Wanyama v Republic (Criminal Appeal 120 of 2019)
[2023] KEHC 2635 (KLR) (Crim) (22 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2635 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 120 OF 2019

JM BWONWONG'A, J

MARCH 22, 2023

BETWEEN

PIUS WANYAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. Okwani, S.R.M, delivered on 16th May 2019 at Milimani Chief Magistrate's Court in Criminal Case No. 1620 of 2014 Republic vs Pius Wanyama)

JUDGMENT

1. This is an appeal against the conviction and sentence of the subordinate court. The appellant was convicted and sentenced to life imprisonment 8 (2) of the *Sexual Offences Act*, No 3 of 2006. Being dissatisfied with the conviction and judgement is filed the present appeal raising 13 grounds.

2. The main grounds raised are as follows: In grounds 1,2,3,5,6,7,10, 11 and 13 the appellant challenged the totality of the prosecution's evidence that was relied upon to convict him. In ground 4, the appellant complained that the prosecution failed to call crucial witnesses who would have helped the court reach an alternative finding. In Ground 8, the appellant challenged the investigations undertaken as insufficient. In ground 9, the appellant argued that trial magistrate failed to consider his submissions and authorities cited before making a determination on his guilt. In ground 12, the appellant stated that the trial magistrate erred by shifting the burden of proof to him to disprove the charges against him.

3. During the hearing of his appeal, the appellant abandoned those grounds of appeal. He filed supplementary grounds of appeal raising 8 new grounds. The main grounds raised were as follows: In ground 1, the appellant complained that the trial court failed to adhere to section 200 (3) of the *Criminal Procedure Code* when taking over the matter. In grounds 2,3,4,5 and 8 the appellant

challenged the totality of the prosecution's evidence relied on to convict him. In ground 6, appellant argued that the trial court failed to consider the provisions of section 124 of the *Evidence Act*. In grounds 7 the appellant challenged the trial court's failure to consider his defence.

4. In response to the appeal, the respondent filed grounds of opposition dated 23rd November 2022. The grounds raised are that the appeal is an abuse of the court process since the appellant was properly convicted and prosecution discharged its burden of proof. The appeal lacks merit and should be dismissed.

5. As this is the Appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

6. M.O (name withheld) PW1 gave unsworn statement after voir dire examination. She narrated that she was playing outside their gate when the appellant who owned a barbershop nearby gave her a sweet. He asked her to go to the barbershop with her. When she declined, he pulled her into the premises. He removed her clothes and made her lie on the floor. He covered her mouth and put his 'dudu' penis into put in vagina. After defiling her, he dressed her and threatened her not to tell anyone. He then sent her away. She told the court that she was in a lot of pain. She went home and informed her aunt N what had transpired. N examined her and reported the incident at the police station. Vero a police officer accompanied her to the hospital where she was examined and treated. She identified the appellant in court as the perpetrator of the alleged offence. She knew the appellant from the neighbourhood.

7. NOO (PW2) testified that she was the complainant's aunt who lives with her. On 9th November 2014, she noticed the complainant walking abnormally. Upon inquiry the complainant informed her that she had been defiled by the appellant in his barbershop. The complainant had informed Sally who informed her. She examined her and observed white yellowing substance oozing from her private parts. She took the complainant to Nairobi Women's Hospital for examination and treatment. She also reported the incident at the police station. she identified the appellant in court as she known him for some time.

8. Kinuthia Edward Mbugua (PW3) a clinical officer testified on behalf of his colleague Ngengechel who had examined the complainant. The complainant had been brought for examination on 10th November 2014 after an alleged case of defilement. The findings of the examination were that the hymen was broken and had yellow vaginal discharge. She was also in pain. There was a high number of white blood cells which was an indication of an infection. The complainant was treated for sexually transmitted infections. The post rape care form was filed and signed. It was produced as an exhibit.

9. No 51937 PC Frelonca Thuo (PW4) the investigating officer told the court that the she conducted investigation after a complainant of defilement was launched at Muthangari police station. The minor/ complainant had been allegedly defiled by a barber in Kawangware Muslim area. After investigations, the appellant was arrested booked. The doctor confirmed that the child had been defiled. it was alleged that the offence had occurred in the month of October but it was reported in the month of November. She produced the complainant's birth notification to confirm her age.

10. Dr. Maundu (PW5) was the police surgeon examined the complainant on 13th November 2014 who was 5 years old. He produced the P3 indicating that: there were no physical injuries, normal external genitalia, the hymen was intact, there was no lacerations and there was no discharge. It was alleged that

the minor had been defiled on 10th October 2014. She also examined the appellant who had no injuries on his genitalia.

11. On cross-examination, he told the court that the doctor who had examined the complainant did not see the hymen. He was of the opinion that the complainant could have been defiled and the hymen can remain intact.

12. After the close of the prosecution's case, the appellant was found to have a case to answer. He was put on his defence and elected to give sworn testimony. He did not call any witnesses. He told the court that he owns a barbershop in Kawangware Muslim area in Nairobi. that in October 2014, PW2's husband (WM) brought the complainant to shave her hair at his business. that it was the first time he had seen her. thereafter, his younger brother informed him that there had been a case of defilement in the area. The allegations were made against him. he did not take any action. In November 2014, he went to the area Chief to clear his name and informed him the allegations that had been made against him. Subsequently arrested. He denied defiling the complainant.

13. The trial court found the appellant guilty and sentenced him to life imprisonment.

Analysis and determination

14. In ground 1, the appellant complained that the trial court failed to adhere to section 200 (3) of the *Criminal Procedure Code* when taking over the matter. In his submissions, the appellant argued that the trial court failed to inform him of the right under section 200 (3) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. This occurred when Hon. Okwani took over the matter from Hon. Gandani.

15. From the record, the appellant's advocate made the application for the matter to proceed from 'where it had reached'. The application was allowed. From the record, directions under section 200 (3) of the *Criminal Procedure Code* were taken the matter proceeded from where it had reached. Consequently, trial court executed its mandate under the said provisions of the law. The ground of appeal therefore fails.

16. In grounds 2,3,4,5 and 8 the appellant challenged the totality of the prosecution's evidence relied on to convict him. The appellant challenged the contradictory evidence of the two expert witnesses who testified. PW3 indicated that the hymen was broken with yellowish discharge while PW5 stated that the hymen was intact with no discharge.

17. In rebuttal, the respondent submitted that on the element of penetration, the testimony of the victim was cogent. The medical examiner PW3, who examined her confirmed that he hymen was missing. It was her submissions that there were no contradictions. Learned prosecution counsel maintained that the evidence of the victim was clear and precise. This was after the court conducted a voir dire examination to determine her understanding of the process and need to tell the truth.

18. The offence of defilement is defined by section 8 (1) of the *Sexual Offences Act*, No 3 of 2006 as follows:

19. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Therefore, the ingredients to be proved to establish the offence of defilement are:

    (i) The age of the victim.

    (ii) The act of penetration.

    (iii) Positive identity of the perpetrator of the offence.

20. On proof of the case, it was therefore incumbent upon the prosecution to prove that the penetration into the genital organ was unlawful and that it is the appellant who did it. In the instant case, the victim

was a minor aged 5 years old as is evidenced by the birth notification and the medical examination report. My opinion is guided by the decision the Ugandan Court of Appeal in the case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000 where it was held thus:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

21. In the instant case, a birth certificate of the complainant was not produced. A birth notification produced indicated that the victim was born on 24th November 2009 and was therefore aged 5 years at the time of the alleged offence. She was therefore a minor within the law. That evidence was therefore sufficient to proof her age.

22. I now determine whether penetration was proved. In this case, the PW1 gave unsworn evidence. However, the court allowed the appellant's advocate to cross-examine her. The complainant was clear in her testimony that the appellant lured her into his barbershop and defiled her. PW5, testified that she examined the appellant one month after she alleged incident. From his report, she had no were no physical injuries, her external genitalia was normal, the hymen was intact, there was no lacerations and there was no discharge. The PRC form produced indicated that the hymen was intact. PW5 was of the opinion that the complainant could have been defiled and the hymen can remain intact.

23. Although PW1's hymen was intact, Section 2 of the *Sexual Offences Act*, penetration may be partial or complete. The complainant was clear in her testimony of what happened. The element of penetration was therefore proved.

24. On the identification of the appellant, PW1 testified that she had previously visited the barbershop to get a haircut. The appellant was someone known to her. The identification was therefore by recognition. thus the identification was by recognition. As such, the positive identification of the appellant by PW1 properly implicates him to having committed the offence also against her.

25. In ground 6, appellant argued that the trial court failed to consider the provisions of section 124 of the *Evidence Act*. I appreciate that the only evidence connecting the appellant with the offence was that of the complainant, a child aged 5 years. On the issue of whether the evidence of the complainant, a minor, required corroboration, the law is quite clear: it does not. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* (Cap 80) Laws of Kenya, 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.

26. Dealing with a similar issue in the case of *Mohamed v R*, (2008) 1 KLR G & F 1175, it was 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."

27. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. According to the court the complaint was clear and consistent in her testimony and the evidence of PW2 corroborated her evidence in some material particular. It was therefore the court's finding that the complainant's evidence was truthful and that she was a credible witness. That in my view satisfies the requirement of section 124 of the *Evidence Act*. In my view, there is no set formula for recording the court's satisfaction with the truthfulness of the complainant's evidence as long as the substance of the finding reveals that the court believed in the evidence of the complainant. I therefore find that the learned trial magistrate was indeed satisfied with the evidence.

28. In grounds 7 the appellant challenged the trial court's failure to consider his defence. In the judgement of the trial court, the court noted that defence of the appellant was a mere denial. Further, his defence challenged the credibility of the complainant as a witness. All these were considered and the trial court found them unbelievable. This ground therefore fails. The upshot is that the conviction is safe and upheld.

29. On sentence, the appellant was sentenced to serve life imprisonment. As regards sentence, I take into account the circumstances in which the incident took place, and in particular the residual health effects the complainant has suffered.

30. In this regard then I am persuaded that a 30-year sentence which runs from the date of conviction is suitable. I therefore set aside the life sentence and substitute it 30 years' imprisonment, which shall run from date of conviction.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kinyua: Court Assistant

The appellant in person

Ms. Joy Adhiambo for the respondent