Mwenda v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 11976 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E006 OF 2023

AK NDUNG'U, J

OCTOBER 8, 2024

BETWEEN

PHYNIAUS MWENDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offences Case No.E88 of 2021– Hon. V. Masivo, SRM)

JUDGMENT

1. The Accused, Phyniaus Mwenda was charged with Defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. The particulars were that on the 13th day of November, 2022 at Laikipia Central Sub-County within the Laikipia County, willing fully and unlawfully caused his penis to penetrate the vagina of MM a child aged (14) years. In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section II (1) of the *Sexual Offences Act* No. 3 of 2006. After trial he was sentenced to serve 15 years imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;

    i. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution not prove their case beyond reasonable doubt.

    ii. That the learned trial magistrate erred in matters of law and fact by not appreciating that the complainant gave conflicting evidence.

    iii. That the learned trial magistrate erred in matters of law and fact by failing to note that there was no proper medical evidence linking the appellant to the commission of the offence.

iv. That the learned trial magistrate erred in matters of law and fact by not appreciating that the medical report says that he outer genitalia was normal, which brings out the question, how? If this was a rape case termed Defilement?

v. That the learned trial magistrate erred in matters of law and fact by failing to note that the accused right to a fair trial under article 50 of *the Constitution* of Kenya was infringed upon.

vi. That the learned trial magistrate erred in matters of law and fact by failing to note that according to the testimony of the complainant she alleges to have been defiled on 5th June, 2022 which contradicts the first report date.

vii. That I pray to be present during the hearing of this appeal in order to adduce more grounds and may this appeal be given the earliest date possible.

viii. That I pray this appeal to succeed, sentence quashed and I be set at liberty.

3. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal laid down the duty of the Court on a first appeal:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

4. The Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 stated: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

5. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

6. In Kiilu& Another v Republic [2005]1 KLR 174, the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

7. A good point to start from is to recap the evidence at the trial court.

   A recap of the evidence at the trial court was as follows; PW1 testified that she had been sent by her father when the Appellant invited her for tea. She obliged. The Appellant attempted to have sex with her inside the house but he suspected there was someone outside so he stopped. He however followed her and asked her to get into the bushes with him. He caressed her breasts and private parts. They had sex.

8. PW1 left for home but felt guilt and went to Bokeri's house. He found Danson who cooked for them. Bokeri came later drunk. Pw1 spent the night with Danson who forced her into sex after choking her throat.

9. PW1 added that the next morning she was taken to Matanya police station where she was put in custody. She was taken to a dispensary where a PRC form and a P3 form was filled.

10. PW2 narrated how PW1 went missing after she went to mama Bruce's salon but did not return. She was later traced and taken to the police station.

11. PW3 the investigating officer interrogated PW1 who confirmed having sex with the Appellant and One Danson on the material night in two separate incidents. The witness later arrested the Appellant when he was pointed out.

12. PW4 examined the complainant. She had a swelling on her neck.The labia minora and majora were normal. The hymen was broken. There was presence of a white discharge. HIV test was negative and there was no spermatozoa seen. He concluded there was penetration.

13. In a sworn defence, the accused denied the offence and stated he was just arrested on the 14.11.21.

14. I have had occasion to consider the evidence on record. I am cognizant of the fact that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions made.

15. Of determination is whether the Appellant could rely on additional grounds of appeal that were not in his petition of Appeal without leave and, secondly, whether the prosecution proved its case to the required degree. In considering these issues, I bear in mind that it is trite law in the criminal justice system that the burden of proof always lies with the prosecution and that it does not shift as held in Okethi v Okale v Republic [1965] E.A.555. It is incumbent upon the prosecution to discharge that responsibility to the required degree by establishing the allegations levelled against an accused person.

16. It is obvious that this court should answer the question of the regularity of the challenged new grounds of appeal on the basis that no leave was sought as envisaged under Section 350(2) of the criminal procedure code

17. Counsel for the respondent submits, and rightly so, that the Appellant is barred from submitting on grounds that were not in his Petition of appeal in accordance with Section 350 of the Criminal Procedure Code. It is submitted that those grounds should be disregarded.

18. In deference to the court's primary duty to do justice to the parties noting that the Appellant was acting in person and was therefore disadvantaged in knowledge of legal procedures, and in view of the fact that the Respondent was served and has submitted on the new grounds, I admit the same and deem them as properly filed and proceed to make findings thereon the irregularity notwithstanding.

19. I hasten to add that the trend of Appellants raising new grounds of their appeals is gaining notoriety and if not checked, may visit prejudice on the Respondent and are a source of disorder in the proceedings. I think that enhanced legal awareness through paralegals and even during court visitations to prison may be timely interventions in that regard to ensure compliance with the law.

20. Did the prosecution prove its case to the required legal threshold, that is, beyond reasonable doubt? The three ingredients of the offence of defilement are the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to lie. (see George Opondo Olunga v Republic [2016] eKLR.)

21. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
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> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

22. Turning to the evidence on record, I note that prove of the age of the complainant was achieved through the production of her birth certificate. Indeed the same is not contested.

23. As regards penetration, it is PW1's evidence that the Accused and later one Danson had sex with her. The medical evidence adduced by PW4 is to the effect that there was penetration. That conclusion by the clinical officer is not borne out of his findings as recorded in the PRC and P3 forms. The recorded findings indicate that PW1 had a swelling on the neck. The genetalia was normal with a hymen broken (old). It is instructive that loss of virginity may be as a result of many other factors other than penetration by a genital organ. There was a whitish substance . No spermatozoa was seen.

24. A keen review of this medical evidence falls short of corroborating the complainant's evidence. The clinical officer fails to explain his conclusion that there was defilement even after he recorded negative findings other than a positive finding of an assault that was evident from a swelling on the neck.

25. The evidence thus available in support of penetration is that of PW1, the Complainant, since there was no independent eye witness evidence adduced. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in Bernard Kebiba v Republic [2000] eKLR stated that:

> " The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

26. The court of appeal weighing on in the matter in Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR was of the opinion that:

> " The relevant law in Kenya is succinctly set out in Chila v The Republic [1967] EA 722 at page 723:
>
> 'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'
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> The decision was applied in Margaret v the Republic [1967] Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another [1936], 3 EACA 124."

27. However, the requirement for corroboration of evidence of a minor finds exception in sexual offences where the minor is the victim of the offence by providing that the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of

the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

28. In the case of Mohamed v R, [2008] 1 KLR G&F 1175, the Court held that:

> "It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

29. The Court of Appeal sitting in Mombasa in Sahali Omar v Republic [2017] eKLR held that:

> "On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the *Evidence Act*...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v R (supra) and Johnson Muiruri v Republic, [1983] KLR 445 and also John Otieno Oloo v Republic [2009] eKLR)...In addition, the proviso to section 124 of the *Evidence Act* affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:
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> "...The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."
>
> The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

30. Therefore, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. What is required of the trial court is to be satisfied that the victim is telling the truth. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning

must appear in the judgement of the trial court and the record itself must show that the trial court was so satisfied. It was therefore held in Omuroni v Republic [2002] 2 EA 508 that:

> " Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

31. I have re-evaluated the evidence of the complainant. She gave graphic details of the incidents. Her evidence is not shaken in cross examination. The trial court which had the advantage of seeing and hearing her testify clearly gave reasons for believing her. The court stated;

> " I find that her evidence available could be relied on without being corroborated.. The reason is that I listened keenly to her evidence. She was firm in her testimony. She was able to recall the details of the material day very well. She was able to describe the Accused person's house with precision which description went unchallenged. She was able to narrate how she was caressed by the accused person and eventually had sex with him...."

32. In this mater the evidence by the complainant was cogent and the trial court recorded its reasons for believing it. Penetration was proved.

33. PW1 testified that she knew the Appellant. The Appellant invited her to his house and made her tea. They spent considerable time together as the Appellant caressed her and later during the act in the bush. Am satisfied there was evidence of recognition and the Appellant was properly identified.

34. There was no challenge to the sentence. I have however considered this aspect of the proceedings. The court considered all necessary factors. It arrived at a legal sentence. I have no basis upon which to interfere with the correct exercise of discretion. With the result that the appeal herein lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER 2024.

A.K. NDUNG'U

JUDGE