Ng'ata v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 11668 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E035 OF 2023

AC MRIMA, J

OCTOBER 3, 2024

BETWEEN

GIDEON WANJALA NG'ATA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S.K. Mutai (SPM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E089 of 2022 delivered on 4{{^th}} May 2023)

JUDGMENT

1. GWN, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that 'on the3rd day of May 2022 at [particulars withheld] within Trans-Nzoia County, intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of E.N.W child aged 6 years'.

3. The Appellant also faced the alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the alternative charge are that 'on3rd day of May 2022 at [particulars withheld] within Trans-Nzoia County, intentionally and unlawfully caused contact between your genital organ namely penis with the genital organ of namely vagina of E.N.W a child aged 6 years'.

5. The Appellant pleaded not guilty on both counts. A trial was held.

6. Four witnesses testified on behalf of the prosecution. Upon close of its case, the trial Court found that a prima facie case had been made against the Appellant. He was put on his defence. He gave sworn testimony and did not call any witness.

7. At the close of the defence case, the Court rendered its judgment. The Appellant was found guilty of the offence of defilement.

8. On considering mitigation, the Appellant was sentenced to 20 years' imprisonment.

The Appeal:

9. The Appellant was dissatisfied his conviction and sentence. Through undated Grounds of Appeal, he urged that his conviction and sentence be set aside on the following basis;

    1. That the learned trial magistrate erred in both law and fact by convicting the appellant and sentencing him to serve 20 years imprisonment on evidence of incredible witnesses.

    2. That the learned trial magistrate erred in both law and fact when she convicted the appellant and sentence him to serve 20 years imprisonment.

    3. That the learned trial magistrate erred in both law and fact by sentencing the Appellant to 20 years yet failed to note the at e Appellant alibi Defence was plausible, believable and that it revealed contagious issues which the Magistrate when giving verdict.

    4. That the learned trial Magistrate erred in both law and fact when she sentenced the Appellant to serve 20 years imprisonment yet failed to not that the gravity to the case against the Appellant was not watertight therefore harsh sentence.

The Submissions:

10. In his written submissions, the Appellant stated that the was framed up. It was his case that penetration was not proved since the complainant testified that, he applied saliva between the complainant's legs the chuchu was put on the susu and not in the susu.

11. As regards the medical report, the Appellant submitted that despite finding that the complainant's hymen was broken and old looking, there was lack of indication that the complainant felt pain. He also claimed that the lack of any tear at the vaginal opening of the vagina rendered the evidence of penetration uncorroborated.

12. The Appellant further poked holes on the credibility and reliability of the complainant's evidence and her mother's on whether she bought mandazi or had five shillings with her when she went home.

13. While referring to the evidence of expert witness, the Appellant submitted that Police Officers do not offer P3 forms and that the treatment notes were not availed and attached to the Court records as required by law.

14. The Appellant further took issue with the testimony adduced by the Clinical Officer, PW2, on behalf of Sheila Olunga, who had filed the treatment notes but was on maternity leave at the time of the trial.

15. As regards the age of the complainant, the Appellant submitted that whereas the mother of the Complainant gave evidence that the complainant was six years old, no birth certificate was availed.

16. The Appellant further submitted that no assessment was done to ascertain the age of the complainant.

17. In submitting that he was not identified as the perpetrator, the Appellant submitted that no investigation was carried out by the Investigating Officer to confirm that he indeed orchestrated the offence.

18. In the end the Appellant implored the Court to make the finding that the trial Court erred in relying on uncorroborated evidence of one witness.

19. On the sentence, the Appellant submitted that it was harsh for an offence that was not proved. He urged that he get the protection of *the Constitution*.

The Respondent's case:

20. The Respondent challenged the appeal through written submissions dated 28th March 2024.

21. It was its case that, the age of the complainant, the identity of the perpetrator and penetration, which were the elements necessary to establish the offence of defilement were established.

22. In respect to the complainant's age, the Respondent referred to Misc. Appeal No. 24 of 2015, Mwalango Chichoro -vs- Republic where the Court observed the victim and believed that he was a minor based on observation and common sense.

23. As regards penetration, the Respondent submitted that the law does not envision absolute penetration nor the release of spermatozoa. The decision in Daniel Wambugu Maina -vs- Republic was relied upon.

24. Finally, on the element of identity of the Appellant, the Respondent submitted that the complainant identified and recognized him as his neighbour.

25. In rebutting the grounds of appeal, the Respondent submitted that the medical evidence submitted by the Respondent was enough to sustain a conviction. It was its case that the trial Magistrate considered the Appellant's defence and correctly rejected it as a mere denial.

Analysis:

26. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

27. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed; and if so, by the Appellant.

28. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are penetration,age of the victim, and identification of the perpetrator.

29. This Court will, hence, deal with the above elements sequentially as it re-assesses the evidence.

Age of the complainant:

30. There is no much contest on the age of the complainant. Despite the Appellant's contention that her age was not proved, there is on record the Complainant's Birth Certificate produced by the Investigating Officer as P. Exh. 4.

31. The Certificate shows that the complainant was born on 3rd March July 2015.

32. A computation of her age as at 3rd May, 2022 shows that the complainant was 6 years and 10 Months.

33. The complainant's age was, therefore, proved beyond reasonable doubt and that she was a minor in law.

Penetration:

34. The issue of penetration was attested to by three witnesses. They were the complainant [testified as PW1], her mother [testified as PW3] and the Clinical Officer [testified as PW2].

35. PW1 was taken through a voir-dire examination, and the trial Court's found that she could not comprehend the meaning of taking oath, hence, her unsworn testimony.

36. PW1 testified that on the fateful day, she was at the fence walking from home when the Appellant called her to his house. Therein, the Appellant asked her to remove her shoes and to climb the bed. She obliged and the Appellant then removed her trouser and covered her in a blanket.

37. The Complainant further testified that the Appellant applied his saliva between her legs and did bad manners. She described the ordeal by stating that the Appellant used his 'chuchu' and put it on her 'susu'. It was her evidence that she screamed but the Appellant continued. That, the Appellant then gave her Kshs.5 and asked her not to tell anyone what had happened.

38. PW3 was alarmed by PW1 who had Kshs. 5/= and wanted to buy mandazi. On enquiry, PW1 revealed what the Appellant had allegedly done to her. PW3 checked PW1's private parts and noticed some dirt. She took her to hospital and police.

39. Nelson Lusiola was a Clinical Officer at Kitale County Teaching Referral Hospital. He produced the P3 form, the treatment book and treatment book as exhibits.

40. He stated that the complainant's hymen was torn, had inflammation of labia and that she had tenderness during examination. He concluded that PW1 had a penile insertion on her vagina.

41. The term 'penetration' is defined by Section 2 of the said Act in the following way;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

42. This position was fortified in Mark Oiruri Mose -vs- R (2013) eKLR when the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

43. Later the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

44. The cumulative evidence of PW1, PW2 and PW3 was conclusive proof of the occurrence of penetration. The Complainant's description of how the Appellant defiled her was a vivid recount of events that cannot be said to be made up by a six-year-old child.

45. This Court is convinced that the element of penetration was proved. The inconsistency by the Complainant as to whether he bought or did not but the Mandazi with the five shillings the Appellant gave her does not dislodge the occurrence of penetration.

46. Penetration was, therefore, proved in this matter.

Identity of the perpetrator:

47. When the complainant took the stand, he identified the Appellant as Baba Abby. She described him as her neighbour. When she was asked who that was, she pointed right at the Appellant.

48. PW3's evidence corroborated the Complainant's testimony. She stated that when the Complainant got home, she informed her that Baba Abby had given her Kshs. 5 to buy mandazi.

49. In this case, it was only PW1 who rendered evidence on identification. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

50. Evidence by a single witness must be treated carefully and cautiously. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> .... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

51. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

52. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

53. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

54. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

55. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

56. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanours. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

57. The complainant was quite forthright on the identity of the assailant. The incident occurred during day time. PW1 knew the assailant as a person whom was their neighbour.

58. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events occurred on the fateful day, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.

59. This Court has also considered the Appellant's defence. He raised the issue of alibi that he was in West Pokot on the alleged times and that he was framed as a result of a boundary dispute.

60. However, the evidence on record instead placed the Appellant at the scene of crime. Further, there was nothing much to firm the allegation that the Appellant was framed as a result of a boundary dispute. The defence was, hence, correctly disregarded.

61. This Court, therefore, finds that the trial Court was right in finding that the Appellant was positively identified by way of recognition.

62. Having established all the ingredients in favour of the prosecution, the Appellant was properly convicted, As such, the appeal against conviction hereby fails.

Sentence:

63. The Appellant was sentenced to 20 years imprisonment.

64. That is a term shorter that than imprisonment for life, the sentence prescribed under Section 8(2). In the premises, the Appellant's sentence was lenient. However, since the Respondent did not file a cross-appeal or a Notice of enhancement of sentence as to challenge the sentence, this Court will not interfere with the sentence in place.

65. The upshot is that the appeal on sentence also fails.

Disposition:

66. Drawing from the foregoing, the entire appeal is not merited.

67. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

68. Consequently, the following final Orders hereby issue: -

    a. The Appeal is wholly dismissed.

    b. The file is hereby marked as closed.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

GWN, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.