Wandeho v Republic (Criminal Appeal E022 of 2021)
[2023] KEHC 2308 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E022 OF 2021

FG MUGAMBI, J

MARCH 17, 2023

BETWEEN

NICHOLAS WANDEHO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the sentence of Hon. C.A. Ogweno, RM dated 30th September 2020 in Sexual Offence Case No. 436 of 2017 in the Chief Magistrate's Court at Mombasa)

JUDGMENT

1. The appellant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8(1) read with 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on 14th March 2017 at (particulars withheld) in Mombasa county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of KA, a child aged 2 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section11(1) of the *Sexual Offences Act* No 3 of 2006.

2. The appeal is premised on the following grounds:

    i. That the charge was defective

    ii. That the appellant was a minor at the time of committing the offence

    iii. That the allegations were not proved beyond a reasonable doubt

    iv. That the appellant's rights were violated

    v. That the defence of the accused was ignored

3. PW1, the complainant, gave unsworn evidence She explained how her uncle had defiled her in the house in his bedroom while her mother was in the siting room. It was her evidence that the appellant had given her chewing gum and rubbed her vagina using his penis. He threatened her not to tell anyone.

4. PW2 was the mother to KA. She testified that her daughter was born on April 1, 2014. She produced the birth certificate before court. On the day in question she testified to having seen KA go to the appellant's room in the servant's quarter. Minutes later when she came out of his room KA went for a short call. As she did so, PW2 noticed that KA seemed to be in pain. She examined her and noticed that her vagina had bruises and it was red and swollen. She confronted the appellant who denied any wrong doing. She called KAs father and together they went to the Makupa Police Station. She also accompanied KA to the medical examination. PW2 also confirmed that the appellant was her cousin.

5. PW3, Dr Nefisa Seif, a medical officer at Coast General Hospital, testified on behalf of the doctor who examined KA. It was her evidence that KA had lacerations on the labia minora and her hymen was intact. There was also redness of the vaginal area which was also swollen. These injuries were consistent with a case of sexual assault.

6. PW4 was the sister to PW2 and aunt to KA. She was in the living room when KA followed the appellant to his room. Moments later, she heard PW2 screaming and upon examining KA she saw that KAs vagina was red and swollen. She later found a damp blue t-shirt in the appellant's room which PW2 carried to hospital together with KAs panty.

7. PW5 was a volunteer at the community health center who accompanied PW1, PW4 and KA to Makupa Police Station and to Coast General Hospital. The appellant was well known to her. PW6, Corporal Safari Chea attached at Makupa Police Station was the initial investigating officer who interrogated PW2. PW6 was George Ogunda, a Principal Chemist at the government chemist in Mombasa. He performed a DNA test using the appellant's t shirt and samples taken from the appellant and KA. The DNA report confirmed that KAs panty had semen on it and that the semen matched the buccal swab taken from the appellant. PW7 was Inspector Paul Chai stationed at Jomvu Police Post who testified to the chain of custody of the exhibits which were misplaced in the matter.

8. The appellant was put on his defence and gave sworn evidence. He denied the allegations and stated that he was on his way back to work after lunch when a group of people accosted him. It was then that he learnt that there were rape allegations against him. He denied knowing KA or any of the witnesses and denied any relationship with them. In the same vein he states that he and PW2 had a brawl because she had accused him of stealing from her salon.

9. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v. Republic* [1972] EA. 32). I am also cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32. I will now proceed to determine the issues raised by the Appellant for appeal.

    i. Whether the offence against the appellant was proved beyond reasonable doubt

10. The appellant had initially been charged with the offence of incest. The charge sheet was amended on the application of the respondent from incest to defilement. Incest generally concerns sexual relations between closely related people within a family. The offence is provided for under sections 20 and 21

of the *Sexual Offences Act*. Section 20 of the Act particularly deals with incest by males. It provides as follows:

> 20.
>
> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years... (emphasis mine).

11. PW2 testified that she was a cousin to the appellant. Technically speaking, the relationship between KA and the appellant would therefore not fall within the categories of relations provided under section 20(1). In the circumstances, out of abundance of caution the prosecution may have made an application under section 214(1) of the *Criminal Procedure Code* to amend the charges during trial.

12. While the provisions of section 214(1)(i) provide that an accused person should be given an opportunity to plead to the altered charge, failure to respond to the fresh charges does not automatically vitiate the trial. The test is whether there would be any prejudice to be suffered by the accused person (see *Joseph Kamau Gichuki v R*, Nairobi Criminal Appeal No 523 of 2010). From the trial record, the learned trial magistrate correctly directed herself that there would be no prejudice suffered by the accused person under the circumstances. It is therefore my finding that this ground of appeal to quash the trial based on a defective charge sheet fails.

13. Having said that, the elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are provided under section 8 of the *Sexual Offences Act*. These are:

    i. Age of the complainant,

    ii. Penetration and

    iii. Positive identification of the assailant.

Age of the complainant

14. The Court of Appeal decision in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated the parameters along which age may be proved. This is by documents and evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

15. KA testified in her examination in chief that she was 4ys. PW2, her mother produced the original birth certificate showing that she was born on April 1, 2014. This conclusively set her age at 2yrs and 11 months at the time of the offence.

Penetration

16. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

17. The parameters of proving penetration were summarized by the Court of Appeal decision in JWA -v- Republic (2014) eKLR as well as *Geoffrey Kioji v Republic*, Nyeri Criminal Appeal No 270 of 2010.

18. It was KAs testimony that the appellant inserted his 'dudu' (penis) into her vagina (which she pointed to) while she was in the appellant's room. PW3, the doctor corroborated this evidence by the medical report which showed laceration on the labia manora, which she described as injuries consistent with a sexual assault case. The DNA test further proved the presence of the appellant's spermatozoa on KAs green inner pant.

19. The respondents invite the court to also consider the case of *Mark Oiruri Mose v R* (2013) eKLR and *Erick Onyango Odeng' v R* [2014] eKLR in support of their submission that penetration even on the surface of the girl's organ amounts to penetration. It is therefore not necessary that the hymen is broken for there to have been penetration. From the totality of the evidence, I am satisfied that the element of penetration has been proved.

Identification of the perpetrator

20. KA in her testimony fondly referred to the appellant as 'uncle Nico' and identified him in court. PW2, the mother to KA stated in her evidence that the appellant is a cousin, and that their mothers are sisters. It was also her testimony that they had lived with the appellant for 1 year. All of this evidence was not controverted by the appellant. Owing to these facts, there is no doubt that the appellant is well known to AK. The identification was based on recognition leaving no room for mistaken identity.

21. Based on the foregoing I find that the appellant was convicted on cogent evidence.

    ii. Whether the sentence was harsh and excessive under the circumstances

22. The appellant submits that the learned trial court failed to take into account his age when sentencing him. I have looked at the trial court record and I notice that the court observed that the appellant did appear to be a minor. The court asked for an age assessment report on two different occasions. The reports produced in court showed that the appellant was 18 and 16 years old at the time the offence was committed.

23. In the circumstances, the penal sanctions that should have been imposed on the appellant are provided under Part XV of the *Children Act* of 2022. Under section 238(1) of the Act, no child shall be ordered to imprisonment. In circumstances such as this, a retrial would be an option depending on the circumstances of the case. In this case, the appellant has been denied the benefit that would accrue to him as a child offender. He is now an adult. He was arrested in March 2017 and has served almost six years in prison which he would not have served had he been convicted as a child. In the circumstances, a retrial is not in the interests of justice.

24. In light of the foregoing, the appeal is allowed, the conviction and sentence quashed. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED IN OPEN COURT VIRTUALLY AT NAIROBI THIS 17TH DAY OF MARCH 2023

F. MUGAMBI

JUDGE