Wambui v Republic (Criminal Appeal E109 of 2021)
[2023] KEHC 2306 (KLR) (13 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E109 OF 2021

JM CHIGITI, J

MARCH 13, 2023

BETWEEN

GERALD WAWERU WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence of the Appellant by the Learned Hon. Catherine Mburu (SPM),sitting in the Senior Principal's Magistrate's Court at Kikuyu, in MCSO 04 of 2018 delivered on the 4th day of November,2021)

JUDGMENT

Brief Background

1. The Appellant before this Court was charged with the offence of Sexual Assault contrary to Section 5(1)(a)(i) as read together with Section 5 (2) of the *Sexual Offences Act*, 2007 and an alternative charge of committing an indecent Act with a Child contrary to Section 11(1) of the *Sexual Offences Act*, 2007.

2. A plea of not guilty for both charges was entered on 25th February, 2019.

3. A brief background of the matter before the trial court is that the Appellant herein was accused of having sexually assaulted VNN a minor.

4. The Prosecution started its case on 25th February, 2019 calling 5 (five) witnesses. The first witness PW1, the complainant's mother testified that at the time of the incident she was attending a women's meeting, and when she got home from the meeting, the complainant's sister informed her that the Complainant had been crying, complaining of pain in his buttocks. The Complainant is said to have narrated to PW1 of how the Appellant lured him into his house, laid him on the chair, and inserted his fingers in his anus, and asked him to lick his penis.

5. PW1 testified that together with the Complainant they reported the matter at Ruthigiti Police Station and subsequently visited Ruthigiti Health Care Centre, and Nairobi Women's Hospital upon referral by the Health Care Centre.

6. The Court conducted a voire dire exercise before taking the Complainant (PW2) testified after which it was established that the minor did not possess sufficient intelligence to be sworn. In his testimony, the victim gave an account of what had transpired in the Accused's house as had been narrated by PW1.

7. PW3, a clinical officer at Tigoni Hospital testified that he examined the minor on 16th January, 2018 and observed that the victim had a small anal tear measuring 1-2 cm on the top skin. He testified that at the time of examination the child was still in pain but there was no bleeding noted. This he said had also been observed in the Post Rape Care form that had been filled at the Nairobi Women GVRC.

8. He further testified that the minor tested negative for HIV, hepatitis B, as well as other sexual transmitted infections. PW3 went ahead to testify that the minor was given medicine to prevent HIV after a possible exposure, a hepatitis B vaccination, as well as antibiotics, and post trauma counselling.

9. PW4 testified that he worked at Nairobi Women Hospital and also at GVRC, and that he had a Diploma in clinical medicine, surgery and pharmaceutical technology. He also testified that he had training on Gender based violence medical management. In his testimony he reiterated the testimony of PW3 and confirmed that indeed the victim had been examined at the hospital on 15th January, 2018 at around 5 p.m. and that it had been confirmed that the minor had an anal tear although there was no blood flow.

10. The last witness was PW5 who was the investigating officer. In his testimony the officer confirmed that indeed PW1 had made a report at the Kikuyu Police Station gender desk accusing one Gerald Waweru Wambui of sexually assaulting her son. The officer confirmed that he had received exhibits which had blood stains. He further confirmed that on general observation, and according to the birth notification in his possession the victim was only 5 years and thus below 18 years of age. He also testified that the Appellant was arrested by members of the public who caught him in the act.

11. The Appellant in his testimony, given on 28th September 2021, stated that on 15th January 2018, he had left for work and was on night shift and that he went home at 8 a.m. and that upon arriving home he met his mother who sent him to buy soap. While at the shopping center he testified that the victim's mother assaulted him, put him in a vehicle and took him to Lusigeti Police station. He also testified that prior to the incident the victim's mother had threatened his mother and that there was a grudge between the two families.

12. The Court in its Judgement dated 19th October, 2021 upon considering the testimonies adduced before it, and the evidence produced in collaboration thereof, found the Appellant person guilty and sentenced him to life imprisonment.

13. It is this conviction and sentence that the Appellant wishes the court to set aside and quash. The grounds raised are as follows;

    i. The learned trial magistrate erred both in fact and in law by convicting the Appellant when the Prosecution had not proved their case against the Appellant beyond reasonable doubt.

    ii. The learned magistrate erred both in fact and in law by failing to resolve the apparent doubts in the Prosecution's case in favour of the Appellant.

iii. The prosecution considerably failed to investigate the cause and/or address the root cause of the matter on which the Complainants anchored the alleged offence imposed on the Appellant as there was a likelihood that the charges against the Appellant were born out of ill-will and malice.

iv. The learned trial magistrate erred both in fact and in law by failing to scrutinize and evaluate the ingredients of the alleged offences viz a vis the Prosecution's evidence which was contradictory and inconsistent in material facts, thereby arriving at an erroneous f decision.

v. The learned trial magistrate erred both in fact and in law in failing to find that the Prosecution failed to prove identification of, and lack of penetration by, the Appellant upon the Complainant (minor) beyond reasonable doubt.

vi. The learned trial magistrate erred in both fact and law by failing to find that the evidence of the Complainant (the alleged victim) was that of a minor who had been coached so as to frame the Appellant.

vii. The learned trial magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the Prosecution and could not shift to the Appellant.

viii. The learned trial magistrate erred both in fact and in law when she failed to consider the plausible defence of alibi but relied on very weak reasons to convict the Appellant.

ix. The learned trial magistrate erred in law and in fact when she made a partial evaluation of the evidence and finding in favour of the Prosecution instead of awarding the benefit of doubt to the Appellant especially where the alleged victim did not identify, but denounced, Exhibit 4.

x. The learned trial magistrate erred both in fact and in law in failing to find that no tangible evidence was formed or presented to the court linking the Appellant to the commission of the offence.

xi. The learned trial magistrate erred both in fact and in law by failing to find that the Appellant's demeanor in court pointed to that of a person who did not understand the nature of the offence he was charged with having been a product of a special school since the age of 10 years, which heavily prejudiced his defence.

xii. The learned magistrate relied on speculation, probabilities and possibilities to convict the Appellant and sentenced him to life imprisonment for an offence with a minimum sentence of ten (10) years.

14. Based on those grounds, the Appellant prays that: -

i. The Appeal be and is hereby allowed.

ii. The Conviction and the sentence be and are hereby set aside and quashed.

iii. The Appellant be set at liberty forthwith unless otherwise lawfully held.

15. The Appellant in his written submissions contended that it is a well-established rule for there to be corroboration as has been established under Section 124 of the *Evidence Act* and by the Courts in cases such as BKM v Republic [2020] eKLR. Further it was the Appellant's argument that it is a well-established rule of law that the unsworn testimony of a child of tender years must be corroborated, which was not the case before the trial court as it could not have been established whether the minor was telling the truth when he was asked whether or not he knew what the Bible says about telling lies, leading to the court deciding to have him give an unsworn testimony.

16. Also, it is urged that despite the testimonies by PW3 and PW4 no direct or material evidence was adduced at the trial court linking the Appellant with the commission of the offence. In addition, that according to PW5's testimony the Appellant was arrested in the act, and therefore it was very easy to take a DNA specimen from the alleged violating part of his body for matching with the victim's DNA.

17. The Prosecution is also faulted for failing to call a witness from among the children who were playing with the Complainant to confirm whether or not they saw the Appellant walking the victim towards his house. According to the Appellant as was held in the case of Bukenya vs. Uganda [1972] failure by the prosecution to summon a vital witness infers that the case was not proven beyond reasonable doubt.

18. It is also learned counsel's submission that the Appellant at the age of nine (9) years was taken to the Educational Assessment and Resource Centre where it was established that he was intellectually challenged and he depicted difficulties. The Center recommended he be transferred to a special needs' institution.

19. The Appellant's demeanor during trial, it was submitted pointed to him as one who could not understand the nature of the offence owing to the above challenges, and this it is argued heavily prejudiced his case.

20. On whether the sentence imposed by the trial court is harsh and excessive Section 5 (2) of the *Sexual Offences Act* is cited which provides for a minimum sentence of ten (10) years where a person is charged with sexual assault. Section 26 of the Penal Code together with Paragraphs 7.17,20.22 and 20.24 of the Sentencing Policy Guidelines are also cited in this regard.

21. The learned magistrate, it was submitted, failed to take into account that the Appellant was a first offender as a mitigating factor, that there was bad blood between the neighbors brought about by a land dispute; and further also failed to consider the Pre-Sentence report wherein even the Complainant's uncle, spoke positively of the Appellant.

22. In response, the Respondent filed written submission dated 22nd June, 2022. In the submissions it was argued that the Prosecution established through evidence that the Appellant willingly and unlawfully caused his fingers to penetrate the genital organs of the victim. The victim's evidence is said to have been corroborated by other witnesses as well as independent medical evidence.

Analysis And Determination

23. This Court has carefully considered the Appeal before it in the light of the evidence on record, the grounds of Appeal and submissions filed on behalf of the Appellant and the State, and over and above the grounds of Appeal.

24. The issues that crystallize for determination are whether the prosecution proved the charge of sexual assault; and if so, whether the sentence meted on the Appellant was too harsh.

25. It is trite that this being a first appellate court it is expected, that it will analyze and evaluate afresh all the evidence adduced before the lower court, and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In Okeno vs. Republic [1972] EA 32 the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

26. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 1. 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.
>
> 2. 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."

27. This provision was the subject of the determination in John Irungu vs Republic (2016) eKLR where the Court of Appeal expressed itself as hereunder:

> " Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

28. Section 5 (1) of the Act under which the Appellant was convicted under provides as follows:

> (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.

29. The Complainant in the instant case testified that the Appellant inserted his finger in his anus. PW3 a clinical officer and PW4 who works at Nairobi Women's hospital in their testimonies both confirmed that the Complaint had a small anal tear measuring 1-2 cm on the top skin which although not bleeding was tender.

30. The Court of Appeal at Mombasa in the case of John Irungu v Republic [2016] eKLR held as follows on the issue of penetration in cases of sexual assault;

> " Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against "any person". That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

31. Having had due regard to the Complainant's testimony, and that of PW1, PW2, PW3 and PW4, the P3 form, and the PRC form, I find that the trial court rightly found that the Prosecution had proved beyond any reasonable doubt that there was evidence of penetration.

32. The court has also noted that the Appellant contended that the prosecution failed to call any of the children who were playing with the Complainant to testify whether or not the Appellant called the Complainant into his house.

33. The Court in the case of DK v Republic (Criminal Appeal E129 of 2021) [2022] KEHC 407 (KLR) (28 April 2022) (Judgment) observed thus;

> " 9) In Bukenya & Others. v. Uganda (1972) EA 594, it was held that the prosecution is duty bound to make available witnesses necessary to establish the truth even if the evidence may be inconsistent with the prosecution's case.
>
> 10) The *Evidence Act*, Chapter 80, Laws of Kenya provides at Section 143 That: "No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."
>
> 11) This position was restated in Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005, where the Court of Appeal held, "...As a general principle of law, whether a witness should be called by the prosecution is a

matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

12) There is no evidence that complainant's grandmother and Kirimi witnessed the commission of the offence. Their evidence was therefore not crucial to the prosecution case and failure to call them does not weaken the prosecution case."

34. This court is in agreement with the above observation that whether a witness should be called by the prosecution is a matter within their discretion, and an Appeal court will not interfere with the exercise of that discretion unless it is shown that this decision was made due to ill motive.

35. The court in the above case also went ahead to address the issue of identification of the Appellant. It held as follows;

13) I will tie this ground to the ground on identification of the Appellant. The only witness to the incident is the complainant. Concerning identification of the Appellant, the court reveals that Appellant was identified by his name which left no doubt in the kind of the court that Appellant was not a stranger to the complainant and could not have been mistaken for someone else. (See Anjononi & others v Republic [1980] KLR 57.

14) As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows: "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.

15) From the totality of the evidence on record, I find that the trial court's conclusion that Appellant had been identified as the assailant and that complainant was truthful was well founded.

36. Similar to the Appeal before this court, the only witness to the incident is the complainant who according to PW1 identified the Appellant as 'cucu's Waweru' and this was due to the reason that he referred to the Appellant mother as 'cucu'. PW2 also identified the Appellant at the dock and referred to him as Waweru during his testimony. The trial magistrate observed that the evidence places the Appellant in the act as he had been positively identified by the complainant.

37. The Appellant in his defence, before the trial court elected to give an unsworn statement. It is not denied that it is his right in law. However, such unsworn evidence is incapable of being tested through

cross examination for veracity, and accordingly has low probative value. The Court in the case of T M M v Republic [2018] eKLR stated as follows on unsworn statements;

> 24. The law relating to unsworn statements is well expressed by Emukule, J in the case of Mercy Kajuju & 4 Others v Republic [2009] eKLR where he stated as follows:
>
> > "I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.
> >
> > .....
> >
> > There are of course Constitutional issues to overcome for instance Section 77 of *the Constitution*(Repealed) on fundamental rights and compulsion to give evidence. There is need to study these provisions and ss.211 and 306 of the Criminal Procedure Code, for the better enforcement of the law in relation to the criminal justice system and eliminate these unsworn statements as they add no value to the system and if any they confuse the accused who are mostly ignorant of their effect, and thereby obfuscate the system all together....
> >
> > Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused person elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-
> >
> > (1) to test the credibility of the witness;
> >
> > (2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and
> >
> > (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,
> >
> > (4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.
> >
> > In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight

will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.

In Amber May vs The Republic [1999] K.L.R. 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as May vs The Republic [1981] KLR. 129, the court of Appeal inter alia held-

1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)"

38. The Appellant, in his unsworn testimony, raised the defence of alibi. It is trite law that an unsworn statement cannot be subject to the rules of evidence because they are not technically considered to be evidence. Although having no probative value, it should be weighed against all other evidence. Instead of being evidence-based, its potential is compelling. It must be backed up by evidence that is documented in the case for it to have any value.

39. This Court takes cognizance of the fact that the trial magistrate in reaching the final decision considered the Appellant's unsworn evidence, and came to the conclusion that the defence did not dislodge the evidence presented by the prosecution.

40. The Appellant in his grounds for Appeal contended that the Magistrate erred in failing to find that the Appellant's demeanor in court pointed to that of a person who did not understand the nature of the offence he was charged with. The Appellant herein never raised the issue of a learning disability at the trial. The issue was raised in this Appeal and therefore, smacks of an afterthought.

41. The Court has had due regard to the proceedings before the trial court, and the cross-examination conducted by the Appellant on the Prosecution witnesses, and it is not convinced that the Appellant did not understand the nature of the offence he was charged with.

42. On the issue of whether the sentence was too harsh or not the court in the case of Wanjema vs Republic, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows: -

" An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account

some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

43. The trial magistrate in reaching the decision to sentence the Appellant to life imprisonment, considered the pre-sentencing report dated 1st November, 2021 which evidenced that the victim and his mother were afraid of the Appellant. Further, the court also observed that while out on bond the Appellant had harassed the victim's mother and the same had been reported to the court.

44. This Court takes judicial notice of the fact that the Appellant is a first offender, and it is of the opinion that the sentence meted on the Appellant is excessive. The court in the case of Benson Ondieki Odhiambo v Republic [2020] eKLR where the Appellant had been charged with similar offences as the Appellant herein held as follows;

> "(9) His main concern is the review of the sentence meted out by the trial court i.e. twenty (20) years imprisonment which accorded with Section 5(2) of the *sexual offences Act* but in the opinion of this court rather excessive for a first offender considering that the provision provides for a term of not less than ten (10) years imprisonment which may be enhanced to life imprisonment as desired herein by the a respondent. The circumstances of the case did not call for any enhancement of the prescribed sentence.
>
> (10) Consequently, even as the appeal (if at all) on conviction cannot succeed the appeal on sentence succeeds by virtue of being rather excess and must now be set-aside and substituted with a sentence of ten (10) years imprisonment with effect from the date of the sentence (i.e. 31/5/2018) less the three (3) years imprisonment already served prior to the re-trial of the case on 31st day of 2017. In effect the appellant shall serve seven (7) years imprisonment and if the delay in this case caused him to stay in jail for that period of time or more, he may forthwith be released if the prison authorities deem it fit and lawful."

Disposition

45. In light of the above this court upholds the conviction of the trial court. However, for the sentence of life imprisonment this court sets aside the trial court's sentencing, and substitutes the same with a sentence of ten (10) years imprisonment, with effect from the date of conviction. This Court has considered the time served in custody by the Appellant person.

Order

i. The Appeal is partly allowed.

ii. The conviction is upheld.

iii. The sentence for life imprisonment is hereby substituted with the a sentence of ten (10) years imprisonment with effect from the date of conviction.

DATED AND DELIVERED AT KIAMBU THIS 13TH DAY OF MARCH, 2023.

.....

J. CHIGITI (SC)

JUDGE