Waingwe v Republic (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 401 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 142 OF 2016

W KARANJA, PO KIAGE & F SICHALE, JJA

MARCH 31, 2023

BETWEEN

JOHN WAINGWE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (N. Mwangi, J.) dated 28th April, 2016inHCCRA NO. 54 of 2012)

JUDGMENT

1. The appellant, Joshua Gichuki Mwangi, was arraigned before the Principal Magistrate's Court at Butali on 24th February 2010 and charged with defilement contrary to Section 8(1) as read together with Section (2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on the 22nd February 2010 in Central Kabras Location within the former Western Province, he intentionally caused his penis to penetrate the vagina of ESN (minor), a child aged 12 years.

2. In the alternative, he was charged with indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. During the trial, it was adduced that on the material day, PW1 (the minor) was walking home from school when she stopped at a sugarcane plantation for a short call. While at it, she was accosted by a man, who kicked her, put a headscarf in her mouth, took her further into the sugar plantation, stepped on her hands and legs, then defiled her. He also put mud in her mouth and nostrils to further prevent her from screaming.

4. Once he was done with the vile act, he removed the headscarf from her mouth which allowed her to scream. This caught the attention of members of the public who promptly went to her rescue. PW1 testified that she knew the appellant by recognition as he lived near their home and used to sell chicken

to her uncle. She said that she gave a description of her assailant who wore a blue t- shirt, black trousers and had a scarf on.

5. The members of the public arrested two men wearing scarves and PW1 was able to identify the appellant as the one wearing the blue t-shirt and black trousers and she knew him by name. During cross-examination, she categorically stated that the one who defiled her was short and fat while the other man who was also arrested was tall.

6. Her testimony was corroborated by that of Patrick Makunda and Rebecca Sitati, PW2 and PW3, respectively. They were among the members of the public who went to rescue PW1. They found her lying down in the plantation. Her school uniform was muddy, she did not have a panty on, she was weak, was unable to walk properly and had mud in her nostrils. She informed them that was defiled by a person known to her. Sylvance Osida, PW4, a clinical officer at Malava district hospital, observed that PW1 looked sick and worried and had difficulty walking. She also complained of pain in her private parts and upon examination, he observed that PW1 also had pain on her neck. His finding was that PW1 had been defiled due to the broken hymen and the presence of spermatozoa in her vagina.

7. Once the prosecution closed its case, the trial Senior Resident Magistrate was satisfied that the prosecution had made out a prima facie case against the appellant and accordingly placed him on his defence.

8. The appellant gave an unsworn statement and denied the charges. He stated that he was accosted by members of the public who arrested him alleging that he had defiled a girl, and frog- matched him to the police station. He also alleged that it was PW1's father who defiled her. He called, Antony Komut Kunai, DW2, who merely repeated the appellant's assertion. He confirmed that the appellant was indeed accosted by members of the public, accused and taken to the police station.

9. The learned Magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged convicted and sentenced him to 20 years imprisonment.

10. Aggrieved, the appellant appealed to the High Court at Kakamega. Mwangi, J re-evaluated and re-analysed the entire evidence and dismissed the appeal, upholding the conviction and sentence.

11. Still dissatisfied still, the appellant has preferred this second appeal, based on 7 grounds, which in the main complained that the learned Judge;

    a) Failed to uphold the appellant's appeal even after finding that the charge sheet was defective.

    b) Failed to hold that the identification of the appellant was not safe.

    c) Upholding a sentence that was based on fictitious and insufficient evidence.

    d) Failed to consider his defence.

12. At the hearing of the appeal the appellant appeared in person while the State was represented by Mr Ligama Shitsama, the learned Prosecution Counsel.

13. The appellant complained that; PW1's testimony was uncorroborated and the trial magistrate ought not to have relied on the testimony of a single witness; he never undertook a medical test to attest whether he was the one who defiled PW1; no police officer was called as a witness yet such evidence was critical; PW1's birth certificate was not availed hence her age was not adequately established; his identification as conducted by members of the public was unsafe; the learned judge erroneously substituted the defective charge with the appropriate one as opposed to acquitting the appellant, thus wrongfully upholding his sentence and conviction.

14. In light of the above, he urged this Court to quash the conviction and set aside the sentence.

15. The prosecution submitted that the substitution of the charge by the High Court was provided for by the law and was appropriate in the interest of justice for the victim. The absence of the investigating officer did not vitiate the watertight case presented by the prosecution through their 4 witnesses. PW1 was the star witness and her testimony was cogent. It was also adequately corroborated. The evidence tendered was sufficient to convict the appellant and there was no need for him to undergo a medical examination for his guilt to be established. His defence did not shake the evidence adduced by the prosecution. We were urged to dismiss the appeal as it was unmeritorious.

16. We have considered the record of appeal as well as the submissions. Our role as a second appellate court and jurisdiction is limited to matters of law as defined in Section 361 of the *Criminal Procedure Code*. This was affirmed by this Court in *David Njoroge Macharia v Republic* [2011] eKLR 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."

16. The issues for consideration are; whether it was necessary for the appellant to have undergone a medical examination; whether the testimony of PW1 was corroborated; whether his identification was safe; whether the prosecution ought to have called upon more witnesses specifically a police officer; whether PW1's birth certificate needed to be produced in court to establish her age; and whether the learned judge erred by substituting the defective charge with the appropriate one.

17. It is trite that the evidence based on a single witness must be carefully examined to ensure that injustice does not occur. This Court has over the years raised caution in the evaluation of such evidence. In *Francis Kariuki Njiru & 7 Others v Republic* [2001] eKLR it was pronounced:

> " [T]he law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

18. From the record, we have established that the learned judge was alive to and properly seized of the dangers of relying on single witness testimony. She correctly considered the surrounding circumstances and the corroboration of PW1's testimony which stemmed from the testimony of PW2 and PW3 and the medical examination conducted by PW4 which proved that her hymen was broken and spermatozoa was found in the minor's vagina. All these proved that she had been defiled.

19. On the number of witnesses required, we concur with the learned judge's application of Section 143 of the *Evidence Act* which states that no particular number of witnesses, in the absence of a provision to the contrary, is required for proof of any fact. The appellant's assertion that more witnesses were required to prove his guilt is therefore misconceived. Furthermore, the learned judge relied on the provision of Section 124 of the Evidence Act which stipulates that corroboration is not mandatory in

sexual offences. This was affirmed by this Court in *Stephen Nguli Mulili Vs. Republic* [2014] eKLR that;

> " ...with regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

20. On the appellant's identification, we find no fault in the learned judge's finding that the same was by way of recognition as PW1 knew the appellant before the defilement. It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See *Anjononi & Others vs. Republic*, (1976-80) 1 KLR 1566, 1568.

21. Moreover, the fact that PW1 described the appellant as soon as the members of the public came to her rescue, which enabled them to arrest him shortly thereafter, gives more credence to her testimony. We hold that the appellant's identification was safe and free from error.

22. With that holding, it follows that we wholly concur with the learned judge's conclusion that the appellant need not have undergone a medical examination to establish his guilt. PW1 properly identified him as her assailant and given the corroborative evidence presented before the trial court, we are satisfied that there was sufficient proof that he indeed committed the crime.

23. On whether PW1's birth certificate needed to be produced in court to establish her age, the learned judge arrived at a proper conclusion that the same was not necessary. Non-production was not fatal to the prosecution's case. The reliance of the estimation on

    the P3 form and the testimony of PW1 was enough to establish her apparent age. She was in standard 6 and it is quite clear that 12 years is the proper age for a student at that level. Faced with similar circumstances, this Court in *N N C v Republic* [2018] eKLR, held;

> " Was the testimony of PW 2 and the P3 form credible in this regard? In answering this question we are not lost to the fact that the complainant testified that she was 8 years old and was in class 2 at xxxx Primary school. We have also taken into account the provisions of; Section 2 of the *Children Act* which defines "age" to mean the 'apparent age' in cases where actual age is not known (See *Evans Wamalwa Simiyu v Republic* [2016] eKLR. The apparent age of the complainant to the doctor who examined the complainant in this case, was 9 years. Though
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> PW1's level of schooling may not be conclusive proof of her age, when it is looked at together with the fact that a clinical officer (PW5) had pegged her age at 9 years, we are not satisfied the trial court erred by concluding the complainant was below the age of 11 years." (Emphasis ours)

24. Lastly, on whether the learned judge erred by substituting the defective charge with the appropriate one. We find that she properly applied her mind when she invoked the provision of Section 382 of the Criminal Procedure Code which provides;

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant,

charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

25. The learned judge applied the provision judiciously and appropriately cured the defect in the charge and substituted the appellant's conviction for the offence of defilement contrary to Section 8 (1) as read together with Section 8 (3) of the SOA. On whether any injustice was occasioned, we note, just as she did, that the appellant never raised this issue at the trial stage. Moreover, the substituted charge attracts a sentence of not less than 20 years, which is the sentence meted against the appellant, as opposed to the earlier one under Section 8 (2) which attracts life imprisonment. Thus, if the appellant suffered anything, it was an advantage.

26. We find that there was no failure of justice occasioned to the appellant by the irregularity. Since the charge was that of defilement which in law means having carnal knowledge of a female below the age of majority, which was sufficiently proved, the use of the wrong section of the SOA at the trial, had no adverse consequence to the conviction. See *Alfayo Gombe Okello v Republic* [2010] eKLR.

27. In the end, we find no reason to depart from the concurrent findings of the two courts below. This appeal is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR