Wangechi v Republic (Criminal Appeal E032 of 2022) [2023] KEHC 20672 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E032 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

PAUL MUHORO WANGECHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction by Hon Wanja in S.O. No. 10 of 2020 in the PM's Court at Othaya and delivered on 02.08.2022)

JUDGMENT

1. The appellant herein filed the undated petition of appeal wherein he has challenged the conviction and sentence by the trial court in Principal Magistrate's Court at Othaya in Sexual Offence Case No. 10 of 2020. The trial court convicted the appellant of the offence of defilement contrary to Section 8(1) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 and sentenced him to serve fifteen (15) years imprisonment. He faults the trial court for his conviction and sentence.

2. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as enumerated on the face of the petition of appeal.

3. At the hearing of the appeal, the court directed that the parties file written submissions to argue the appeal.

4. The appellant submitted that he was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act* and upon trial, was convicted and thereafter sentenced to 15 years imprisonment. That he is dissatisfied with the conviction and the sentence arrived at by the trial court. He merged grounds 1, 2 and 3 to wit that the complainant was an untruthful witness and further, the prosecution's evidence was tainted with contradictions which made the same unreliable. That the trial court relied on the evidence of a single witness to convict the appellant herein. On grounds 4 and 5, it was submitted that the prosecution did not prove its case to the required standards

but instead shifted the burden of proof to the appellant. That the investigations herein were below par to warrant conviction and further, no DNA test was carried out to determine the spermatozoa found in the complainant was indeed that of the appellant herein. The appellant contended that the findings by the medical officer was also questionable as there was bacteria that was found in the complainant while the same was not found on him. On ground 6, it was stated that his rights to fair hearing were not upheld as he was not given a chance to interrogate the submissions filed by his advocate. Reliance was placed on the case of Akhuya Vs Republic Criminal Appeal No. 42 /2002 at Kisumu. In regards to sentencing, he submitted that the same was harsh and excessive as the trial magistrate did not exercise her discretion as her hands were tied by the provisions in the *Sexual Offences Act*. Therefore, it was prayed that this court quashes the conviction and sets aside the sentence herein.

5. The appeal was opposed by Ms. Lubanga Varoline, the Learned Prosecution Counsel as she submitted that the appeal is devoid of merit and thus ought to be dismissed. The respondent submitted that all the ingredients of the offence of defilement were proved and further noted that lack of DNA test results did not lead to miscarriage of justice as the law is clear on the ingredients of the offence of defilement which were proved beyond any reasonable doubt. Further, it was submitted that article 50 (2) of *the Constitution* provides that every accused person has a right to fair hearing. That the accused was not denied the right to legal representation as the record shows that the appellant had an advocate who was allowed a chance to cross examine the witnesses and interrogate the prosecution's case. Therefore, that there was no prejudice occasioned to the appellant or any violation of his rights. In the end, the respondent urged this court to dismiss the appeal for the same was destitute of merit.

6. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on both conviction and sentence wherein the appellant contends that his conviction was not safe and further that, his sentence was harsh and excessive.

7. The duty of this court while exercising its appellate jurisdiction 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 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter, the court should 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. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is 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).

8. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

9. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington Vs DPP 1935 AC 462 and Miller Vs Minister of Pensions 2 ALL 372-273.

10. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. In *Charles Wamukoya Karani Vs Republic*, Criminal Appeal No. 72 of 2013,

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

11. The question therefore is whether the above elements were proved to the required standards.

12. It is not disputed that the complainant at the time of the commission of the offence, was 16 years old as the same could be ascertained from the evidence produced before the trial court (P. Exh. 1 - Birth Certificate).

13. In the case of *Edwin Nyambaso Onsongo Vs Republic* (2002) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe Vs Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held 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, guardian or medical evidence among other forms of proof….."

14. In this case, a birth certificate was produced as an exhibit. It shows that the complaint was born on 8/12/2003. As such, this court is satisfied that the complainant was a minor which satisfies the legal requirement.

15. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.

16. In this case, PW1 testified how she met the appellant at the mosque area and the appellant asked her name. The appellant held her hand twice and she started feeling dizzy and the next thing that followed is that she found herself naked on a bed and that she was feeling pain on her private parts and the appellant was with her on the same bed. That, the appellant started touching her breasts and he inserted his penis into her vagina and wherein he penetrated her for about twenty minutes. She was categorical that the appellant had sexual intercourse with her.

17. The complainant gave a graphic account of all that transpired and in my humble view, therefore, even without corroboration of her evidence, the same was cogent enough for the court to return a verdict of guilty. It is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. [See *George Kioji Vs R* Nyeri Criminal Appeal No. 270 of 2012 (unreported)]. The court was of the view that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

18. Further, PW4, the clinical officer testified that upon examination of the complainant, she found that the complainant had a broken hymen with lacerations on her outer genitalia plus tissues at 6.00 O'clock at the vaginal opening. That a vaginal swab revealed spermatozoa and motile bacterial and the same was an indication of infection in the genitalia. It was her view that an aggressive penetration to the genitalia could cause lacerations.

19. In regards to identification, it is on record that the appellant had stayed with the complainant from 04.10.2020 to 05.10.2020 when she finally escaped after tricking the appellant. From the same, I hold

the view that the complainant had a large latitude of time within which she could easily recognize and /or identify the appellant herein as the person responsible for the sexual assault. In my view, the circumstances herein shows that identification was thus favourable for the twoo spent a lot of time together. [See *Kariuki Njiru & 7 Others Republic*, Criminal Appeal No. 6 of 2001 (Unreported)].

20. In view of the foregoing, the conviction of the appellant was proper given that the ingredients forming the offence of defilement were proved.

21. The appellant contended that the prosecution's evidence was full of contradictions thus discrediting the prosecution's case. In *Joseph Maina Mwangi Vs Republic* CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

22. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his/her testimony cannot be relied on. The court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. [See *Nyakisia Vs R*. E. A. C. A. Crim. App. 35-D-71; -/5/71].

23. This court has subjected the evidence adduced before the trial court to a fresh scrutiny and it notes that some of the issues raised by the appellant to be contradictory is the period of time the complainant remained unconscious. In my humble view, the same is neither here nor there as the prosecution only had to prove the elements of the criminal offence herein which in my view, were met.

24. In this case, considering the weight of evidence adduced by the prosecution weighed against that adduced by the appellant, it is outright that the appellant was responsible for the sexual abuse on the complainant.

25. The appellant also decried the fact that the trial court relied on a single witness evidence to convict him. In the case of *Khalif Haret Vs The Republic* [1979] KLR 308, Trevelyan and Hancox, JJ pronounced themselves as hereunder:

> "What then, is corroboration? As was put succinctly in *R vs. Kilbourne* (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."

26. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

27. In this case, the appellant contended that despite the fact that PW4 stated that spermatozoa and motile bacteria were found in the complainant's genitalia, it would have been prudent for the prosecution to have conducted DNA to fully determine whether the same belonged to him. That, however, is not the end of the matter as it is trite that 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* 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.

28. 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]

29. As such, the trial court cannot be faulted over the same.

30. On the issue that the burden of proof was shifted to the appellant in that he decried the fact that the spermatozoa found in the complainant could have been taken for DNA sampling to conclusively determine whether the same originated from him; Section 36 (1) of the *Sexual Offences Act*, 2006 provides thus:

> " Evidence of medical, forensic and scientific nature

1. Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

   The wording of section 36 (1) above is couched in discretionary terms, rather than mandatory terms. The above provision was a subject of discussion by the Court of Appeal in the case of *Robert Mutingi Mumbi Vs Republic*, Criminal Appeal No. 52 of 2014 (Malindi) where the appellate Court of Appeal stated:

   "Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. ....DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved."

31. In the case of *Martin Okello Alogo Vs Republic* [2018] eKLR (Supra), as cited in the case of Williamson Sowa Mbwanga Vs Republic the Court of Appeal stated:

> " ....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.........It is partly for this reason that Section 36 (1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

32. From the above, it is clear that medical examination on the appellant was not mandatory but discretionary as there are other ways other than medical evidence in the form of DNA evidence to prove the commission of a sexual offence. As such, the said ground must fall.

33. On the ground that his rights to fair hearing were not accorded to him as he did not have an opportunity to interrogate the contents of written submissions filed by his advocate, it is trite that the accused was not denied the right to legal representation as the record shows that the appellant had an advocate who was allowed a chance to cross examine the witnesses and interrogate the prosecution's case. Therefore, there was no prejudice occasioned to the appellant or any violation of his rights as alleged.

34. The appellant further submitted that the trial court meted out a harsh and excessive sentence which was disproportionate to the charge. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/O Owoura Vs Reginum* (1954) 21 270 as follows:-

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, (1950) 18 E.A.C.A 147:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is ////Vs Shershewky, (1912) C.C.A. 28 T.L.R. 364."

35. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006.The sentence provided under section 8(4) is as stipulated hereunder:

> 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.

36. The complainant herein was 16 years of age at the time the offence was committed. The appellant was sentenced to 15 (Fifteen years) imprisonment for the said offence. It is my view that the same is not only lawful but also legal. The same is not excessive or harsh.

37. In view of the foregoing, I find the appeal both on conviction and sentence devoid of any merit and I hereby dismiss it.

38. It is so ordered.

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

L. NJUGUNA

JUDGE

....for the Appellant

....for the State