Wachira v Republic (Criminal Appeal 46 of 2018)
[2023] KECA 16 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 16 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 46 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JANUARY 26, 2023

BETWEEN

SOLOMON NGATIA WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. M. Odero, J.) delivered and dated 25th May, 2018 in HC CR.A. No. 219 of 2015)

JUDGMENT

1. This is a second appeal by Solomon Ngatia Wachira, the appellant, who was initially convicted of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* and sentenced to 30 years' imprisonment. His first appeal was dismissed in its entirety and the conviction and sentence of the trial court upheld. The appellant is dissatisfied with the judgment of the first appellate court prompting him to lodge this appeal before us.

2. In his memorandum of appeal, the appellant raises five grounds of appeal which we paraphrase and condense in the following manner. First, that he was denied the chance to present his defence witness despite him informing the court of his availability. Second, that the prosecution evidence was marred with inconsistencies and as such could not support the conviction. Third, that the exhibits produced in evidence were obtained in a manner that violates the appellant's right to a fair trial.

3. The appellant also filed supplementary grounds of appeal which raised the following three further grounds. First, that the trial court allowed un- procedural production and admission of evidence contrary to Article 50(4) of the *Constitution*. Second, that the sentence passed against the appellant was extremely harsh and excessive in the circumstances. And finally, that the respondents did not prove their case against the appellant to the required standards in law as set down under section 107 of the *Evidence Act*.

4. This being a second appeal, our mandate is confined within the parameters of section 361 of the *Criminal Procedure Act*. The scope of our mandate arising from section 361(1) of the *Criminal Procedure Code* has been expounded by this Court in many decisions including in *David Njoroge Macharia v Republic* [2011] eKLR in which the court held as follows:-

> " That being so only matters of law fall for consideration – see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611."

5. The particulars of the charge facing the appellant were that on diverse dates between the month of September 2012 and the night of October 19, 2013 at [Particulars Withheld] Estate in [Particulars Withheld] District in Nakuru County, the appellant intentionally and unlawfully had carnal knowledge of a minor, WMM, aged 14 years.

6. In brief, the case for the prosecution against the appellant was that WMM was a student of the appellant at school and would go to the appellant's house in the evenings for tuition alongside other children. WMM gave evidence that on one day when the other children had left, the appellant grabbed her and had sex with her using a condom. She bled but went home and did not inform anyone about what transpired.

7. WMM further testified that the appellant repeated the acts on October 19, 2013. Similarly, on this day, she did not tell anyone about it at all. She then proceeded to give evidence that on October 28, 2013, her mother found her at about 8.30 pm in the company of the appellant. They both took off and went to the appellant's house where they hatched a plan as to what to tell the complainant's parent. Later on, her parents came to the appellant's house where she was assaulted while being asked to explain her whereabouts. Thereafter, she went home with her parents, and on the next day she was taken to Rift Valley Provincial General Hospital for medical examination. From the hospital, the complainant was escorted to the police station.

8. The evidence of PW2 corroborated the testimony of PW1, concerning the incidents of October 28, 2013. PW3 then gave evidence and produced the medical report. From the P3 Form, it is evident that the complainant had an old broken hymen and whitish discharge. The witness testified that that constituted proof of penetration.

9. In his defence, the appellant gave sworn testimony. He stated that he was a class teacher to the complainant. He also stated that he used to conduct private tuition for the complainant alongside other students. He however denied ever committing the alleged offence against the complainant.

10. With regards to the events of October 28, 2013, he testified that he had escorted all his three students when on his way he passed by a dairy shop and bought milk which he delivered to his friend who had sent him. On arriving at his house, the complainant came in panting and informed him that her mother had found her with a certain man. Thereafter, the complainant's parents arrived and started beating the complainant. When the complainant and his parents had left, he went and spent the night at his mother's place and later on he was arrested and arraigned.

11. The first appellate court in upholding the conviction and sentence noted that the evidence against the appellant was cogent. The learned Judge also pointed out the various aspects of the case that pointed to the appellant as the perpetrator and that the complainant had no motive of implicating the appellant in

this case. The learned Judge further considered the defence mounted by the appellant and determined that the defence was merely an attempt by the appellant to distance himself from the offence.

12. Both parties filed written submissions in this appeal which they highlighted when this matter came up in plenary on September 28, 2022. In his written submissions, the appellant submits on the first and second grounds of appeal, that his application for adjournment was the first during the whole trial process. He also points out that his application was not opposed. He contends that his denial of adjournment denied him a right to fair trial since he was not accorded adequate time as was accorded to the prosecution when they were afforded at least 3 adjournments. He relies on the High Court decisions in *Joseph Ndungu Kagiri vs Republic* and *Protus Buliba Shikuku vs. Attorney General* [2012] eKLR to buttress this submission. The appellant urged the Court to find that the whole trial, judgment and sentence were a nullity for reasons that his right to fair trial was infringed upon.

13. The appellant also submitted that the evidence on record did not establish his identity as the perpetrator. In his view, there was no proof of penetration on the complainant. He submits that the P3 form was not properly filled and that even so, the report indicated that the hymen had been broken earlier than when the alleged offence occurred. He sought reliance in the case of *PKW vs Republic* [2012] eKLR. The appellant also submits that the evidence of PW1 and PW2 leaves doubt as to the identity of the appellant as the perpetrator. Still on this, the appellant submitted that the evidence on record is contradictory on the aspects of identity of the assailant, and should not therefore be relied upon. It is therefore the appellant's submission that because of the discrepancies and the shortfalls in the evidence of the P3 and that of identity, it cannot be said that the prosecution discharged its mandate of proving the offence beyond reasonable doubt.

14. Finally, with regards to the sentence, the appellant submits that the sentence of 30 years' imprisonment meted against him is harsh and excessive. He also submitted that the two courts below failed to take into account his mitigation. He further submitted that although the sentence was intended to be a deterrence to others, the sentence has failed to achieve that purpose. His plea to this Court is therefore to allow his appeal and set him free.

15. The respondent also filed submissions, dated September 24, 2022. With regards to ground one of appeal, the counsel for the respondent submitted that the appellant was accorded fair trial and ample time to prepare for his defence. Counsel also pointed out that the appellant never raised any alibi defence or gave any evidence to suggest that the alleged offence took place when he was actually in the company of another person whose evidence was capable of exonerating him from the offence. Counsel cited the decision of *Republic v David Kahari Wanjiru [*2019] eKLR to back his submissions, that adjournments are discretionary and that the court exercised its discretion judiciously when it declined to grant the appellant an adjournment. She noted that the court proceeded to give the reasons for declining to grant the adjournment.

16. On the issue whether the P3 form was procedurally produced as an exhibit in Court, counsel for the respondent submitted that the same was in line with the procedure enunciated by the High Court in *Director of Public Prosecutions vs Marias Pakine Tenkewa* [2017] eKLR, Criminal Revision No 8 of 2017. She further submitted that the exhibits, PMF-1 to PMF5, were all properly marked and produced in accordance with the provisions of the *Evidence Act* and the *Criminal Procedure Code*. The respondent pointed out that the appellant never challenged the mode of production of the exhibits during trial and in his first appeal, and that this ground cannot stand the test at this second appeal.

17. On proof of the case against the appellant to the required standards, it was submitted on behalf of the respondent that the evidence of PW1 was corroborated by the evidence of PW2 and PW3 with regards to the identity and penetration. Counsel also submitted that the evidence of PW4 also implicated the

appellant as the items belonging to the appellant and the complainant's sweater were recovered at the school, by PW4 who was his colleague. Counsel was of the view that the evidence on record proved the appellant's culpability, and that the appellant failed to establish any doubt on the said evidence.

18. With regards to sentence, counsel for the respondent submitted that the *Sexual Offences Act* provides for a sentence of not less than 20 years with no maximum prescribed. She went further to submit that the trial court indeed exercised its discretion when it sentenced the appellant to 30 years, in a situation where no maximum sentence was prescribed. Counsel referred us to the decision in *Stephen Kimari Gathano v Republic* [2022] eKLR in support of her submission that aggravating circumstances sometimes calls for the courts to enforce a deterrent sentence, as in this case. Counsel was of the view that the prevalence of the offence with which the appellant was charged with, was an aggravating factor in this case and therefore the trial court was right to sentence the appellant to 30 years imprisonment. Counsel went on to submit that the age of the victim, the use of force and the fact the appellant was the complainant's teacher were all aggravating factors in this case. In summary, counsel urged us to dismiss the appeal in its entirety.

19. As we have already stated at the beginning of this judgment, this is a second appeal and our mandate is confined to considering matters of law. We have reviewed the record of appeal, the rival submissions and authorities cited by both parties, and the law. This appeal raises four issues for determination, namely; whether the prosecution's case was marred with inconsistencies and contradictions that went to the root of the case; whether the case was determined on the right standard of proof; whether the denial of an opportunity to call a witness was prejudicial to the appellant's case; and whether the sentence issued against the appellant is cogent.

20. The first issue we address is whether the denial of an opportunity to call a witness was prejudicial to the appellant's case. It is the appellant's case that he had indicated to the Court that he had a witness who was not able to attend court but the court declined to grant him an adjournment. It is his case that such denial prejudiced his case by denying him his right to fair trial and to defend himself.

21. Section 211(2) of the *Criminal Procedure Code* which deals with adjournments in criminal matters, more so with regards to the defence case, provides as follows:

> "(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

22. We have perused the record of appeal and we note that in denying the appellant's request for adjournment, the trial court said;

> "The defence all along knew the matter is for hearing today, since 12/3/15, and the reasons given for non- availability of witness aren't convincing. I don't know what a personal matter is."

23. Whether the trial magistrate properly or improperly declined to grant the appellants' application for adjournment is a matter that goes to question the exercise of judicial discretion. On discretion, it is a settled principle that discretion should be exercised in a judicious and reasonable manner. The court is expected to take into account the party's overall conduct in the case and the sufficiency of the reasons

for seeking adjournment. This Court, in *Peter M Kariuki v Attorney General* [2014] eKLR dealt at length with the issue of adjournments, stating as follows:

> "In Savannah Development Company Ltd V Merchantile Company Ltd, CA NO 120 of 1992, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs.
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> The Supreme Court of Uganda, in *Famous Cycle Agencies Ltd & Others V Masukhalal Ramji Karia*, (1995) Kampala Law Reports 100, was of the same mind when it stated that granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready.
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> Also in *Lolwe Agencies Ltd V Midland Emporium Ltd*, HCCC NO 25 OF 1998 (KSM), the High Court appropriately stated that, although the granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially, and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.
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> While bearing in mind that whether to grant an adjournment or not is discretionary, the appellate courts are loath to readily question the exercise of discretion by the trial court, nevertheless it must never be forgotten that the right to an adjournment to enable a party to adequately prepare his or her case in a criminal trial is underpinned by no less an instrument than the *Constitution*. The authorities cited above relate to exercise of discretion to grant or refuse an adjournment in a civil dispute. We are of the opinion that although the same principles are relevant in respect of applications for adjournments of criminal trials, nevertheless because of the constitutional basis of that right and the potential impact on a citizen's liberty, the court is obliged to be more circumspect in rejecting an application for adjournment and to specifically consider whether denial of such a right guaranteed by the *Constitution* would result in miscarriage of justice."

24. In the light of that authority, we hold the view that when a court is asked to grant an adjournment in criminal matters, the following principles can be taken into consideration. The first being the sufficiency of the reasons adduced; second, what prejudice, if any, will be visited upon either of parties; third, the previous conduct of the party requesting for adjournment in the case; fourth, the opportunity already available to the party requesting for adjournment to prepare for his case; and fifth, the impact of denial of adjournment on the case of the accused's case. We will deploy this five- pronged test to assess the exercise of discretion by the trial court.

25. It is not for us to set aside the trial court's discretion and substitute our own simply because if we had been the trial court, we would have exercised the discretion differently. It is only if the court did not exercise its discretion judiciously, that the appellate court would interfere with the decision arrived at. The exercise of discretion by the trial court is attacked mainly on the ground that the learned

magistrate failed to appreciate that in the circumstances of the case, a refusal to grant the adjournment was prejudicial to the appellant and resulted in injustice to him.

26. From the record, after the ruling on whether or not the accused had a case to answer, the defence case was scheduled to be heard 4 months down the line. Was this sufficient time for the defence to secure attendance of his witnesses? We answer in the affirmative.

27. From the record of appeal, we note that the prosecution was granted adjournment on three different occasions, namely, January 13, 2014, April 3, 2014, and August 7, 2014. It is on this basis, that the appellant has challenged the exercise of discretion by the trial court. From the record, the appellant had never occasioned any adjournment. The request that was declined was in fact his first application for an adjournment. In as far as prejudice is concerned, we note that this was a criminal matter and the appellant's right to liberty was at stake. He ought to have been granted at least one opportunity to try and make available his witnesses.

28. The next question is as to the sufficiency of the reasons advanced for the adjournment. The appellant's request was premised on grounds that his witness had a personal matter to attend to. The trial court was however not convinced and the court pointed out that it could not tell what a "personal matter" was. We too are inclined to pose the same question as the trial court, that is, what was the nature of this personal matter? The answer to this question cannot be found in the record and therefore, it remains unanswered. The end result is that the reason so adduced remains insufficient. We so hold because in our considered view, the appellant did not give the learned trial magistrate material upon which the court could exercise its discretion in favour of granting an adjournment.

29. The next issue for our determination is whether the prosecution's case was marred with inconsistencies and contradictions that went to the root of the case. The appellant has isolated the evidence of PW1 and PW2 as being contradictory. The appellant's case is that while the complainant denied having any issues with PW2 on lateness, PW2 gave evidence to the contrary. He also took issue with the evidence of PW1 as contradicting that of PW4 and PW2 with regards to the complainant having been engaged in love relationships on previous occasions. The appellant also pointed out certain discrepancies surrounding the disposal and recovery of the complainant's sweater.

30. In *Philip Nzaka Watu v Republic* [2016] eKLR, this court addressed the issue concerning the ability of a witness to accurately recollect the details of events as follows:

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same

phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elia Nsamba Shapwata & Another V The Republic*, CR APP NO 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court

has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.""

31. It therefore follows that any alleged discrepancy must be considered in light of all the evidence on record. We find that the possible late return home, by the complainant cannot water down the otherwise cogent evidence adduced by the prosecution. We further find that the other relationships that the complainant might have had could not, and did not exonerate the appellant from the acts of defilement which he committed.

32. The next issue is whether the evidence on record proved beyond reasonable doubt that the appellant was indeed culpable. Without doubt, and as submitted by both the appellant and the respondent, and as we also restate, the standard of proof in criminal matters is beyond reasonable doubt. In *Stephen Nguli Mulili v Republic* [2014] eKLR the issue of standard of proof was succinctly addressed in the following words:

> " The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated:
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> > "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."" (Emphasis ours).

33. In assessing whether the standard of proof was achieved by the prosecution, we must consider the evidence adduced by the prosecution against that of the defence. Thereafter, we must proceed and assess the discounted evidence as to whether, if all factors remain constant, the only conclusion a reasonable man would reach is that it is only the appellant, and no one else, who could have committed the offence alleged.

34. In carrying out the assessment, we need to review the evidence on record with regards to the various elements of the offence of defilement, namely, proof of penetration, age of the complainant, and the identity of the appellant as the person who committed the offence.

35. From the record, the two courts below reached a similar findings that the proof of penetration on the complainant was proved by the evidence of PW1 and the P3 form as presented in the evidence of PW3. This we are in agreement with and we can only add that the fact that the complainant might have previously engaged in sexual activities did not water down the evidence of penetration herein. In fact, from the record, PW1 testified that the appellant had done this act to her on another different occasion. In both occasions, it was and remains an offence.

36. With regards to the identity of the appellant as the one who committed the offence, we find from the evidence on record both the prosecution and defence, that it is clear that the complainant was at the appellant's house on that particular day. We also find that the complainant was indeed found at the appellant's house by her mother and father on that material day. Further, the evidence of PW1 and that of PW2 discredits the appellant's testimony that she was not in the company of the complainant when PW2 spotted them near her home after which they both took off.

37. We note that the appellant did not rebut the evidence that he had, on previous occasions, defiled the complainant. The following facts were established beyond any reasonable doubt. First, that the complainant used to visit the appellant's house for private tuition; second, that the complainant was a student of the appellant. The two knew each other well. There was no room for mistaken identification; and third, that the appellant defiled the complainant.

38. As a result of our reasons above, we find the appellant's appeal against conviction to be without merit and is hereby dismissed.

39. With regard to the sentence, this Court can only consider an appeal on sentence if the sentence was one which the trial court was not supposed to pass: In short, if the sentence so passed is illegal, or was passed in contravention of or without adherence to the legal and procedural requirements the court would be entitled to interfere with it. The appellant's appeal on sentence is majorly anchored on the fact that his sentence was a deterrent one and which has since not yielded the intended results. The appellant has however not tabled before us any empirical data to support his submissions in this respect. We therefore find no ground to interfere with the sentence as the same was legal and within the law as provided for under section 8(3).

40. The upshot of the foregoing is this appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR