Ngaira v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 21427 (KLR) (1 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E002 OF 2022

WM MUSYOKA, J

AUGUST 1, 2023

BETWEEN

BARNABAS NGAIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. J Nduruti, Principal Magistrate, PM, in Kakamega CMCSO No. 64 of 2020, of 28th December 2021)

JUDGMENT

1. The appellant, Barnabas Ngaira, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 31st August 2019, at Ilesi Location, Kakamega East Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of VK, a child aged 14 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.

2. PW1, Dornboss Mbohi Emoja, testified on behalf of the clinician who attended to the complainant. The complainant was attended at the health facility 1 day after the alleged defilement. The history was that she was given avocado by a person, who later took her to a maize field, and defiled her, and then washed her with water and soap. Upon examination of her private parts, there was laceration of both labia, hymen was missing, and there was whitish discharge from her vagina. PW2, PM S, was the father of the complainant. He stated that the complainant disappeared on 20th May 2020, and when she showed up the next day, it was established that she had been defiled by the appellant. He reported to the authorities, and took her to hospital. He said that she was born on 18th May 2006, and produced a baptismal card to support it. PW3, VK, was the complainant. She testified that the appellant took her

to a maize farm, and defiled her, the exact word used was "alinishika." She said she told an aunt about what the appellant did to her after undressing her, after which he washed her with water. She stated that she narrated to elders and her friend, R, what had happened. PW4, No. 101079 Police Constable Ndogo Hassan, investigated the matter.

3. The appellant was put on his defence, vide a ruling that was delivered on 22nd September 2021. He opted to give a sworn statement, and to call 3 witnesses, and requested for issuance of witness summonses for the 3. He made a statement, I cannot tell whether it was sworn or not, on 25th October 2021. He denied the charges.

4. In its judgment, the trial court found the appellant guilty.

5. The appellant was aggrieved, and brought the instant appeal, revolving around Article 50(2)(j) of *the Constitution* not being complied with; reliance on a baptismal card as proof of the age of PW3; the charge being defective on account of section 134 of the Criminal Procedure Code, Cap 75, Laws of Kenya, for failure to comply with section 214 of the Criminal Procedure Code, after getting PW3 mentally assessed; conviction was based on inconclusive medical evidence and investigations as PW3 had testified that she had been washed with soap and water; misinterpretation of "alinishika" and "ulinilalia," seeing that PW2 did not mention penile penetration; the defence was not considered, and burden of proof was shifted; and the sentence was harsh and excessive. Supplementary grounds were introduced through the written submissions, and they turn around the court imposing a mandatory sentence without considering the circumstances and the provisions of Article 50(2)(p) of *the Constitution*; the ingredients of the offence were not proved; and the case was marred by contradictions and inconsistencies.

6. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions, which I have read through, and taken note of the arguments made.

7. On the sentence of 30 years imprisonment, being harsh, I will start by stating that section 8(3) of the *Sexual Offences Act* prescribes a penalty of not less than 20 years, for victims of 12 and 14 years old. Going by the provisions in the *Sexual Offences Act*, the trial court was not in error. The victim of the defilement was born on 18th May 2006, and had turned 14 years as at 20th May 2020, and was still within the age bracket of 14 as at the date the offence was allegedly committed. PW3 was a child with mental health issues, and the appellant took advantage of that, to have his way with her. Her father, PW2, also lived with disability, being mute. I believe the appellant also exploited that too. He deserved what he got. There is complaint about reliance on a baptismal card to prove age. It was produced by PW2, the father of PW3. PW2, as the parent of PW3, would have been expected to know the date when his child was born, and he could prove her age by merely stating it orally, without having to rely on any document. In any case, the courts have repeatedly held that such baptismal cards would be good evidence on age, for the details are fed into such documents by the parents of the child holding the card.

8. On the medical evidence being inconclusive, because PW3 had been bathed, and, ostensibly, any traces of sexual activity washed away and lost, it will be noted that PW1 picked out lacerations of the labia, and noted that the hymen was broken. Those were the key findings. No amount of washing of the vagina could wash away injuries. PW1 also noted a whitish discharge. Again, washing of the vagina, immediately after the act, would not stop discharges coming out later, either of spermatozoa or other fluids connected to sexual intercourse.

9. On the testimony of PW3 not being conclusive, on whether there was penile penetration, there could be some credence in that submission. PW3 testified to being undressed and washed with water. She added that she had told her aunt what the appellant did to her after he had undressed her. The aunt who was informed of that did not testify, and the court did not get evidence from her on what PW3

had told her. That evidence came from PW2, the father of PW3. However, the fact that PW3 herself did not testify to being penetrated was taken care of by the fact that she told her aunt, who then alerted PW2, and PW2 spoke to PW3, who informed him that she was defiled by the appellant. The fact of defilement was corroborated by the medical evidence, which showed recent sexual activity, through the lacerations on the labia, the missing hymen and the whitish discharge. The same applies to the use of "alinishika" and "ulinilalia," without being definitive that the appellant inserted his penis into her vagina, was qualified by the report that she made to PW2 and the findings by PW1. In any event, the court appreciated that PW3 had psychiatric problems, and took unsworn evidence from her, and that that unsworn evidence was corroborated.

10. On defence not being considered, I not that the trial court devoted the whole of page 8 of the judgment to analyze the defence, and half of page 9 on analyzing the defence submissions. It cannot be that the defence was not considered. The more forceful submissions is on the burden of proof being shifted to him. In the analysis of the defence, the trial court devoted some time to addressing the issue of the appellant not calling witnesses who would have vouched for him, with respect to his claim that he had spent the whole day, on 20th May 2021, with them. The principle in criminal law is that the legal burden of proof always lies with the prosecution, and it never shifts to the accused or defence. However, the evidential burden shifts from and to either side, depending on whoever is bound to prove any allegations of fact that they make. At the ruling of a whether a case to answer has been made out, the court determines whether, evidentially, the prosecution has established a case against the defence. A ruling, that a prima facie case has been made out, is really about the prosecution reaching the evidential threshold, to shift the burden to the accused, to offer an explanation to the case made out by the prosecution. Where no case is made out, the evidential burden does not shift, the entire criminal case collapses. Where a case is said to be made out means that the defence incurs a burden to offer an explanation, by way of evidence geared to that goal. In this instance, when the trial court ruled, on 22nd September 2021, that the prosecution had established a prima facie case, and the appellant had to answer to the prosecution, the evidential burden shifted. That ruling is really about shifting the evidential burden. Once the burden is shifted the accused is bound to lead evidence to explain himself. In this case, the appellant explained that he could not have defiled PW3, contrary to the evidence presented by the prosecution, for he had spent the whole day with some named individuals. He was bound to lead evidence to support that position that he had taken. In the judgment, the court was merely pointing out, that the defence had failed to discharge that evidential burden, by calling the said individuals to support the appellant's position. There was no shift in the legal burden of proof, but the evidential burden had swung to the appellant. The trial court was not in error.

11. On ingredients of the offence of defilement not being proved, it ought to be pointed out that the said ingredients are 3. One, that there was penetration. Two, the age of the victim. Three, the penetration was by the accused person. Penetration was proved. PW3 stated, through PW2, that she had been defiled. PW1 produced a report of an examination on her, which indicated that she had injuries in her genital area, which were consistent with defilement. PW3 clearly identified the appellant as her assailant. He was no stranger to her, being neighbours, and it was a case of recognition, not even identification. PW2 was the father of the PW3, and he must have known when she was born, and he produced a baptismal card to document that.

12. On contradictions and inconsistencies, the appellant did not point out any. In any case, the mere presence of inconsistencies and contradictions is not fatal to a prosecution. For them to count, it must be demonstrated that they went to the core of the matter, and that they were so fundamental as to undermine the whole fabric of the prosecution case. The appellant has not demonstrated that there were inconsistencies and contradictions in the evidence, that were so fundamental to profoundly undermine the prosecution case.

13. The appellant has also raised constitutional questions, with respect to contravention or non-compliance with Article 50(2)(j)(p) of *the Constitution*. Article 50(2)(j) is about disclosure of prosecution evidence ahead of the trial. At arraignment, on 28th May 2020, the prosecution indicated that it had supplied the appellant with copies of the charge sheet, P3 Form and 2 witness statements. It would appear from the record that more statements were supplied on 16th November 2020. I am persuaded that the prosecution did not contravene Article 50(2)(j). Article 50(2)(p) of *the Constitution* is about an accused person benefiting from the least severe sentence, if there has been a change in the penalties between the date the offence was committed, and the time of conviction. The appellant has not demonstrated that there was any such change. What I am aware of is the pronouncement by the Supreme Court, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), which had an impact on sentencing. At sentencing, the trial court did not refer to *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), but was alive to the mandatory minimum sentence, but was clearly not constrained by it, for it expressed the position that the actions of the appellant were despicable and had been aggravated, by the fact that the appellant took advantage of the mental state of PW3, and exercised discretion to enhance the minimum sentence. That meant that the court would still have imposed a heavy sentence, even if there were statutory minimums.

14. Overall, the appeal herein is without merit, and I hereby dismiss it. I affirm the conviction and confirm the sentence. The file herein to be closed. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF AUGUST 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Barnabas Ngaira, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.