Wakhungu v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 20507 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20507 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E024 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

JOSEPH WAFULA WAKHUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was convicted in Karatina PMC's SO No. 3 of 2016 for the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 20 years imprisonment being the minimum sentence.

2. The appellant being dissatisfied with the conviction and sentence instituted the instant appeal vide a petition of appeal filed in court on 16.06.2022 and wherein he raised 5 grounds of appeal but basically he challenged the decision by the trial court for the reasons that the trial court erred in law and in fact;-

    i. In basing conviction on the evidence of PW1 yet the same was not supported by any evidence.

    ii. In overlooking that the prosecution's evidence was hearsay, inconsistent and lacked corroboration.

    iii. That the medical evidence adduced indicated that the broken hymen was old and could not be traced to the material date.

    iv. That the clothes the complainant was wearing at the alleged time of defilement were not produced in evidence.

    v. In rejecting the plausible defense of alibi on the basis that he did not call witnesses in support of the same thus shifting the burden of proof to the appellant.

3. The appeal was canvassed by way of written submissions. The appellant submitted that the elements of the offence were never proved in that there was no evidence of penetration as PW1 used the phrase "defiled me" and without explaining as to what that meant. Further that the evidence by PW4 was to the effect that hymen was missing and that there were no tears, lacerations and bruises and that signs of penetration were missing. Further that the identification in that the victim never testified as to whether she knew the appellant in the past or the relationship between herself and the appellant. The appellant further testified that the prosecution did not avail crucial witnesses and that the evidence by PW1 and PW2 was inconsistent as to the date of the incidence and that as a result of the said inconsistencies and contradictions, the conviction was unsafe. He relied on the case of John Mutua Musyoki -Vs- Republic (2017) CR App. No. 11 of 2016 and Phillip Nzaka Watu -Vs- Republic (2016) eKLR.

4. On behalf of the respondent, it was submitted that the prosecution's evidence was sufficient to prove the elements of the offence the appellant was charged with to the required standards i.e the age of the victim, acts of penetration and identification of the perpetrator of the offence. Further that the prosecution called key witnesses who corroborated the evidence of PW1.

5. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in Okeno Vs. Republic [1972] E.A. 32 and re-stated in Kiilu and another Vs. R (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See Gunga Baya & another Vs Republic [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See Alex Nzalu Ndaka Vs Republic [2019] eKLR).

6. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno Vs. Republic (supra) and re-stated in Kiilu and another vs. R (supra)), the amended grounds of appeal and the written submissions by the parties herein, it is my view that the main issue for determination is whether the prosecution tendered sufficient evidence to prove its case to the required standards. In my view, all the grounds of appeal raised by the appellant revolves around this main issue.

7. As I have already stated, the appellant was charged with the of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

8. Section 8(1) provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". Section 8(3) on the other hand provides that "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. It is therefore clear from these provisions and its indeed trite that for the charge of defilement to stand, the prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. The standard of proof is settled and its beyond any reasonable doubts.

9. As to proof of age, the importance of proving the same was emphasized by the Court of Appeal in Kaingu Kasomo -Vs- Republic, Criminal Appeal No. 504 of 2010 (UR) where the court stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

10. In the case before the trial court, the charge sheet indicated that the victim was a child aged 15 years. PW1 during voire dire examination stated that she was 15 years old. PW2 testified that the victim was born in the year 2001, the Investigating Officer did not produce the same. However PW4 produced the P3 Form and the PRC form as PExbts 1 and 2 and which indicated that the victim was 15 years old.

11. It is trite that age can be proved by both medical evidence and oral 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. (See Joseph Kiet Seet Vs Republic (2014) eKLR).

12. In Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) (cited in Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR) the Court of Appeal held stated that:-

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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." "..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

(See Boaz Nyanoti Samwel -Vs- Republic [2022] eKLR)

13. In the instant case, the evidence as to the age of the minor was never disputed by the appellant. I find that the court rightfully found as to the age of the minor.

14. As to penetration, PW1 testified that on 9.01.2016, she was at home sweeping and that the appellant went home and enquired as to whereabouts of her father and she responded in the negative. That he went to the gate checked around and went back. That he held her by her mouth and carried her to the coffee plantation where he defiled her and that she screamed and no one heard her. That she did not tell anyone until on Wednesday when she told her favourite teacher of what had happened. Her mother testified as having been called by the teacher on 13.01.2015 and being informed of the incidence. PW3 was the head teacher who testified that on 13.01.2015, a teacher by the names Veronica informed her of the incidence which had been reported by a pupil and when she summoned the said pupil (PW1) she repeated the same story to her. That she later called the pupil's mother. PW4 testified that when the minor was taken to hospital and upon examination, the hymen had been broken, head and abdomen was normal, same to thorax and abdomen and that there was no discharge from the vagina which was noted. Further that due to the broken hymen, they made the finding of defilement. She produced the P3 form and PRC form as exhibits.

15. I note that PW1 gave sworn evidence upon the court having conducted voire dire examination and having found her unsuitable to give unsworn evidence. Section 124 of the *Evidence Act* Cap 80 Laws of Kenya provides that;-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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."

16. As such, in sexual offences and where the victim is the only witness, corroboration is not required and the court can convict based on the evidence of such a victim so long as the court is satisfied that the witness is telling the truth. The said reasons ought to be recorded in the proceedings.

17. In the instant case, I have perused through the proceedings and I note that the court while deciding that PW1 would give unsworn evidence warned itself of the same. In its judgment, the court noted that it had a benefit of looking at the demeanour of the complainant and that she appeared composed. That she did not give any conflicting evidence and she was consistent with her evidence even after cross examination by the accused (appellant herein). The court found that the complainant positively identified her assailant who was well known to her.

18. The evidence by the prosecution was sufficient to prove that the appellant herein was the assailant. The victim testified as to how the appellant went to their home and after being informed that her father was away, he took her to the coffee plantation. The offence happened during the day and the appellant did not tender any evidence to disprove this evidence.

19. Considering all the above, it is my view that the elements of the offence of defilement as provided by the law were proved to the required standards.

20. The appellant raised a ground in the grounds of appeal accompanying the submissions (ground c) to the effect that the trial court erred in law and in fact in failing to find that PW1 was not credible witness. In paragraph 17 and 18 of the submissions, the appellant submitted that the court's finding that PW1 did not understand the importance of telling the truth but had sufficient intelligence to testify was afoul to Section 124 of the *Evidence Act* and that the trial court did note on record that the complainant was telling the truth. That the witness would have been couched as to what to testify and thus she was not credible. The case of Ndung'u Kimani -Vs- Republic 1980 KLR 282 was cited. I have perused through the trial court's record and I note that the trial court complied with the provisions of section 124 of the *Evidence Act*. Voire dire examination was conducted and the court found the complainant not able to understand the meaning of giving evidence on oath and proceeded to take the evidence as unsworn. The court noted that it had warned itself of the same. The court in the judgment noted that it had observed the demeanour of the witness and that she was consistent. I cannot fault the trial court as I am not the one who observed the demeanour. This court cannot fault the trial court for believing in the witness as it is the trial court which had the advantage of hearing and seeing the witness. The record indicates that the trial court believed in the witness. The appellant did not in any way prove to this court that the witness was not trustworthy.

21. In my view, the trial court being the one which had the benefits of observing the demeanour of the said witness, this court cannot fault its decision.

22. It is my finding, therefore, that the prosecution indeed proved all the elements of the offence facing the appellant to the required standards and for those reasons the first ground of appeal fails.

23. The appellant's second ground of appeal was to the effect that the trial court erred in fact and in law in overlooking that the prosecution evidence adduced was hearsay, inconsistent and lacked corroboration. However, it appears that the appellant abandoned the said grounds and advanced other different grounds of appeal in his submissions. However, the first ground of appeal is consistent. I will as thus consider the grounds as submitted by the appellant.

24. The appellant submitted that the trial court erred in law and in fact by failing to find that the prosecution's case had discrepancies, was contradictory and inconsistent. In paragraph 14 of the appellant's submissions supported this ground and wherein he submitted that the prosecution's case was riddled with material contradictions, discrepancies and inconsistencies that went to the root of the case. An example of the consistencies as was noted by the appellant was on the date of the offence and the appellant submitted that the complainant testified that the same occurred on 9.01.2016 and PW2 contradicted the said evidence having testified that she was called by PW3 on 13.01.2015. Further that PW1 testified that she was from Kahora whereas PW2 testified that she was from Kara. Further contradiction was noted on the difference between PW5 and PW1's evidence as to how the offence occurred as in PW5 testified that PW1 was dragged to the forest while PW1 testified that she was carried to the coffee plantation while being held on the mouth by the appellant. However I have perused the trial court's record and I note that the evidence was very clear that PW1 was defiled on 9.01.2021 but reported to the teacher later on 13.01.2016 and thus the dates cannot be contradictory as the latter date is not the date of the offence. Further the names of the places PW1 and PW2 came from (Kahora and Kara) does not amount to material contradiction to go to the root of the case and same with the evidence as to how she was taken to the coffee plantation. The evidence was clear as to the occurrence of the offence. As it is trite for contradiction to affect the judgment of the court, it must be material contradiction. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. (See MW -Vs- Republic [2019] eKLR). In this case, the issue as to the names given by the witnesses though contradicting cannot in any way be said to be material and neither is the issue as to how the complainant was taken to the coffee plantation a material contradiction.

25. Under grounds (e) and (f), the appellant faulted the trial court for convicting based on evidence by PW1 yet the same was not supported by medical evidence and further that the medical evidence adduced indicated that the broken hymen was old and could not be traced due to lapse of time. However by dint of section 124 of the *Evidence Act* and the proviso therein, corroboration in sexual offences is not a requirement. As such, this ground in my view fails as the evidence by the doctor was not a compulsory one. However, I fault the evidence of the said doctor for the reasons that it appears that the finding of defilement was based on the fact that there was broken hymen and it appears that the trial court relied on this evidence. In my view, it was wrong for the doctor to link the broken hymen to the act of defilement more so since the witness did not give the age of the tear. The same is not prima facie evidence of penetration as hymen can be lost through other ways. (See PKW versus Republic [2012] eKLR).

26. That notwithstanding, as I have already stated, evidence by PW1 was sufficient and there was no need for corroboration.

27. In the petition of appeal earlier filed, the appellant had raised a ground to the effect that the trial court did not consider his defense of alibi and that the court shifted the burden of proof to him by holding that he did not call witnesses to prove the same. The appellant did not pursue this ground in his submissions but nonetheless I will touch on the same as the ground is clear. I note from the court's record that indeed the court held that the appellant herein failed to prove his defense of alibi. However the Court of Appeal in the case of Erick Otieno Meda -Vs- Republic [2019] eKLR while determining the issue of proof of alibi and having cited comparative authorities held that an alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view. In my view the trial court was right in finding that the appellant had not produced evidence as to the same. There was more which was needed other than just stating that he was away on the date of the offence.

28. Further and having perused the court's record, I find that the said defense was raised during the defense hearing and which was in my view too late for the court to consider the same. As it is trite law, the defense of an alibi must be raised at the earliest opportunity by an accused person during a trial to enable the prosecution look into the same. (See Victor Mwendwa Mulinge Vs Republic [2014] eKLR). Raising the same to late will be considered as an afterthought. The appellant having raised the same too late in the day, I find that the same was not applicable.

29. The appellant submitted that the erred in failing to find that the prosecution failed to avail key witnesses in support of its case in that the nephew PW1 talked about was never called as a witness. However it is trite that the prosecution reserves the right to call the witnesses it deems fit and sufficient. Under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. In the case of Keter -Vs- Republic [2007] 1 EA 135 the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

30. In my view, what was important is the prove that the offence occurred. In the instant case, the same was proved by the evidence of PW1 and which needed no corroboration. I find this ground not merited.

31. The appellant indicated in his petition of appeal filed on 16.06.2022 that he was appealing against both the conviction and sentence. However he never advanced any argument as to the sentence. As such I will not consider the same.

32. As such considering the appeal before me, I find the same lacking merits and the same is dismissed.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State