Mutua v Republic (Criminal Appeal E159 of 2021)
[2023] KEHC 23686 (KLR) (Crim) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E159 OF 2021

K KIMONDO, J

OCTOBER 19, 2023

BETWEEN

KITHOME MUTUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment in S. O. Case No. 3 of 2020 at the Chief Magistrates Court Kibera by R.M. Kitagwa, Senior Resident Magistrate, dated 28th October 2021)

JUDGMENT

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act* (hereafter the Act). He was sentenced to imprisonment for twenty years.

2. The particulars were that on that on the 12th January 2020 in [particulars withheld], within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of EKM [particulars withheld] a child aged thirteen years.

3. The original petition of appeal raised five grounds. However, on 23rd January 2023, the appellant was granted leave to amend the grounds of appeal as pleaded in his "Revised Grounds and Written Submissions" filed on 1st December 2022.

4. The fresh grounds can be summarized as follows: Firstly, that the charge sheet was defective and that plea-taking was flawed; secondly, that the learned trial magistrate misapprehended the evidence and relied on extraneous matters, thirdly, that some material witnesses were not called to the stand; fourthly, that the entire corpus of evidence did not prove the charge to the required standard of proof; and, lastly, that the learned trial magistrate disregarded the defence proffered by the appellant.

5. The appellant relied wholly on the written submissions mentioned above. The gravamen is that the Republic failed to prove all the elements of the charge beyond reasonable doubt.

6. The appeal is contested by the State. Learned State Counsel, Mr. Kiragu, relied wholly on the submissions dated 2nd February 2023; some grounds of opposition of even date; and, further submissions dated 6th February 2023. Upon closer scrutiny of the two sets of submissions, they are identical save for a paragraph in the older version that is headed "appellant's submissions" which seeks to rebut the arguments by the appellant.

7. In a synopsis, the case for the Republic is that there was a fair trial; and, that all the ingredients of the offence were proved beyond reasonable doubt.

8. This is a first appeal to the High Court. I have examined the record; re-evaluated the evidence and drawn independent conclusions. There is a *caveat* because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32, *Felix Kanda v Republic*, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

9. I will begin with the age of the complainant (PW1). Her mother, PW2, testified that PW1 was born on 4th December 2006 as per the birth certificate produced as exhibit 2. I am thus satisfied that at the time of the incident, the complainant was a child aged 13 years.

10. The next important matter relates to the procedure of taking the evidence of two minor witnesses, PW1 and PW3. On 22nd March 2021, the trial Court conducted a detailed voire dire examination of the two witnesses. The learned trial magistrate formed the opinion that the PW1 "possessed sufficient knowledge to understand the consequences of taking oath". The court equally reached a similar finding on PW3. The minors thus gave sworn evidence.

11. I am satisfied that the trial court complied fully with the procedure of taking the evidence of children of tender years. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

12. I will now turn to identification. The complainant and the appellant were neighbours. She knew him well by name. She was categorical that the appellant defiled her on 12th January 2020 in his house when he took him some porridge. The appellant used to buy porridge from her mother. When PW3 went to check on her sister, he found the lights off. When power came back, he saw the appellant opening the door and PW1 dressing up. I will come back to this evidence shortly. From the evidence of PW1 and her brother PW3, I am satisfied that the appellant was positively identified and placed at the *locus in quo*. This was in fact evidence of recognition. *Wamunga v Republic* [1989] KLR 424.

13. In a criminal trial, the legal and evidential burden primarily rests on the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant.

14. Like I stated, the appellant used to buy porridge from the complainant's mother (PW2). On the material day, she had instructed PW1 to spare some porridge for the appellant. That evening she was in the house with her brother, PW3. She took the porridge to the appellant. The appellant then sent her to buy paraffin worth Kshs. 30.

15. When PW1 returned with the paraffin, he tagged at her hand. He asked her to remove her clothes but she declined. The appellant removed them, put her on a bed and inserted his penis into her vagina. She said she then left and informed PW2 about it. The following Monday, she informed her mother, PW2.

16. According to PW2, the appellant had asked for porridge. As she was going out to sell porridge, she told him that her children would give it to him. The following day, at around lunch hour, PW3 told her about the incident. She then questioned PW1 who opened up about the matter. She took her to hospital on 14th January 2020 where the PRC Form and P3 Forms were filled out (Exhibits 1 & 3).

17. According to the complainant's brother (PW3) he was in the house with his two sisters when the appellant asked for the porridge. He thought his sister had taken too long in the appellant's house. He knocked at the appellant's door but there was no response. He sat outside until the power came back. The appellant opened the door. PW2 saw PW1 dressing up. He informed their mother about the incident the following day.

18. PW4, Alice Gori, is a nursing officer at [particulars withheld] Health Center. She examined the complainant two days after the incident. Her genitalia was tender. From the PRC Form that she prepared, the hymen was "freshly broken and very painful on touch" from the 4 0'clock to 11 0'clock regions. There was a whitish vaginal discharge. She concluded that there was penetration.

19. Regarding the P3 form, PW4 said that it was prepared by her colleague, Diana Nyanchama, on 15th January 2020 and who had since left the institution. She was conversant with her handwriting and signature as they had worked together since 2019. I thus find that the lower court properly exercised its power in allowing PW4 to produce the original P3 Form. Furthermore, the conclusions in the P3 Form largely tally with those in the PRC Form.

20. PW5 was Police Constable Robinah Oiye. She testified that the appellant was arrested on 15th January 2020 with the help of the Community Policing Members. In cross-examination, she said that she visited the scene; and, that it was PW1 who identified the appellant.

21. I have also considered the defence by the appellant. He was employed as a driver. On 15th January 2020 he was at work until 2:00 p.m. When he returned to his house, two men who claimed to be police officers arrested him. He claimed that he was not informed of the reason of his arrest. He testified that he did not understand the charges against him.

22. One of the grounds in the appeal is that the defence was not considered. That is not true. The learned trial magistrate at pages 5, 7 and 9 of the typed judgment analysed that defence. However, she concluded that the appellant was positively identified as the person who penetrated PW1; that her evidence was corroborated by sufficient medical evidence; and, that the defence tendered was bogus. I concur fully with those findings.

23. I am also unable to hold that the appellant did not receive a fair trial. The charge was read and explained to him in a language he understood. He was initially granted bond of Kshs 300,000 which was later reduced to Kshs 100,000. He participated at the trial, cross-examined all witnesses, and presented his sworn defence.

24. The nature of the charge did not entitle him to pro bono counsel from the State. On 16th January 2020, the date of plea, the court directed that he be supplied with witness statements in advance. I found earlier that it is not true that his defence was disregarded. I have also found, in all the circumstances of this case, that the defence was counterfeit.In the end I am unable to say that that there was violation of Article 50 of the *Constitution*.

25. Penetration is defined in section 2 of the Act as "the partial or complete insertion of the genital organs of a person into the genital organs of another person". PW1 came across as a truthful witness. She disclosed the incident to her brother the same evening and to their mother the following day. Her evidence is corroborated by her brother PW3, the nurse (PW4) as well as the PRC and P3 Forms.

26. I disagree with the appellant's submission that PW4 was not a competent witness or that her evidence should not have been admitted. She had been a nurse for 28 years. She personally examined the complainant on 14th January 2020 and recorded her findings in the PRC Form. I have also found that she was competent to produce the P3 Form on behalf of her colleague who was no longer working at the facility. The totality of the evidence from PW1, PW3 and PW4 leaves no doubt that the appellant penetrated the complainant in his house on the material night.

27. Furthermore, I am alive that under the proviso to section 124 of the *Evidence Act*, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful. As I have stated, there was sufficient corroboration in this case.

28. The appellant argues that some material witnesses were not called to the stand. That may well be so. However, under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact.

29. I partially agree with the appellant that there were some discrepancies in the evidence. For instance, the date in the charge sheet is 12th January 2020. Some witnesses however stated the year as 2021. I find that the correct version is the year 2020. The appellant was arrested on 15th January 2020. PW1 was taken to the hospital on 14th January 2020. I have two other things to say. Firstly, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No 73 of 1993.

30. Secondly, the charge sheet clearly sets out the offence, the penal provisions and sufficient particulars. I cannot say that it is irregular or defective. Furthermore, I find that the "errors" referred to by the appellant or discrepancies of dates by witnesses are all curable under section 382 of the *Criminal Procedure Code*. I am fortified in that conclusion by the decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

31. In the end, I find that the conviction was safe. The appeal against conviction is accordingly dismissed.

32. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. Under the proviso to section 20 (1) of the *Sexual Offences Act*, the appellant was liable to imprisonment for life. When a penal provision is prefaced by the words "liable to" the sentence following is not a minimum sentence. Furthermore, the Court of Appeal has given fresh guidance on minimum sentences under the Act in *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court [in Muruatetu's] case was applied to this provision, it too should be considered unconstitutional on the same basis.

33. I have considered that the appellant is a first offender. But when asked to mitigate, he stated: "I have nothing to say". Purely in the interests of justice and guided by the authorities above, I will set aside the sentence of twenty years. I substitute it with a sentence of 7 (seven) years in jail. The sentence shall run from 28th October 2021, the date of his original sentence. Furthermore, and in accordance with section 333 (2) of the *Criminal Procedure Code*, the period spent in remand custody from the date of his arrest on 15th January 2020 (but excluding any period when he may have been out on bail) shall be deducted from the sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Oduor for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.