Kirigia v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 14748 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E047 OF 2023

LW GITARI, J

NOVEMBER 7, 2024

BETWEEN

GEORGE MURIMI KIRIGIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal arises from the proceedings in the Principal Magistrate's Court at Nkubu Sexual Offences Case No. E015/2021 where the appellant who was the second Accused was charged with Gang Defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge were that on 20/5/2021 at [Particulars Witheld] village [Particulars Witheld] Sub-Location [Particulars Witheld] Location Imenti South Sub-County, jointly intentionally and unlawfully cause their penis to penetrate the vagina of IN a girl aged twelve (12) years. The appellant denied the charge.

3. The appellant was also charged with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences*, a charge he also denied. A full trial was conducted and the appellant was convicted for the offence of attempted defilement and he was sentenced to serve ten years imprisonment.

4. The appellant was dissatisfied with both the conviction and filed this appeal based on the following ten grounds;

    1. The learned magistrate erred in law and in fact in convicting the appellant on the charge of attempted defilement contrary to section 9(1) as red with 9(2) of the *Sexual Offences Act* even when there was no evidence of probative value adduced by the prosecution witnesses and to the required standard.

2. The learned trial magistrate erred in law and in fact in failing to consider the contradictions and inconsistencies by the prosecution witnesses and evidence which rendered their evidence unbelievable.

3. The learned trial magistrate erred in law and in fact in failing to consider that in the circumstances of this case, it would be difficult for the minor to positively identify the Appellant.

4. The learned trial magistrate erred in law and fact in failing to consider that the evidence of the minor was not at all corroborated by medical evidence and that in any case the minor's evidence was contradicted by the medical evidence.

5. The learned trial magistrate erred in law and fact in failing to consider the Appellant's defence of alibi which outweighed that of the prosecution and which the prosecution did not dislodge.

6. The learned trial magistrate erred in law and fact in failing to consider the contradictions in the evidence of the minor which contradictions would have exonerated the appellant from any blame.

7. The learned trial magistrate erred in law and fact in failing to find that the evidence of the prosecution was no doubt a fabrication and ought to have been disregarded in totality.

8. The learned trial magistrate erred in law and fact by disregarding in totality the evidence of the Appellant in his defence.

9. The learned trial magistrate erred in law and fact by relying on the evidence of the minor in totality even when a vior dire examination had not been undertaken on the said minor to test her competency to give evidence.

10. The learned trial magistrate erred in law and in fact by passing on a sentence that was against the weight of evidence, harsh and excessive in the circumstances of the case and not in tandem with the evidence tendered.

5. The respondent opposed the appeal and prayed that the appeal be dismissed.

The Prosecution's Case

6. The complainant YN testified as PW1 and she told the court that at the time she gave evidence she was 13 years old and in class 7 at a Primary School. She gave her date of birth as 24/5/2008. Her testimony was given on Oath and no 'voire dire' examination was conducted.

7. On the material day she was at home and had dressed up when she heard somebody calling her from outside. She went outside to see who it was and she found it was the appellant. He immediately pulled her outside and started to undress her. He pulled of her pants. She screamed and the 1st accused went to her rescue. The 2nd accused fled The complainant narrated to her mother what happened. The next day the matter was reported to the police at Igoji Police Station. The complainant pant was torn as the appellant wanted to undress her outside the house. The complainant was referred to hospital at Kanyakine Sub-County. She was treated. The complainant testified she knew the appellant as he is her neighbor. She further testified that it was at 8.00pm and she managed to see the appellant with the light from the house when she opened the door.

8. In cross-examination she told the court that she only saw the appellant.

9. PW2 JG is the complainant's mother who testified that on the material day she had gone to the Kiosk to buy sugar and on coming back she met with the complainant who was crying while running. It was at 8.00pm. The complainant told her that the appellant had gone there pretending to be a customer at her shop. On opening the door the assailant pulled her out and removed her pant and her biker she screamed and the 1st accused went to her rescue. PW2 called AC had narrated to her what had happened. She accompanied her to Igoji Police Station and the matter was reported. She then took the complainant to Kanyakine Hospital where the complainant was treated. PW2 told the court that the appellant was their neighbor.

10. PW3 was SK a Clinical Officer at Kanyakine Sub-County Hospital. According to PW3 the complainant made a report of attempted gang defilement on 20/5/2021 at 8.00pm. The complainant had pain on the back and chest. The lower back was swollen. The P3 form was filled eight days after the incident she assessed the injury s bodily harm. She produced the P3 from as exhibits 5- and treatment card exhibit 3.

11. PW4 was the investigating officer Police Constable LK. On 21/5/2021 she perused the OB and noted that this case was allocated to her. The report was that the appellant had attempted to defile the complainant a child aged twelve (12) years old. The victim was referred to Kanyakine Hospital where she was examined and a P3 form was filled. She then visited the scene and recovered a biker and a pant which were torn and the victim was wearing them on the material day. She also obtained the complainant's birth certificate showing that she was born on 24/7/2008. She produced the birth certificate as exhibit 4. The suspects went to Miruriri Police Post to lodge a report upon hearing that they had been reported to the police station. PW4 re-arrested the two. She learnt that the appellant was at home alone when she heard somebody call the name of her mother. She went out and found accused 2 who grabbed her and pulled her outside. He blocked her mouth. She screamed and 1st accused went there. They were in a scuffle and she fled. She then charged the two as she continued with investigations.

12. The learned magistrate found that the appellant and his co-accused had a case to answer and put them on their defence.

Defence Case:

13. The appellant gave a sworn defence and told the court that he heard about the incident the next day when it was alleged that he was at the complainant's house the previous night. He was told he was wanted at Miruriiri Police Post. He was referred to Igoji Police Station and he went and he presented himself to the OCS. He denied the claims. He said he did not commit the offence, he was not mentioned. He testified that he had delivered milk to the complainant's father that some morning of 20/5/2025.

The appeal:

14. The appeal was disposed off by way of written submissions.

The Summary of appellants Submissions:

15. The submissions were filed by Kuria Karatu Advocates. On the 1st ground it is submitted that the learned magistrate erred in law and in fact for convicting the appellant on a charge of attempted defilement contrary to Section 9(1) of the *Sexual Offences Act* even when there was no evidence of

probative value adduced by the prosecution witnesses and to the required standards. He relies on the case of *David Aketch Ochieng v Repbulic* 2015 eKLR where it was held that-

> " ..... For a successful prosecution of an offence of attempted defilement the prosecution must adduce sufficient to the required to prove an attempted penetration. This may in my view include bruises or lacerations of the culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or inner wear without there being penetration."

16. He further relies on the case of *Benson Mugambi v Republic* (2019) eKLR where the court stated that:-

> " The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration, it must prove the age of the complainant, positive identification of the assailant and then prove steps taken by the assailant to execute defilement which did not succeed. Attempted defilement is as if it were failed defilement, because there was no penetration."

17. He has also relied on the following cases:*John Gatheru Wanyoike v Republic* (2019) eKLR*Benson Musumbi v Republic* (2019) eKLR*Daniel Simiyu Wanyonyi v Republice* 2019 eKLR*FAA v Republic* (2020) eKLR*Edison Jambo Kalembe v Republic* (2008) eKLR

18. The appellant submits that there was no evidence led by the minor which really showed that there was any criminal intent to commit an offence of defilement by the appellant.

Ground 2:

19. It is submitted that, the learned magistrate erred in law and infact in failing to consider the contradictions and inconsistences by the prosecution witnesses and evidence which rendered their evidence unbelievable

20. It is submitted that the testimony of PW1 was full of contradictions and inconsistencies. That she did not testify that she had sustained injuries and yet the Clinical Officer observed injuries on her eight days after the alleged offence.

21. That the report made as testified by the clinical Officer was that the two accused had attempted to defile her but was rescued by her mother but the complainant said it was the co-accused who rescued her. That the complainant's evidence must be treated with suspicions.

22. Grounds3, 4, 5, 6, 7, 8 were argued together.

23. The appellant submits that the learned magistrate erred in law and fact in failing to consider that in the circumstances of the case it would be difficult for the minor to positively identity the appellant.

24. It is submitted that the incident took place at 800 pm at night when circumstance did not favour positive identification. He submits that the complainant could not have seen the appellant clearly and he evidence ought to have treated her evidence with caution as the offence was committed at night. He relies on *Nzaro v Republic* (1991) KAR 212 as quoted in the case of *Joseph Otieno Oketch v Republic* (2019) eKLR where the court held that evidence of identification/recognition at night must be absolutely watertight to justify conviction. He also cited the case of *Anderson Kamau Gatuthu v Republic* (2020) eKLR, *Kiil & Another v Republic* (2005) 1 KLR 174 and *Nicholas v Repbulic* (2020) eKLR

25. He submits that it is evident that the complainant would not have seen the appellant clearly and so her evidence ought to have been treated with care as the alleged incidence is said to have occurred at night and allegedly, the same happened outside the house and therefore there is a great likelihood of error in identification. That the complainant gave a history of gang defilement by two persons who wanted to defile her but they fled. That it is a mystery how the story changed.

Ground 9:

26. The appellant submits that the learned magistrate erred in law and fact by relying on the evidence of the minor in totality even when vioir dire examination had not been undertaken on the said minor to test her competency to give evidence.

Appellants's Submissions:

27. Your Ladyship we first address the question of what constitutes a voire dire examination. Section 19(1) of the *Oaths and Statutory Declarations Act* provides the procedure of receiving evidence of a child in the following terms:

> " 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 understands the duty of speaking the truth."

28. According to the court in *Mutuku Musyoki v Republic* (2020) eKLR

> " A voire Dire (to speak the truth) is an Anglo-French legal phrase which in the context of common law criminal procedure, refers to a preliminary examination by a trial Judge or magistrate to determine the competency of a witness of tender age as to whether he or she is possessed to sufficient intelligence to testify in the matter before court and understands the duty of speaking the truth. I am of the view that the Section 19 is an abrogation of the right to fair trial of a child under Article 50 and right to protection under Article 53(d) of *the Constitution* because whereas an adult can choose to testify unhindered, a child whose evidence does not go through a viore dire automatically ceases to apply to his/her evidence rendering such evidence useless and of no legal effect."

29. In the case of *Japheth Mwambire Mbitha- v- Republic* (2019) eKL

> " Voire dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (see Duhaime Llyod. "Voire Dire definition " *Duhaime's Legal Dictionary*) With specific regard to the testimony of children of the truth. The purpose of voir dire was explained by this court in *Johnson Muiruri v Republic* (1983) KLR 445.

30. That the learned magistrate erred in both law and in fact by passing on the sentence that was against the weight of evidence, harsh and excessive in the circumstances of the case and not in tandem with the evidence tendered.

31. The appellant submission here is that since the 'voire dire' examination was not conducted, the learned magistrate could not have relied on the evidence to convict the appellant.

Respondent's Submissions:

32. The respondents conceded the appeal because voire dire examination was not conducted on the minor complainant who was thirteen years of age at the time of giving the testimony. The respondent relies on Section 125(1) of the *Evidence Act* which provides:-

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

33. The respondent further cites section 19(1) of the *Oaths and Statutory Declarations Act* which provides as follows:

> " (1) 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 understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Cod*e (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

34. She further submits that the court of Appeal the case of *Kibageny v Republic* (1959) EA 92 the Court of Appeal held that a child of tender years means a child under the age of fourteen years. The Counsel further cites the decision in the Court of Appeal at Nyeri in the case of *Patrick Kathuuma v Republic* (2015) eKLR where the court held that:

> " We 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 impacts the right to a fair trial and should always be followed. The age of a 14 years remains a reasonable indicative 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 in the *oaths and Statutory Act* 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two Statutes."

35. The respondents submits that where the witness as in this case was aged 13 years and that essential step was not taken in a criminal trial, that trial becomes problematic. The applicant implore the court to order a retrial as there is enough evidence on record to show that the appellant attempted to defile the minor complaint. That the fact that the voire dire examination was not conducted does not mean that the offence was not committed by the appellant. That the appellant has only served one year off his one year sentence and no injustice will be visited on him if a retrial was ordered.

Analysis and determination:

36. I have considered the proceedings before the trial courts, the grounds of Appeal and the submissions. This is a first appellate and the court is enjoined to analyse the evidence which was tendered before the

trial court evaluate it and come up with its own independent finding. See *Okeno v Re Public* (1972) EA 32.

37. In this case I note that the Respondent has conceded the appeal but has urged the court to order a retrial. The issue for determination is whether the court should order a retrial.

38. The respondent has noted that the trial was problematic due to failure by the learned trial magistrate to conduct a 'voire dire' examination before taking the evidence of the minor and relying on it to convict.

39. In the case of *Muiruri v Republic* (1983) KLR 445 Supra as cited by the appellant, the court of Appeal held that where the trial court fails to comply with the procedure of examining the child to determine whether the child understands the nature of the oath, no conviction can be sustained. The learned trial magistrate did not conduct voire dire examination on the complainant. In the circumstances, a conviction cannot stand and the respondent has done an honourable thing to concede the appeal.

40. The issue which I have to consider is whether I should order a retrial. The Court of Appeal in *Mwangi v Republic* (1983) KLR 522 held as follows:-

    1. "A retrial will not be ordered if a conviction was set aside because of insufficient evidence.
    2. A retrial will not be ordered if a conviction was set aside because of insufficient evidence.
    3. A retrial will not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.
    4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.
    5. A retrial should be ordered where the interests of justice so demands each case should be decided on its merits."

41. The Court of Appeal in *Samuel Wahini Ngugi v Republic* (2012) eKLR stated that-

> The law as regards what the court should consider or whether or not to order a retrial is now well settled. In the case of *Ahamed Sumar v Republic* (1964) EA 483 the predecessor to this court stated as concerns the issue of retrial in criminal cases as follows:-
>
> > It is trite that where a conviction is vitiated by a gap in the evidence of other defect for which the prosecution is to blame the court will not order a retrial. But where the conviction is vitiated by a mistake of the trial court for which the prosecution was not to blame it does not in overview follow that a retrial should be ordered..... Each case must depend on the particular facts and circumstances of the case but an order for retrial should only be made where the interest required it and should not be ordered when it is likely to cause an injustice to an accused person."

42. See also the Court of Appeal in *Lilomo Ekimat v Republic* Criminal Appeal No. 151/2004 where the court stated that:-

> the principal that has been accepted to courts is that each case must depend on the particular facts and circumstances or each case but an order for retrial should only be made where interests of justice require it."

43. In this case the error in this case was occasioned by the trial court. I have carefully evaluated the evidence which was adduced before the trial court. I am of the considered view that the evidence is not sufficient to support a conviction for the reasons that the learned magistrate held that the charge of gang rape was proved. |It is clear from the record that the complainant had alleged that the appellant and his co-

accused had attempted gang defilement and yet the appellant and his co-accused were charged with gang defilement. In her testimony in court, the complainant alleged that it was the appellant who attempted to defile her and she was rescued by the 1st accused.

44. PW4 the investigating officer testified that it was the appellant who attempted to defile the complainant, 1st accused rescued her, surprising and without any explanation she charged the 1st accused with gang defilement. This despite that she stated on oath that 1st accused had gone to rescue the complainant from the appellant. The appellant was charged with attempted defilement. The evidence adduced was wanting as the evidence tendered did not prove that there was attempted defilement or even gang rape. My decision based on these reasons is that no conviction can stand with the evidence tendered before the trial court.

45. I find that to order a retrial is to give the prosecution an opportunity to fill the gaps in its case. Alternatively if they rely on the same evidence no conviction can stand. The appellant would be prejudiced either way and a court of law should not allow that to happen as it is to violate the rights of the appellant trial.

46. In the end I find that the appeal is not opposed and is allowed. For the reasons stated, above and based on the above cited decision a retrial should not be ordered. I allow the appeal. The conviction of the appellant is quashed and the sentence is set aside. The appellant is set at liberty unless is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE