Nyangale v Republic (Criminal Appeal E062 of 2022)
[2023] KEHC 22588 (KLR) (2 August 2023) (Judgment)

Neutral citation: [2023] KEHC 22588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E062 OF 2022

A. ONG'INJO, J

AUGUST 2, 2023

BETWEEN

ERICK MWAKILENGE NYANGALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered by Hon. R.M. Amwayi, Senior Resident Magistrate on 30th June 2022 in Mombasa Chief Magistrate's Court S. O. No. 47 of 2020, Republic v Erick Mwakilenge Nyangale))

JUDGMENT

Background

1. Erick Mwakilenge Nyangale was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* no 3 of 2006.

2. The particulars are that Erick Mwakilenge Nyangale on 9th April 2020 at around 4.30 pm within Jomvu Sub-County intentionally and unlawfully caused his penis to penetrate the vagina of MMM a girl aged 13 years old.

3. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* no 3 of 2006.

4. The trial magistrate considered the evidence of seven prosecution witnesses and the unsworn statement of the appellant and convicted the appellant on the main charge of defilement and was sentenced to serve 15 - years imprisonment which ran from 29nd July 2022.

5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds filed on 22nd June 2023: -

1. That the trial court erred in law and facts by failing to conduct voire dire examination on the complainant.

2. That the trial court erred in law and facts by failing to see that the prosecution evidence was riddled with material discrepancies.

3. That the trial court erred in law and fact by failing to see that the prosecution had withheld crucial evidence.

4. That the trial court erred in law and fact by failing to see that the complainant's testimony did not conclusively link me to the offence.

5. That the trial court magistrate erred in law and fact by failing to take into account the pre-trial custody period

6. That the trial court erred in law and facts by failing to consider my mitigation under Section 216 and 329 of the *Criminal Procedure Code*.

6. The appellant prayed for the court to quash the conviction and set aside the sentence.

Prosecution's Case

7. PW1, MM the complainant herein gave sworn evidence after undergoing voire dire examination and said she was aged 14 years, a pupil in class 7 and that she was born on 1.12.2007. She said the accused by the name Erick was known to them and that he was their neighbor. She said that on 94.2020, they went to Erick's house without permission and that Erick locked the door and told them to wait as he prepared tea. That he then told his brother to go and take a shower and that she was left with the accused in the house. She said that he then did bad manners to her and touched her breast. She said that she was in a tshirt and trousers and that he removed her trousers and panty and did bad manners by forcefully having intercourse with her. That he penetrated her vagina using his penis and that she cried as she was in pain. That he told her not to tell anyone and that he had locked the door from inside so that her brother could not get in. That after he was done, she dressed and he opened the door for her brother. That she went home and told her parents and she was taken to hospital.

8. PW2, DM gave sworn statement after undergoing voire dire examination and said that the complainant was his sister and that the accused was known to him and he identified him in court. PW2 said that on 9.4.2020, they went to the home of the accused and that the accused told him to light a jiko. That Erick went to the shop and his sister washed a sufuria. That he came back with bread and that they cooked tea and took. That he told PW2 to go and take a shower and that the bathroom is outside. That he left him with his sister and on coming back he found the door locked. That he knocked and they opened and he found Erick and his sister sitting on the mattress. That Erick was in a trouser but no shirt and that his sister was fully dressed. That he told his sister to go and take a shower and that he took them back home. That the complainant told her aunt what happened and she was taken to hospital the following morning.

9. PW3, TK testified that on 9.4.2020 at 7.00 pm, she was at home when she received a phone call from one B who informed her that the two children were missing and one of the children is the complainant herein. That when she got there, she found B with a cane and the children were crying. That she then took the cane and asked them what had happened. That they interrogated the children who said that Mwakilenge had told them to go to his house and that he promised he will buy them good things. That the complainant had been warned not to tell what happened. That when they checked the complainant, she was wet and she said that Mwakilenge told her to shower after he was done. PW3

identified Mwakilenge who was their neighbor in court. PW3 said that the matter was reported to the police and they were advised to take the child to hospital at Port Reitz and they reported the matter to Jomvu Police Station.

10. PW4, CM said that on 9.4.2020 at about 7.00 pm, he received a phone call from his sister T who told him that the children were not at home and that it was during curfew. That at about 7.15 pm, they called again and told him that the children had gone back and upon interrogating the children, they said that the complainant had been defiled and that the complainant was PW4's daughter. They said that the accused took them from their home and to his house in Ufuta and that after he received the information, he advised them to report the matter to Nyumba Kumi which they did. That the following day, they went and reported to the police station and PW4 later recorded his statement. He said that he reported the matter at Jomvu Police Station and they were told to take the child to hospital which they did where the child was taken to Port Reitz Hospital. He said the accused was known to him prior to the incident as they were neighbours. PW4 identified the accused as the one in court.

11. PW5, Mwalimu Balu, the village elder said that on 20.4.2020, he received a call from CM who told him that a person had defiled his daughter. That he then proceeded to his home and found a group of people there including the suspect. That PW5 arrested the suspect who was the accused person before court and took him to Jomvu Police Station. That he then recorded his statement.

12. PW6, Said Gadho Salim the clinical officer from Port Reitz Hospital testified that he had the outpatient booklet and the P3 and PRC for the complainant. He said that the P3 Form was filled on 16.4.2020 by Dr. Kah whom he had worked with for over three years and that he was familiar with his handwriting and signature. That the patient went in with allegations of having been defiled by a person known to her. That on examination, she had bruises on labia minora and the hymen was broken. That the vagina had whitish vaginal discharge. PW6 produced the P3 Form as PExh 3 and that the patient was treated as an outpatient. That the vagina had epithelial cells, pregnancy was negative, VDRH was negative. That she was put on PEP, P2 and antibiotics. He produced the treatment notes as PExh 2 and the PRC Form as PExh 4. That the patient according to the PRC Form was forcefully penetrated and the vaginal examination revealed bruises on the labia majora and minora.

13. PW7, no 53488Ncpl Mwalumo Abdall from Jomvu Police Station and the investigating officer herein said that the previous investigating officer CPL Fudhu went on transfer to Voi and that he took over the matter on 3.6.2021. He said that he went through the file and noted it was a defilement case. That the accused was alleged to have defiled a child on 9.4.2020 and that investigations commenced after the report was made and the complainant taken to hospital for examination. That the accused was later arrested and during interrogation he admitted to having committed the offence. That he was charged with the offence before court and that statements of the witnesses were recorded and it was proved that the complainant was born on 1.2.2007. PW7 produced the birth certificate as PExh 1 and identified the accused as the one before court.

Defence Case

14. The accused, Erick Mwakilenge gave an unsworn testimony that on 20.4.2020, he was heading to work and about 2 kms from his house, he heard someone calling him and when he proceeded to where he was, he realized it was C. That there was an altercation between him and C about why the accused had never visited him yet he knew where C lived. That C told him to go in the house and greet his family. That inside the house was his wife, two girls and a boy. That he then sat and the woman asked why he had never visited them. That she then alleged that he had taken their daughter. That C left and got back with four people and one of them introduced himself as the village elder and said that the accused

was under arrest for defilement. That he was taken to Jomvu Police Station and later to court. The accused denied committing the offence.

15. Directions were taken on 18th May 2023 that the appeal was to be canvassed by way of written submissions but as at the time of writing the judgment, only the appellant had filed the submissions on 22nd June 2023.

Appellant's Submissions

16. The appellant submitted that the trial court erred by failing to conduct voire dire examination on the complainant as required by law. That the requirement that a minor witness should be examined on their capability to testify on oath is predicated on the principle that the minor may be incapable of testifying on oath on account of lacking the intelligence to understand the need to tell the truth and the knowledge of what an oath is all about. The appellant relied on Section 19 of the *Oaths and Statutory Declarations Act* and the cases of *John Muiruri v Republic* (1983) KLR 445 and *Peter Kariga Kiume v Republic*.

17. On material inconsistencies in evidence, the appellant argues that the prosecution evidence was riddled with material inconsistencies that suffice to vitiate the trial and that the magistrate allowed it. The complainant pointed out the said inconsistencies in the evidence of the prosecution witnesses. He relied on the decisions in HCCR Misc. Appl. no 345 of 2001, *Juma & Others v AG (UR),* Maina v Republic (1970) EA 370, *Jon Cardon Wagner v Republic & 2 Others* (2011) eKLR, and *Peters v Sunday Post* (1958) EA 424. That the trial court should warn itself of the danger of convicting on such evidence as it may prejudice the accused person.

18. On crucial evidence withheld, the appellant contended that there was an allegation that there was an aunt who was informed of the alleged incident of defilement subsequent to which the complainant was sent to the hospital for examination. The appellant stated that the said B was better placed to give the court a clear account of the alleged ordeal as narrated to her by the complainant. That however, this witness was never summoned to testify. He relied on the case of *Bukenya v Uganda* (1972) EA 549 that the prosecution must avail all witnesses necessary to establish the truth even if their evidence may be inconsistent. The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case. Where the evidence called is barely adequate, the court may infer that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution.

19. On sentence, the appellant submitted that the trial court purported to have taken into account the mitigation submissions that he presented during pre-sentencing but nevertheless proceeded to impose a sentence of 15 years imprisonment. He stated that the period of over two years and four months ought to be effectively taken into account pursuant to Section 333(2) of the *Criminal Procedure Code* and relied on the case of *Ahamad Abolfathi Mohamed & Another v Republic*, Cr. App no 135 of 2016.

Analysis and Determination

20. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered

the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

21. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

    i. Whether failure to conduct voire dire examination on the complainant was fatal to the prosecution's case

    ii. Whether the prosecution's evidence was riddled with material discrepancies

    iii. Whether the prosecution withheld crucial evidence

    iv. Whether the complainant's testimony linked the appellant to the offence

    v. Whether the trial magistrate took into account the appellant's pre-trial custody period.

    vi. Whether the appellant's mitigation was considered under Section 216 and 329 of the *Criminal Procedure Code*

Whether Failure to Conduct Voire Dire Examination on the Complainant was Fatal to the Prosecution's Case

22. The Appellant submitted that the court required to form an opinion that the complainant of minor age is possessed of the understanding of the nature of an oath prior to receiving of their evidence and that requirement is not discretionary.

23. Section 125 (1) of the *Evidence Act* states: -

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

24. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides: -

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

25. In the case of *Samuel Warui Karimi v Republic* [2016] eKLR it was held: -

> " ...voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."

...

"This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the *Children's Act* has remained a guide in regard to criminal responsibility."

26. In *John Muiruri v Republic* (1983) KLR 445, Criminal Appeal no 44 of 1982 Court of Appeal at Nairobi, Madan, Porter JJA and Chesoni Ag JA held: -

> " Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> ...
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> When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood ...."

27. In *Patrick Kathurima v Republic*, Criminal Appeal no 137 of 2014, the Court of Appeal held: -

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of *cap 15*. We are aware that Section 2 of the *Children's Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

28. Voire dire examination was not conducted before PW1 testified although it is indicated that she was 14 years by the time she was testifying on 8th July 2021. It appears that the trial magistrate took it that during examination the complainant was asked her age and she said she was 14 years old. She took an oath and gave very consistent evidence upon which the appellant cross examined her extensively. The evidence was corroborated by medical evidence given by PW6 which confirmed that the complainant had bruises on her labia minora and majora and that her hymen was broken. PW6 said there was evidence of forceful penetration. The trial magistrate found that the evidence of PW1 and PW2 was intact, reliable and unchallenged considering the incident took place in broad daylight and the complainant and her brother identified the person who defiled her. This court finds that failure to conduct voire dire examination where the court has established that the complainant's evidence was consistent cannot be fatal to the prosecution's case.

Whether the Prosecution's Evidence was Riddled with Material Discrepancies

29. The contradictions or discrepancies that the appellant has alluded to in his submissions do not go to the crux of the matter herein that the complainant was defiled and that she was defiled by the appellant.

30. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

Whether the Prosecution Withheld Crucial Evidence

31. The appellant argued that Beatrice who made a phone call to PW3 was better placed to give court a clear account of the alleged ordeal but she was never summoned to testify despite the fact that she was the first person who received a firsthand account of the same.

32. Section 143 of the *Evidence Act* provides: -

> 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.

33. The fact that the complainant was defiled was told to PW3 as well as Beatrice and none of the two could take preference over the other in terms of narrating what both of them were told by PW1 and PW2. In any case, the eye witnesses, PW1 and PW2 gave firsthand information of what happened. The appellant has not clearly stated what Beatrice ought to have said which was not said in court and which adverse inference should be made.

34. Section 143 of the *Evidence Act* gives the prosecution the mandate to call only witnesses with relevant evidence even if it is only one witness provided that they are competent and credible witnesses.

Whether the Complainant's Testimony Linked the Appellant to the Offence

35. The appellant did not submit on the ground and a reevaluation of the evidence on record shows that the appellant took PW1 and PW2 to his house, made PW2 to light the fire as PW1 was washing the sufuria and he went to buy bread. When he returned, he prepared tea which he took together with the two children and then told PW2 to go and take a shower and after PW2 had left, he locked the door from inside and defiled PW1 on a mattress that was left on the floor in his house. The appellant was therefore placed at the scene by PW1 and PW2 and the scene was his house.

Whether the Trial Magistrate Took Into Account the Appellant's Pre-trial Custody Period

36. From the sentence passed against the appellant, the trial magistrate said that she had considered the remand period and sentenced the appellant to 15 years imprisonment without saying whether the remand period was to be deducted from the sentence or that it was already deducted before she arrived at the sentence of 15 years. This court finds that is not certain and therefore orders that the 15 years jail term commences from 23rd April 2020 when the appellant was first arraigned in court as he was not able to secure his release from bond.

Whether the Appellant's Mitigation was Considered Under Section 216 and 329 of the Criminal Procedure Code

37. After the appellant was convicted, the prosecution said he did not have any past criminal records and, in his mitigation, he asked the court to consider the duration he had been in custody and that he was the breadwinner of his family. The trial magistrate then said that she had considered the time that he had been in custody and sentenced him to 15 years imprisonment.

38. Section 8(3) of the *Sexual Offences Act* provides: -

> 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.

39. The words of Section 8(3) connote that it is a mandatory sentence. However, it is now settled that a law that deprives the trial court the discretion to pass sentence in consideration of the merits of each case is unconstitutional. Refer to the holding in *Philip Mueke Maingi & Others v AG & Others*, Petition no E017 of 2021, High Court of Kenya at Machakos.

40. Considering that the prescribed sentence is 'not less than twenty years' and the trial court passed a sentence of 15 years, it is evident that she exercised her discretion considering the despicable conduct of the appellant who took advantage of the lockdown during the pandemic to entice children with food and then defile the complainant in his house.

41. In conclusion, the appeal on conviction and sentence lacks merit the same is dismissed. The appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 2ND DAY OF AUGUST 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Court: Copy of judgment to be supplied to the appellant and respondent.

HON. LADY JUSTICE A. ONG'INJO

JUDGE