Kimathi v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 14413 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14413 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E001 OF 2024

LM NJUGUNA, J

NOVEMBER 20, 2024

BETWEEN

PETER DEDAN KIMATHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. R.G. Mundia, PM Embu Chief Magistrate's Court Sexual Offence No. E018 of 2021 delivered on 06th October 2023)

JUDGMENT

1. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 08th January 2024, seeking that a retrial be ordered to accord the appellant a chance to legal representation. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

    a. By convicting and sentencing the appellant while the offence of defilement had not been proved;

    b. By failing to explain to the appellant his right to legal representation;

    c. By convicting and sentencing the appellant on insufficient evidence where crucial witnesses were not called; and

    d. By convicting and sentencing the appellant while the complainant did not account for her whereabouts from the time of the alleged offence to when she arrived home.

2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence are that on 21st March 2021 at around 3.00 p.m in Embu North sub-county within Embu County, the appellant intentionally caused his penis to penetrate the vagina of BW, a child aged 15 years.

3. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences, whose particulars are that on 21st March 2021 at around 3.00 p.m in Embu North sub-county within Embu County, the appellant intentionally caused his penis to touch the vagina of BW, a child aged 15 years.

4. The appellant pleaded not guilty to both charges and the plea was duly entered. The matter proceeded to full hearing.

5. PW1 was the victim who was born on 22nd August 2005. She stated that she met the appellant when her grandmother had sent her to the market to buy medicine and milk. That the appellant asked her to take him to Muchagori and since she was familiar with him, she accepted and he collected some keys from his friend before they left. That he carried her on a motor cycle up to a house which he opened and forced her to get in. That while inside, he removed a knife and ordered her to remove her clothes, which she did and then he inserted his penis into her vagina.

6. That when he was done, she told him that she was going to report the matter to the police and he locked her inside the house. That he returned later and asked her if she still wanted to report the matter but she said no and that is when he let her go. She testified that she went back home without the things that she had been sent to buy and she found that they were looking for her. That she disclosed what had happened to a village elder who told her mother and then they reported the matter to the police.

7. She stated that the police took her to hospital where it was confirmed that she had been defiled. She knew the appellant because he was married to her hairdresser. On cross-examination, she stated that when she accompanied the appellant, she did not think that he had bad intentions since he was familiar to her. That the appellant had a knife which he used to threaten her and he was also stronger than her.

8. PW2 was PWM, the victim's mother, who produced the victim's birth certificate and testified that she had sent the victim to her maternal grandmother's place. That at around 3.00p.m, she called her mother who informed her that she had sent the victim to buy medicine and milk. That she did not return until night and everyone was getting worried. On being asked where she was coming from, the victim told a village elder called M that she had been defiled and the matter was reported at the police station. That the police escorted her to Embu Level 5 Hospital and she was admitted for 2 days. She stated that the appellant operates a boda-boda in the same village. That PW1 has never disappeared like that before. On cross-examination, she stated that when PW1 returned at 9PM, she did not say that she was with the appellant because he had threatened her.

9. PW3 was JM, a member of Nyumba Kumi who stated that PW2 asked him for help to find PW1. That while they embarked on looking for PW1, Her grandmother called to say that PW1 was at her place. That when they asked PW1 where she was, at first, she was reluctant to say but eventually she opened up to him and told him that she had been defiled by the appellant who had threatened her life. That they reported the matter at the police station and then the child was taken to Embu Level (5) hospital. On cross-examination, he stated that PW1 opened up to him after she had been beaten by her mother. That PW1 told him that she was with the appellant.

10. PW4 was PC Jane Muchene of Mutunduri Police Post who stated that PW2 reported that PW1 had been defiled. That she recorded the statements and CPL Catherine escorted the girl to Embu Level 5 Hospital where she was examined and treated. That she verified PW1's age through her birth certificate and ascertained that she was 15 years old at the time of the incident. She stated that she interrogated the minor about the incident and she identified the appellant as her assailant, before she recorded statements from the witnesses.

11. The appellant was arrested in connection with the offence and he was charged. On cross-examination, she stated that the victim told the police that she boarded the motor cycle only because she was a friend to the appellant's wife. That she could not remember the physical location of the house the appellant took her to, but she knew the owner who was at Muchagori shopping center. The victim told the police that the appellant kept her until 9PM before he released her to go away.

12. PW5 was Dennis Mwenda, a clinical officer of Embu Level 5 Hospital who produced the P3 and PRC forms filled by Dr. Philis Muhonja, his colleague. He testified that upon examination of the vaginal area, there were lacerations at 6, 7 and 11 o'clock. Inside the vagina there were bruises measuring 2×5mm on the vaginal walls and they were about 18 hours old. She was treated with antiretrovirals and STD medication and she was sent for counselling. On cross-examination, he stated that he testified on behalf of the doctor who examined the victim. That he is the one who collected samples to be taken to the government chemist.

13. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.

14. DW1, the appellant, stated that nobody saw him with PW1 that day and that PW3 intimidated him into giving a statement to the police. That no-one can place him with the minor at the crime scene and that he is being framed for the offence. He asked the court to dismiss the case because it has turned his life upside down. On cross-examination, he stated that he knows PW1 as a school-going girl and he does not habour any grudge with her or her parents.

15. At the end of the defense case, the trial court convicted the appellant and sentenced him to 20 years imprisonment. On that basis, he is seeking an order for retrial.

16. The court directed the parties to file their written submissions but only the respondent complied.

17. The respondent relied on the case of Simiyu & Another v. Republic (2005) eKLR and sections 2(1) of the *Sexual Offences Act* on the definition of penetration. It further relied on the cases of AML v. Republic (2012) eKLR and Edwin Nyambogo Onsongo v. Republic (2016) eKLR and argued that the elements of defilement had been proved beyond reasonable doubt. It was its argument that while the appellant's right to representation is enshrined under Article 50(2)(g) of *the Constitution*, it is upon the appellant to prove that substantial injustice would occur if he is not accorded representation at the state's expense. Reliance was placed on the cases of David Macharia Njoroge v. Republic (2021) eKLR and Republic v. Karisa Chengo& 2 Others (2017) eKLR. It urged that the sentence imposed by the court is lawful and should not be revised.

18. The issue for determination is whether the case meets the threshold for issuance of an order for retrial on the ground of legal representation.

19. The right to legal representation at the state's expense is provided for under Article 50(2)(h) of *the Constitution* as follows:

> "Every accused person has the right to a fair trial, which includes the right ... to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly ...."

20. Through this appeal, the appellant has stated the trial court failed to explain to him his right to legal representation, which is the basis for his prayer that the case be retried in order to accord him the chance to have legal representation. The enabling provision of *the constitution* on this issue provides that this right should be such that if it is not accorded, substantial injustice will result. That means,

the appellant should demonstrate what injustice occurred by him failing to be assigned an advocate at the state's expense.

21. Other courts have consistently held that this right is not open ended and that it is important that the appellant demonstrate the prejudice he suffers from its denial. In the case of Republic v. Chengo & 2 others (Petition 5 of 2015) [2017] KESC 15 (KLR), the Supreme Court stated:

> " In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in article50 (2) (h) of *the Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the *Legal Aid Act*. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

22. From the trial court's record, it is evident that the appellant participated in the trial. He had the opportunity to cross-examine prosecution witnesses and he did so. When called upon, he defended himself and the court reached its verdict based on the evidence before it. Furthermore, there are factors to be considered before a court makes an order for retrial of a case. In the case of Fatehali Manji v. Republic (1966) EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

23. Further, in the case of Kenneth Mwatia Mwengu v Republic [2020] KEHC 3074 (KLR), the court stated:

> " The grounds upon which a matter may be referred for retrial are well settled in the case of Samuel Wahini Ngugi v. Republic (2012) eKLR where the Court of Appeal held: -
>
> "The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial

should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'".

24. From the foregoing, a retrial cannot be ordered only to give the appellant a chance to be represented by counsel. The appellant, in this appeal, has also argued that his conviction was based on insufficient evidence. He was charged with the offence of defilement contrary to section 8(1) read together with 8(3) of the *Sexual Offences Act* which provide:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) 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."

25. In the case of Okeno v. Republic [1972] EA 32, it is the role of an appellate court to reexamination the evidence adduced at the trial in order to make its own finding. The age of the victim was ascertained through her birth certificate which indicated that she was 15 years old at the time of the incident. The testimony of PW5 revealed that the victim had lacerations outside vagina and bruises inside the vaginal walls. PW1 also testified that the appellant took her to his friend's house and inserted his penis into her vagina. She identified the appellant since he was someone that she was familiar with because he was the husband to her salonist.

26. From the evidence, she was with the appellant from about 3PM in the afternoon and he released her to go home at around 9.00 p.m. According to section 124 of the *Evidence Act*, the testimony of the victim of a sexual offence is enough to identify her assailant and such testimony does not need to be corroborated. The appellant defended himself saying that the whole case is a lie and that it is a ploy to destroy his life. He stated that he was being framed since nobody saw him with the victim on that day. This defense did not punch holes in the prosecution's case thus the standard of proof was met.

27. It is my view that the evidence adduced by the prosecution was sufficient to prove the case beyond reasonable doubt, thus the conviction is safe. The trial court proceeded to sentence the appellant to 20 years imprisonment.

28. For the reasons stated in this judgment, I find that the appellant's prayer for a retrial cannot be granted since the conditions for granting a retrial have not been met. It is also my finding that the conviction and sentence imposed by the trial court were reached after consideration of the relevant factors.

29. Therefore, the appeal lacks merit and the same is hereby dismissed.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent