence of sexual assault or penetration. Apart from the allegations that the assailant touched the Survivor's private parts, there was no evidence provided by the prosecution that there was penetration into her genitalia.

38. As seen from the provision of law above, in a charge of sexual assault, penetration in the two scenarios set above is a crucial ingredient of the offence. The act of unlawfully touching the genitalia of another, without such penetration as is described above, amounts to an offence of indecent act and not sexual assault. I am in the premises persuaded that the offence of sexual assault was not proved as the ingredients thereof were not established.

39. With regard to the second issue for determination, the main evidence that links the Appellant to the commission of the offence is that ofthe Survivor and her mother. The prosecution case was solely dependent on the identification of the Appellant by the two witnesses.

40. It is to be noted that the Survivor told the court the assailant took her into Karandi Forest and touched her private parts using his fingers. She was the only one present at the time. She told the trial court that the assailant was not known to her and that she was given the Appellant's name by her aunt, PW3, as the assailant.

41. On her part, PW2 stated that he she had been looking for the Survivor when she saw the assailant emerging hand in hand with her daughter from Karandi Forest. On sighting the witness, the assailant took to his heels. The witness was then told by the Survivor that the assailant had touched her private parts using his fingers. PW2 stated that she did not know the Appellant prior to that day. The witness however contradicted herself when she was cross-examined by stating that the Appellant was known to him as he had previously visited her home.

42. Although the Appellant admitted that he was a relative of PW3 and that the two knew each other, PW3 was not present when the Survivor and the assailant emerged from Karandi Forest. It is unclear how the witness and the arresting and investigating officer identified the Appellant as being the assailant as no explanation to that end was made by the three witnesses.

43. It is trite law that where the evidence relied on to implicate an accused person is entirely that of identification, the evidence must be water tight to justify a conviction (see Kiaria v Republic [1984] KLR 739). Such evidence should be tested with the greatest care (see Maitanyi v Republic [1986] KLR 198).

44. The two witnesses did not describe how or the circumstances under which they identified the Appellant as being the person who violated the Survivor. It is also apparent from the evidence of the Survivor that she did not know the assailant but was given the Appellant's names by PW3. In the circumstances of this case an identification parade should have been held particularly to test the correctness of the identification of the Appellant by the Survivor and her mother, both of whom did not know the assailant before the incident, noting further that PW2 contradicted herself on the issue of prior knowledge of the assailant.

45. It is apparent, in the circumstances, in the absence of proper identification, that the Appellant was convicted on the basis of suspicion. How is suspicion to be treated? The Court of Appeal in the case of Sawe v Republic [2003] eKLR, observed thus:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

46. The court went on to state as follows:

> " The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As

this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."

47. I need not say more. I am persuaded that on the basis of the evidence that was available to the trial court, the Appellant was not properly identified as the assailant.

48. For the reasons states above, the Appellant's conviction was not safe and his appeal has merit.

49. The Appellant also challenged the sentence. While sentencing the Appellant and the first accused person, the trial Magistrate rendered herself as follows:

> " Mitigation is duly considered. Under Section 5(1)(b)(ii) of the *Sexual Offences Act*, 2006the sentence provided is as follows;
>
> > "A person convicted for an offence under Section 5(1)(b)(ii) shall be liable to imprisonment for a term not less than ten (10) years but which may be enhanced to life imprisonment.
> >
> > Accordingly, the accused is hereby sentenced to serve ten (10) years imprisonment which is the minimum sentence....".

50. It is instructive from the record that the Appellant was in remand custody from 23rd June, 2022 when he was presented for plea for the second time. The period during which he remained in custody ought to have been considered. The Court of Appeal in Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR held that: -

> " "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody...".

51. According to The Judiciary Sentencing Policy Guidelines:

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

52. From the authorities and text, the trial court should have ordered that the sentence runs from 23rd June, 2022.

53. From the foregoing therefore and on the basis of the reasons that I have given above I find that the appeal is well merited. I proceed to allow it as the conviction of the Appellant was not safe. I therefore quash the Appellant's conviction and set aside the sentence of ten (10) years.

54. I further proceed to order that the Appellant be set at liberty forthwith unless lawfully detained in some other cause.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 16TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Respondent: Ms. Ndeda, Prosecution Counsel holding brief for Ms. Gakumu.

Court Assistant: Ms. Njoroge.