Willy v Republic (Criminal Appeal 91 of 2020) [2023] KECA 864 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 864 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 91 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

JULY 7, 2023

BETWEEN

BARAKA WILLY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the Judgment of the High Court at Nairobi delivered on 9th January 2019 by L.N. Mutende, J.inCriminal Appeal No. 32 of 2017)

JUDGMENT

1. On December 17, 2015, Baraka Willy, the appellant herein, was convicted on one count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment in the Principal Magistrate's Court at Mutomo. The particulars of the offence were that on September 2, 2015 at about 2.00pm at Mutha Location, Mutomo Sub-county within Kitui County, the appellant intentionally caused his penis to penetrate the anus of KKK, a child aged 8 years.

2. He had alternatively been charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, in that on the same date, time and place he intentionally and unlawfully touched the anus of KKK, a child aged 8 years.

3. A summary of the prosecution's case was that, PW1, KKK, the complainant, after a voire dire examination testified that she was defiled by the appellant while on her way to school in the company of her younger sister. The appellant held her hand, led her to a bush and told her sister to go home and not to tell anyone, failing which he would slaughter her. He then proceeded to undress her completely, grabbed her by her legs and when she fell down, he defiled her and threatened to harm her if she screamed. When he was done, he went away, the complainant went home and told her mother what had happened. She was accompanied by her mother to the appellant's home and police station where the matter was reported and later she was taken to hospital for examination.

4. PW2, KK, the complainant's mother testified that on the material day, she saw her younger daughter going home alone and when she asked her where PW1 was, she told her that she had been left standing alone by the road. She went looking for her and met up with her while she was crying. Her clothes were blood stained and she disclosed to her what had happened. Both went back to the scene of the incident where they tracked foot prints that led them to the appellant father's home. It is then that PW1, without provocation disclosed and pointed at the appellant as the person who had defiled her.

5. PW3, Willy Muthui, the appellant's father confirmed that indeed the appellant was working on the farm near the scene of the incident. While corroborating the testimony of PW2, he stated that the foot prints that led PW1 and PW2 to his homestead bore the appellant's shoe marks.

6. PW4, SK, the complainant's uncle received information of the incident from PW1's father. He called the police who advised that PW1 be taken to hospital. They escorted PW1 to the police station after which she was referred to Mutomo Health Centre for examination and treatment. The report was received by PW5, CPL Michael Mulwa of Mutha Police Station. Together with PW3, they went to Katene area where he arrested the appellant. PW6, CPL Benedict Kiptoo also of Mutha Police Station received a call regarding the incident on the material day from PW4. He escorted PW1 to hospital for examination where it was confirmed that indeed she had been defiled. He preferred the charges against the appellant and established from the child's Health Card that she was born on May 24, 2007.

7. The medical examination was conducted by PW7, Daniel Mulwa a Clinical Officer at Mutomo Health Centre on September 3, 2015 and he also filled the P3 form. He noted that PW1's clothes were stained with human stool, her hymen was intact, she had a tear on the anal region and blood cells confirmed there was bleeding. He concluded that she had been defiled.

8. In his unsworn defence, the appellant denied any involvement in the offence. He stated that he had been away at his grandmother's home for three days preceding the incident and he returned home on the material day. It was while he was taking a bath that his father told him that there was a report that he had defiled a child whose name he could not recall. Although he denied any involvement in the offence, he was nonetheless arrested the following day. To him, PW1 had framed him.

9. Upon trial, the appellant was found guilty and sentenced to life imprisonment. Dissatisfied, he preferred a first appeal to the High Court at Kitui against both the conviction and sentence. By a judgment delivered on January 9, 2019 (LN Mutende, J), the Court upheld both the conviction and sentence, thus dismissing the appeal in its entirety. Further aggrieved, the appellant has approached this Court on a second and perhaps the last appeal. In a home-made Supplementary Grounds of Appeal, he has raised four grounds of appeal, namely that; his right to a fair trial under article 50(2)(h) of the *Constitution* were violated; the trial court did not form an opinion on whether PW1 understood the responsibility of taking an oath; the case was not proved beyond reasonable doubt; and that the sentence imposed was harsh, extremely excessive and contravened articles 27 and 28 of the *Constitution* as it did not take into account his mitigation and the unique circumstances of the case.

10. The appeal was canvassed by way of written submissions with limited oral highlights. The appellant's submissions were undated whilst for the respondent were dated October 11, 2022. The appellant appeared in person while learned counsel, Mr. Omondi appeared for the respondent.

11. The appellant submitted that his right to a fair trial was breached because he was not provided with an advocate at State expense, thus occasioning him substantial injustice. This contravened article 50(2)(h) of the *Constitution* which requires that an accused person be provided with an advocate at State expense where substantial injustice is likely to be occasioned.

12. He also complained that the voire dire examination on PW1 was not properly conducted. He took issue with the fact that by merely asking PW1 who was a minor whether she would tell the truth was not sufficient examination to test her understanding of the import of taking an oath. To this extent, it was his view that PW1's evidence was not properly received in court.

13. Further that, the prosecution did not prove its case to the required standard, which is beyond reasonable doubt as his identification was not full proof. He submitted that the name that was given to the police of the culprit was not his, and that, it was PW1's mother who coached PW1 on what to tell the police. Therefore, this was not a case of identification by way of recognition, consequent to which an identification parade ought to have been conducted. He faulted reliance on the foot prints that led PW1 and PW2 to his father's homestead as a means of identifying him. He further submitted that penetration was not proved as PW1 was unable to elucidate what exactly transpired to her and, as such, a conclusion that she was defiled was faulty and a mere speculation.

14. Finally, the appellant faulted the sentence meted to him which he considered harsh and excessive. He decried the Court's failure to consider his mitigation, which, if it had been considered, would have led to a more lenient sentence, as opposed to sentence handed which gave an impression of admission of guilt. His view was that the Court ought to have considered that the *Sexual offences Act* is not in tandem with our progressive *Constitution*, and therefore, ought to have meted out a more lenient sentence than is provided in the *Act*. We were thus urged to set aside the sentence of imprisonment and substitute it with a more lenient sentence.

15. On the part of the respondent, learned counsel for the State, Mr. Omondi submitted that this being a second appeal, we are limited to considering only points of law. To him, the two courts below arrived at concurrent findings of fact which this Court should be hesitant to disturb.

16. As regards identification, he submitted that the appellant was positively identified. The defilement took place in broad daylight when circumstances for a positive identification were conducive. There was therefore no possibility of a mistaken identity; instead, the identification was sufficient and reassuring. As such, the issue of identification by way of foot prints was a non-issue. As regards penetration, the PW1 was candid as to what transpired, and, furthermore, her evidence was corroborated by that of the Clinical Officer. Further, the appellant suffered no prejudice on account of the manner in which the trial court conducted the voire dire examination. Counsel submitted that the appellant's defence was rightly dismissed and urged us to uphold the conviction. Finally, counsel posited that the sentence meted out was lawful and proper and the appeal lacked merit and should be dismissed in its entirety.

17. We have considered the record of appeal, submissions made by both parties and the law. We appreciate our role as the second appellate court. Our jurisdiction is limited to considering matters of law only as defined in section 361 of the *Criminal Procedure Code* and reiterated by this Court in an avalanche of case law including the case of *David Njoroge Macharia v Republic* [2011] eKLR as follows;

> "That being so, only matters of law fall for consideration-see section 361 of 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."

18. Cognizant of the principles set out above, we have demarcated the issues that fall for determination to be whether; the trial was conducted in a fair manner; voire dire was properly conducted; the ingredients of the offence were established; and, whether the sentence meted out was harsh and excessive.

19. On whether the trial was conducted in fair manner, the appellant contended that he was not informed of his right to have an advocate provided for him at the State's expense yet he was charged with a serious offence. The right to a fair trial under the *Constitution* is one of the fundamental rights that cannot be derogated from under article 25. It is spelt out under Article 50 (2)(h) as follows; -

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (h) 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. It has been said time without number that the right to legal representation is not an automatic right, nor is it an absolute right; an accused person has to establish that failure to provide him with an advocate at State expense would cause him tremendous prejudice. To quote the Supreme Court in Petition No 11 of 2017, *Charles Maina Gitonga v Republic* [2018] eKLR, it was observed that: -

> " ...legal representation is not an inherent right available to an accused person under Article 50 of the *Constitution* or any provision of the Repealed constitution and that under section 36(3) of the *Legal Aid Act* No 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

21. In this case, the court record shows that the appellant did cross examine each of the prosecution witnesses. He also ably conducted his defence without a hitch. This is a testament that no prejudice nor substantial injustice was suffered by him for the failure to have a legal counsel represent him during the trial. We find no merit in this ground of appeal.

22. The appellant argued that the *voire dire* examination on PW1 was not properly conducted. He hinged this complaint on the ground that, during the examination, the trial court failed to establish that the complainant understood the meaning of taking an oath.

23. For better understanding of how the examination was conducted, we think it is prudent to duplicate the relevant part as under:

> " Introduction.
>
> My name is KK. I am pupil at [K]. I am in nursey.
>
> Question: What is the name of your class teacher? Answer: Teacher K.
>
> Question: Is the teacher a male or a female? Answer: She is a female.
>
> Question: If she is female, how you address her in other words; I mean aunt or uncle?
>
> Question: Do you attend a Sunday School? Answer: No, I don't attend Sunday School. Question: Given a chance would tell a lie or truth? Answer: I would choose to tell the truth."

24. After this examination, the Court concluded as follows:

> " From the foregoing *voire dire*, I am satisfied that the witness though a child apparently of tender age, is possessed of sufficient she was intelligent enough intelligence to testify. She will give evidence under affirmation."

25. We underscore the fact that there is no set procedure or formula by which a voire dire examination should be conducted. What is paramount is that, that questions put to the minor are sufficient to

test whether she/he understands the import of speaking the truth and, if she/he will give a sworn statement, she/he appreciates the meaning of taking an oath. The court arrives at either answer based on the questions that the minor is asked. As spelt out above, no doubt the learned trial magistrate meticulously examined PW1 with to determine her appreciation of speaking the truth. Indeed, in view of the answers she gave, the Court concluded that she was intelligent enough to testify and that she would be affirmed. Her evidence was accordingly given under affirmation as opposed to an oath. It is simple to deduce that the Court opted for an affirmation premised on the fact that the minor said that she does not attend Sunday School.

26. We emphasize that, on examination, the Court put across questions to the minor who told the court her name, school, class, teachers name, teacher's gender, whether she attended Sunday school or not, if she would tell the truth or lie. She intelligently answered all the questions that were asked. We are unable from the foregoing to agree with the appellant that the mere fact that the trial court did not establish that PW1 understood what taking an oath involved, the voire dire examination was improperly conducted. PW1 was forthright that she would tell the truth and based on her religious background, she was affirmed. At the point at which she said she does not attend Sunday School, the Court concluded that it was best she testifies under affirmation. At that point, there was no need for the Court to proceed to ask her if she knew the meaning of an oath. The Court was satisfied that she possessed sufficient intelligence to speak the truth under affirmation. We also arrive at the same conclusion as the trial court, and we are therefore, unable to agree with the appellant that the voire dire examination was not properly conducted.

27. In so holding, we find solace in this Court's case of *Johnson Nyoike Muiruri v Republic* [1983] eKLR which cited this Court's case of *Peter Kiriga Kiune* Criminal Appeal No 77 of 1982 (unreported) where it was held that:

> "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, *Oaths and Statutory Declarations Act*, cap 20. The *Evidence Act*, (s 124, cap 80)."

28. We have said enough to demonstrate that the voire dire examination met the legal threshold and did not contravene the manner in which the evidence of PW1 was received. Further, even if the same was not properly conducted, that does not per se vitiate the entire prosecution case as long as there is other independent and corroborative evidence. Indeed, there was such evidence. This ground of appeal also fails.

29. As to whether the prosecution proved its case beyond reasonable doubt, in the case of *John Mutua Munyoki v Republic* [2017] eKLR, it was held that for the offence of defilement to be proved, the prosecution must establish: the age of the minor; penetration; and, identity of the perpetrator.

30. Our analysis of the evidence drives us to conclude that all the three ingredients of the offence charged were proved beyond reasonable doubt. PW1's age was proved by way of a Health Card tendered by PW6 which indicated that she was born on May 24, 2007, thus placing her age at 8 years as at that time of the incident. As to penetration, PW7 testified that upon examination of PW1, her underpants were stained with human stool, she had a tear in her anal region with presence of blood cells, and the likely weapon used was a blunt object. He concluded she had been sodomized, which was irrefutable

medical evidence of defilement. We find no reasons to interfere with the conclusion arrived at by the two courts below on these two findings.

31. As to whether it is the appellant who committed the offence, it was the prosecution's evidence that the appellant grabbed PW1 by the hand while on her way home. She met her mother and immediately told her what had happened and they both went back to the scene where they found foot prints that led them to the appellant's home where upon seeing the appellant, she pointed at him as her assailant. PW3 testified that he did not go to the scene but it was factual that the foot prints that led PW1 and PW2 to his homestead bore the appellant's shoe marks. Further, the appellant, on the material day was working close to the scene of the incident which was within his farm. The appellant in his defence averred that he had travelled and only returned home that day, a few minutes before PW1 came home and implicated him.

32. The appellant did not proffer any explanation as to why his own father would give false testimony as to his whereabouts on the day of the incident. More crucially is that, PW1 positively identified him as her assailant without coercion or coaching. The ease with which she did so was because the offence was committed in broad day light when no opportunity for mistaken identity was available. Indeed, from the chronology of the events as narrated by the prosecution witnesses, there was no time for PW1 to be coached or the scene to be interfered with or better still, for the witnesses to frame him.

33. The two courts below arrived at a concurrent finding that it was the appellant who defiled PW1. The prosecution proved this ingredient without difficulty. We find no basis to interfere with the conclusions arrived at by the two courts.

34. Lastly, the appellant contended that the sentence of life imprisonment meted out was not only harsh and excessive, but also unconstitutional. He decried that it was meted without considering his mitigation and the unique circumstances of the case. We have combed through the proceedings and unfortunately, we are unable to see the sentencing proceedings. However, from the Judgment of the High Court, it is clear he had pleaded remorse and being a first offender. That notwithstanding, we are of the view that, the two courts meted out the sentence upon a proper exercise of sentencing discretion and consideration of the facts of the case. The circumstances of the case are grave; the appellant sodomized PW1 leaving her with physical scars and permanent psychological trauma she will live with for the rest of her life. This calls for a deterrent and denunciation measure. Further, the sentence was both legal and proper and we find no reason to interfere with it.

35. Ultimately, our conclusion is that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE–MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR