Nderitu v Republic (Criminal Appeal 60 of 2021)
[2023] KECA 1439 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1439 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 60 OF 2021

AK MURGOR & PM GACHOKA, JJA

NOVEMBER 24, 2023

BETWEEN

JOSEPH KARUMBI NDERITU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the judgment of the High Court at Nairobi (J. Lesiit, J.) delivered on 4th June 2014 in Criminal Appeal No. 90 of 2013)

JUDGMENT

1. This is a second appeal from the trial magistrate's court, where the appellant, Joseph Karumbi Nderitu was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

2. The particulars of the offence were that on 12th March, 2011 in the former Kiambu District, the appellant committed an act which caused penetration of his male genital organ into the female genital organ of MWN (referred to as NW during the trial) PW1 a girl child aged 7 years. In the alternative, he was charged with indecent assault contrary to section 11(1) of the *Sexual Offences Act*, where the particulars were that he indecently assaulted the child by touching her private parts namely vagina.

3. The appellant pleaded not guilty and the prosecution called 5 witnesses. Upon considering the evidence, the trial magistrate found the appellant guilty and convicted him of the offence of defilement and sentenced him to life imprisonment.

4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court which dismissed the appeal, and upheld both the conviction and the sentence.

5. Aggrieved by the High Court's decision, the appellant brought this appeal, on grounds that the High Court; wrongly relied on a defective charge sheet to uphold his conviction; failed to consider that the

voir dire examination was improperly conducted; wrongly relied on uncorroborated evidence; failed to find that penetration was not proved; failed to appreciate that the prosecution did not call crucial witnesses; and failed to appreciate that the appellant was suffering from mental illness during the proceedings.

6. The appellant filed written submissions, and when the appeal came up for hearing on a virtual platform, he stated that he would rely on the submissions. He also stated that he had attended counselling and various courses from which he would benefit were he to be released from prison.

7. In the written submissions, the appellant submitted that the charge sheet was defective as it indicated the complainant as MWN, which name appeared in the list of witnesses and is captured in all the documents, yet the person who testified as the complainant was called "NW". It was further submitted that despite the difficulty PW1 faced in understanding the nature of the affirmation, the learned judge nevertheless upheld the conviction on the basis of her evidence.

8. On whether the prosecution proved the offence to the required standards, it was submitted that the trial court wrongly relied on the uncorroborated evidence of PW1 and that the prosecution failed to call crucial witnesses; that there were contradictions in the prosecution evidence, particularly in the identity of PW1 which was questionable; that as a consequence, the prosecution failed to prove its case to the required standard.

9. The appellant went on to submit that he was mentally incapacitated during the trial, and had duly notified the trial magistrate, but his complaints were not taken into account, which was prejudicial to him.

10. On their part, Mr. Mureithi, learned prosecution counsel for the State opposed the appeal and submitted that the prosecution proved its case to the required standard. The appellant was found guilty of the offence, and upon re-evaluation of the evidence, the High Court came to the same conclusion. Counsel submitted that the charge sheet was unambiguous since the appellant understood the charges that he faced. Regarding the assertion that the prosecution evidence was uncorroborated, it was submitted that the trial court was entitled to rely on section 124 of the *Evidence Act* to convict the appellant since the court was satisfied that the complainant was telling the truth.

11. The Court's jurisdiction as the second appellate court is limited to matters of law only as spelt out in section 361 of the *Criminal Procedure Code* and affirmed by this Court in *David Njoroge Macharia v Republic* [2011] eKLR thus;

> 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."

12. While appreciating the scope of our mandate as expounded above, and having given due consideration to the record of appeal, the memorandum of appeal and submissions, we consider that the following issues are for determination;

    i. whether the appellant was fit to stand trial;

    ii. whether the charge sheet was defective;

    iii. whether the voir dire examination was properly conducted;

iv. whether uncorroborated evidence was relied upon to convict the appellant;

v. whether the ingredients of the offence of defilement were proved to the required standard; and

vi. whether the prosecution failed to call crucial witnesses.

13. So as to appreciate the context within which the issues arise, it is crucial that we set out briefly the facts that were before the trial court.

14. After a *voir dire* examination was conducted, PW1 stated that her name was NW and that she was 7 years old. She went on to state that on 12th March 2011 at about 6.00 p.m. whilst at her friend Mary's house, Mary went to the bathroom and left her outside. At that point, the appellant came and told her to go and buy him cigarettes. When she declined, he grabbed her, carried her into his house and locked the door. He took her into his bedroom where he removed her pants and inserted the 'thing' he uses to pass urine (his penis) in her private parts which was painful. After warning her not to tell anyone, he opened the door and went to the shop. PW1 testified that after her ordeal she informed Mary and one Micheal of what the appellant had done to her. They later informed her elder sister, IWN, PW2 who took her to Kiambu District Hospital. The matter was later reported to the police station.

15. PW2 is PW1's older sister. She testified that on the date of the incident she arrived home and was informed by her step mother that PW1 had been defiled by the appellant. She took her to the hospital where she was treated. She confirmed that PW1 was born in 2004 and that the appellant was a relative.

16. DNK PW3 is PW1's father. He arrived home in the evening to find a crowd outside his house. He was informed that his daughter had been defiled by the appellant. He stated that his daughter's name is NW and that they had taken her to Kiambu District Hospital where the doctor confirmed that indeed PW1 had been defiled. The appellant was later arrested. He produced a health card that showed that PW1 was born on 2nd June 2002 and confirmed that the appellant was his nephew.

17. In cross examination, he stated that the appellant was not beaten and denied that PW1's treatment card had been altered. He was informed that the appellant had mental issues and had gone to the police station with documents from Mathari Hospital.

18. PW4 was Dr. Wanjiku Njoroge. She worked with Dr. Mutahi who prepared PW1's P3 form. She testified that PW1 aged 7 years was presented to hospital on 12th March 2011 with a history of assault by a person known to her and that upon examination she had bruises on the labia minora, and the hymen was not intact, but there were no pus cells and no spermatozoa. She produced the P3 Form.

19. In cross examination, she confirmed that the name on the treatment notes had been cancelled and not counter signed. She stated that according to the treatment notes, PW1 was treated on 13th March 2011 and the person treating her noted that the hymen was intact, yet on the 15th March 2011 when the P3 form was prepared, the doctor noted that the hymen was broken. She explained that the treatment notes were filled by a clinical officer who was not conversant with the details of the case.

20. Winnie Ingaiza, PW5, was the investigating office who took over from a colleague who had investigated the case and handed over the file to her but could not be located. She produced the P3 Form and clinic notes.

21. The appellant gave a sworn statement of defense and denied committing the offence. He stated that on 12th March, 2011 he was unwell and was in his house sleeping when people came and falsely accused him of defiling the child. They had beaten and injured him in the process.

22. The appellant called his mother Jane as DW2. She had seen PW1 on the material day and had not noticed that anything was wrong with her. She took the appellant, who had seriously been beaten by members of the public to hospital where he was issued with a P3 Form.

23. Returning to the issues raised and beginning with whether the appellant was suffering from mental incapacity and required a mental assessment report prior to commencement of the trial, in addressing this issue, the trial court had this to say;

> " There is also a point raised by counsel for the defence in passing that the accused person has a mental problem. I do appreciate that this court referred him to Mathari Mental Hospital at some point during the proceedings, but no medical report was subsequently presented to confirm his mental status. He may have been having a mental problem, but I do not think that this has any bearing in this case as he understood the proceedings and cross examined the witnesses before seeking legal representation. When plea was taken no abnormalities were noted by the court in fact, he is the one who requested to be taken to the mental hospital.

24. While the High Court stated thus;

> "The record of the proceedings is very clear that the appellant did not raise the defence of insanity at any stage of the proceedings. Furthermore, the record of proceedings does not raise any doubts as to the appellant's state of mind. The law is clear that a person is presumed to be sane, unless the opposite is proved, the burden of proof lies on the person claiming insanity and the standard of proof is on a balance of probabilities. I think that the defence of insanity the appellant has raised at this stage is an afterthought, and does not lie. Nothing turns on this point".

25. The requirement for an accused being fit to stand trial arose out of concern for criminal trials to be fairly conducted. See (Blackstone, Commentaries on the Laws of England, Clarendon Press, Oxford, 1769, Vol IV, P 250). In such cases, four principles are applicable, namely;

    a. A recognition that it is fundamentally unfair to try an unfit accused;

    b. A recognition that it is inhumane to subject an unfit accused to trial and punishment;

    c. A perception that, a trial of an unfit accused is comparable to trial of an accused in absentia, (Allen, Kesevarajah & Moses (1993) 66 A Crim R 376,397. 10 See Vernia),

    d. A procedure the legal system repudiates; and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment."

26. That said, section 11 of the *Penal Code* provides;

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

27. Section 162 of the *Criminal Procedure Act* further specifies;

    (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

28. In explaining the duty of a trial court where the defence of insanity was raised in the case of *Leonard Mwangemi Munyasia v Republic* (Reported) [2015] eKLR this Court observed that;

> "What must be avoided . . . is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question".

29. When the plea was taken on 14th March 2011, the appellant pleaded not guilty. During the mention on 28th March 2011, the appellant stated that he was unwell and requested for treatment. On 9th May 2011, he told the court that he had a mental problem and asked to the taken to Mathari Hospital, which order was issued by the trial magistrate. On 17th May 2011, the matter was again adjourned because the appellant stated that he was unwell. The trial court ordered that he be taken to Mathari Hospital for treatment. On 31st May 2011 when the matter was again mentioned, the appellant stated that he was unwell. The court again ordered that he be taken for treatment.

30. On 4th July 2011, when the matter came up for hearing, the appellant stated;

> "Accused: I am not feeling well. I ask for another date. Prosecutor: The witness has been coming. He does not look sick. Accused: I am sick.
>
> Court: The appellant did not look badly off. I think he is was employing delay tactics. Matter proceed to hearing".

31. What can be discerned from the above proceedings is that, the appellant generally claimed to be unwell and in need of treatment. On two occasions, he stated that he wanted to go to Mathari Hospital, and it is only on 9th May 2011 that he claimed to have a mental problem. There was nothing in the proceedings that pointed to any mental instability, and it is evident that the trial magistrate did not observe any anomaly in his conduct that would have led her to conclude that he was mentally unstable.

32. Section 162 (1) is clear. It specifies that, "When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness." Our re-examination of proceedings did not disclose that the appellant was unfit to stand trial or unable to defend himself. Even though he declared that he had a mental problem, nothing pointed to his having been mentally unfit to stand trial. The record does not disclose that he was unable to cross-examine the witnesses, or that he was incapable of defending himself. In point of fact, he deftly questioned the witnesses, and aptly laid out his defence. There was no indication during the trial that he was challenged in any way. More importantly, there was no mention in his defence that he was mentally challenged, or that he suffered a mental lapse when the offence was committed. He did not plead mental infirmity as a defence. Just like the learned judge, we are of the view that there was nothing that showed that he was insane, before during or after the proceedings. Accordingly, we dismiss this ground.

33. Concerning the charge sheet, the appellant contends that it was defective since, it indicated that the complainant was MWN, which name was captured in all the documents, yet the person who testified as the complainant was "NW".

34. Section 134 of the *Criminal Procedure Code* sets out the components of a charge sheet thus;

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

35. In determining whether a charge sheet is defective or not, this Court in *Sigilani v Republic* [2004] 2 KLR, 480 held that;

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

36. In the case of *Peter Ngure Mwangi v Republic* [2014] eKLR, this Court faced with a similar situation that concerned the different names of the complainant in the charge sheet held that;

> " ...we find that the defect in the charge sheet of stating the complainant's name to read "M" instead of "M" did not prejudice the appellant in any way. Our reason for saying so is that the person who was robbed was "M". He is the one who led police to the arrest of the appellant. He is the one who knew the appellant as a neighbour. By indicating his name to read "M" instead of "M" was merely a typographical error. The type of errors normally curable under Section 382 of the *Civil Procedure Code*. We are satisfied that the first two Courts were justified in finding it inconsequential to the success of the prosecution of the appellant in connection with the offence he had allegedly committed. Section 382 of the *Civil Procedure Code* as the appellant did not point out any prejudice which the irregularity could or did occasion him."

37. We agree and adopt the above conclusions. In the instant case, though the charge sheet indicated that the complainant's name as 'MWN' which was captured on the P3 form, clinic card and treatment notes, PW1 testified that her name is "NW". She was clear that she was at one Mary's house when the incident occurred while Mary was in the bathroom. PW2 stated that PW1 was her younger sister, and that she had taken her to the hospital where she was examined and found to have been assaulted. PW3, her father produced her Child Health Certificate. Though PW1 referred to herself as 'NW' and the name 'MWN' was indicated in the charge sheet and the documents produced, what was consistent in the documents was her name 'W', and all the witnesses who testified referred to her by that name. Clearly, the appellant was not mistaken as to who the complainant was. He was aware of the offence and the date it occurred. He cross examined the witnesses and did not indicate the existence of any discrepancy in his defence. We are satisfied that the difference in the complainant's name in the charge sheet and in the evidence did not prejudice him in any way, and in any event, it was curable under section 382 of the *Criminal Procedure Code*.

38. Next, the appellant complained that the voir dire examination was not properly conducted and that the trial court convicted him on uncorroborated evidence. In this regard, the record shows that the trial magistrate affirmed PW1 upon appreciating that she knew the difference between the truth and falsehoods, but did not understand the meaning of an oath. Based on this, the court clearly convicted him on, not only her evidence, but also on the medical report, and other witness evidence, all of which corroborated her evidence. We would add that the reference to section 124 of the *Evidence Act*

in the judgment was with regard to the need for corroboration of her evidence having regard to the circumstances of the case. Since nothing turned on it, the complaints are unmerited and fail.

39. Turning to the allegation that crucial witnesses were not called, the appellant asserts that one Mary and Michael should have been called to testify.

40. However, it is specified in section 143 of the *Evidence Act* that no particular number of witnesses, in the absence of any provision of law to the contrary is required to prove any fact.

41. In the case of *Keter v Republic* [2007] 1 EA p.135, it was held that;

> The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

42. The charge the appellant faced in the instant case was a sexual offence.

43. PW1 testified that the assault took place in the appellant's house where he had locked the door. Based on the circumstances, neither Mary nor Michael would have seen him assaulting her, so that their evidence would not have added any value to the prosecution's case. This ground is without merit.

44. As to whether the offence was proved, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients. They are; the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) and (2) of the *Sexual Offences Act* which stipulates;

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

    2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".

45. Regarding the first element of age, this Court in the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated;

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

46. In the instant case, though the appellant asserted that PW1's age was not proved, yet PW2 and PW3 who are PW1's sister and father respectively gave her age as 7 years at the time of the incident. PW3 produced her Child Health Card that indicated that she was 7 years old. This was corroborated by the P3 Form produced by PW4, the doctor. As were the courts below, we too are satisfied that PW1's age was sufficiently proved.

47. As pertains to the second element of penetration. The appellant has argued that this was not proved because, the treatment card of the Kiambu Hospital indicated that her "hymen was intact", which entry was cancelled and replaced with "hymen not intact".

48. In this regard the trial court stated;

> " In the same treatment card, there is an observation on the first visit that the child had bruises in the labia minora, which is the inner part of the vaginal opening. This is an indication that there was some degree of penetration. Even if I were to ignore the state of the hymen, I have to deal with this part of the evidence noting that penetration need not be complete. Partial penetration of any death constitutes development. In whole, this substantially corroborates the evidence of the child that she was defiled. The entire evidence on defilement cannot be disregarded merely because of the alteration on the treatment card. In any event, the alteration was countersigned by the doctor who also had an opportunity to physical (sic) examine the child. I am satisfied that the child was defiled."

49. The High Court for its part also stated;

> " The doctors confirmed that she had been defiled, and the age and of the injuries consistent with the day of the incident".

50. PW1's evidence was that the appellant took her into his house and sexually assaulted her. The trial court found her testimony to be cogent and consistent. It was corroborated by the medical reports which indicated that she had bruises on her labia minora and the hymen was torn. Both the courts below were satisfied that the totality of the circumstances pointed to penetration of PW1. Based on the concurrent finding of fact of penetration by the two courts below, we too are satisfied that penetration was proved.

51. On the appellant's identity, the record shows that he was PW1's cousin, and therefore the question of mistaken identity does not arise.

52. In view of the aforegoing findings, the offence was proved to the required standard, hence rendering the conviction safe, with the result that, the appellant's appeal is accordingly dismissed in its entirety.

53. The Judgment has been delivered pursuant to Rule 34(3) of the *Court of Appeal Rules, 2022* since Kantai, JA refused to sign the Judgment.

54. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR