Mwangi v Republic (Criminal Appeal 15 of 2020)
[2022] KECA 817 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 817 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 15 OF 2020

HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA

JULY 22, 2022

BETWEEN

EPHANTUS IRUNGU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ngenye, J.) dated 18th October 2016 in HCCRA No. 200 of 2015)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*. The particulars thereof were that on 18th May 2014 at Kiambiu slums in Nairobi within Nairobi County, the appellant intentionally caused his penis to penetrate the vagina of KM, a child aged 10 years hereinafter "the complainant."

2. The prosecution called a total of 6 witnesses during the trial. According to the complainant she was aged 10 years old at the time of the incident. That while playing outside their house at around 4.00p.m. the appellant called her into his house, blocked her mouth, forcefully undressed her, pushed her on the sofa set and sexually assaulted her. When done, the appellant gave her 10 shillings and she went home crying. When her grandmother came home, she immediately informed her what the appellant had done to her.

3. PW2 MM the grandmother to complainant testified that on the fateful day she arrived at home at 8.00 p.m. from work and found the complainant crying. Upon inquiry and interrogation, the complainant confided her that she had been defiled by the appellant. She noted blood stains on the complainant's bedding. She then took the complainant to hospital where she was treated and discharged. She thereafter reported the incident at Shauri Moyo police station.

4. PW3, Christine Kado a social worker on getting the information regarding the incident visited the complainant's home and accompanied her to hospital. PW4, Purity Kajuju, a clinical officer, treated the complainant. She had difficulties in walking and looked sad. She noted several bruises and the inner labia wall was red though the hymen was intact. However, no spermatozoa was found. She opined nonetheless that there had been sexual activity.

5. PW5 Dr. Shaka, a police surgeon also examined the complainant and found her external genitalia normal, though the labia minora had reddened and the hymen had a tear at 5 O'clock. He prepared the P3 form and later examined the appellant. PW6 PC Nancy Bukayo from Eastleigh Police Base was assigned to investigate the case and upon conclusion of the investigations she preferred the charge against the appellant.

6. The appellant testified in his defence and called one witness. He stated that he worked as a cleaner and while heading home from work he was accosted by four men who started beating him on allegations that he was terrorizing PW2. It was at this juncture that PW2 emerged claiming that he had defiled the complainant. Administrative Police Officers on patrol saved him from the beatings and took him to the chief's camp and later to Shauri Moyo Police Station. That PW2 had a grudge against him as she used to live in a plot where the appellant was a caretaker and garbage was found in her house which caused her to be evicted and upon being evicted, she had vowed to teach the appellant a lesson.

7. His witness DW2, Jane Muthoni a caretaker at a flat in Eastleigh testified that the appellant on 11th May 2014 worked continuously until 3p.m. Accordingly the appellant could not have committed the alleged offence at 4 pm.

8. After evaluation of the evidence on record, the trial magistrate found the appellant guilty of the offence charged, convicted him and sentenced him to life imprisonment.

9. The appellant was aggrieved by the conviction and sentence and appealed to the High Court where he contended that the case was not proved beyond reasonable doubt, that the complainant's evidence was not corroborated and that her age as well as penetration which are key elements of the offence were not proved. Lastly, that his defence was not considered.

10. The 1st appellate court upon hearing the appeal on merits dismissed it in its entirety. Dissatisfied with the decision, the appellant has approached this court on a second and perhaps last appeal on grounds that the first appellate court erred in law and fact for failing to find that: voire dire examination conducted on the complainant was improper; the age and penetration of the complainant was not proved; he was not properly identified as the perpetrator of the crime, the reasons given by the trial court were insufficient to justify invocation of Section 124 of the *Evidence Act*; to re-evaluate the evidence and cure the inconsistencies; and lastly failure by the trial court to consider his defence.

11. At the hearing of the appeal the appellant appeared in person while the respondent was represented by Mr. Njeru Solomon, Senior Prosecution Counsel. Both parties filed written submissions which they relied on entirely and opted not to highlight.

12. In his submissions, the appellant while citing several authorities which we have considered submitted that there was failure to prove the key ingredients of the offence of defilement. Firstly, there were inconsistencies in the prosecution evidence as to who had committed the offence. secondly, the age of the complainant was not cogently proved. That PW2 and PW3 never testified as to the age of the complainant and the same was only disclosed in the P3 form and post rape care forms.

13. The appellant further submitted that critical witnesses were never called to testify which left a huge gap in the prosecution's case. Lastly, the appellant submitted that, failure to consider the defence of

alibi that he raised and the existence of a grudge between him and PW2 which resulted in the framed-up charge, occasioned him injustice.

14. Opposing the appeal Mr. Njeru Solomon, urged that the trial magistrate made no error in arriving at the findings of facts and law which were echoed by the 1st appellate court. The 1st appellate court was equally alive to its duty to re-evaluate and re-assess the evidence and arrive at an independent conclusion. On voire dire, examination, the respondent submitted that the same was properly conducted and even though the complainant was thereafter affirmed, the appellant exhaustively cross-examined her. The appellant did not therefore suffer any prejudice or injustice. On identification, it was submitted that the appellant was properly identified by the complainant whilst in the act. She knew him as they used to live in the same plot. Similarly, PW3 testified that when she was informed of the incident and proceeded to the home of the complainant, she found members of the public at the scene about to lynch the appellant. Furthermore, the appellant himself admitted that he was at one time a caretaker of the premises where the complainant lived. Accordingly, the identification of the appellant cannot be disputed. On the issue of penetration, it was submitted that the complainant narrated graphically how the appellant had penetrated her vagina. That PW2 also testified as to finding the beddings of the complainant soiled with blood. That though the hymen was not completely broken, that in itself was no proof that penetration did not occur. As per Section 2 of the *Sexual Offences Act*, penetration includes partial or complete insertion of the genital organ and in the instant case, there was partial penetration as per the medical evidence.

15. Lastly, as to the age, it was submitted that though the complainant and PW2 did not produce any documentary evidence regarding the age of the complainant, there was the medical report which estimated the age of the complainant to be 10 years, which was equally reflected in the medical report from MSF clinic and post rape care form. Lastly, the complainant herself testified that she was 10 years of age which assertion was not challenged by the appellant at all. Counsel further submitted that, it is settled law that age is not necessarily proved by documentary evidence alone, but can be equally proved by visual observation and oral evidence and that is what happened in the current case.

16. Having considered the record of appeal, submissions by both parties, we take cognizance of the fact that this is a second appeal and by dint of Section 361 of the *Criminal Procedure Code*, we are confined to considering matters of law only. See the case of *Karingo v Republic [1982] KLR 213*.

17. The issues of law that we have to determine are whether the prosecution proved to the required standard the ingredients of the offence, voire dire examination, re-evaluation of the evidence and consideration of the appellant's defence. As analyzed in this judgment before, the two courts below arrived at concurrent findings that the complainant was a minor, that prove of age was not necessarily by documentary evidence but could also be proof by virtual observation and oral evidence. In the circumstances of this case the evidence of the complainant, PW2, PW3 and PW4 was sufficient to proof the age of the complainant. Courts have accepted different mediums of evidence to proof age in cases of defilement. For instance, in the case of *Richard Wahome Chege v Republic* Criminal Appeal No. 61 of 2014 (UR) this Court held as follows: -

> "On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate, PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 (the Doctor) who examined the complainant, and the complainant herself."

18. In the instant case, the complainant stated her age when voire dire was being conducted and when she testified; so was the evidence of evidence of PW2. Again there was the evidence of the medical personnel who examined the complainant.

19. On penetration the two courts below once again concurred that there was partial penetration and that as per the law, whether partial or complete penetration all constituted penetration. This is in line with Section 2 of the *Sexual Offences Act* We have no reason to depart from those concurrent findings.

20. On to the third issue of whether the appellant defiled the complainant, both courts believed the evidence of the complainant which was unshaken during cross- examination. Further the appellant was well known to the complainant and PW2. The two courts below arrived at concurrent findings of fact that the complainant was defiled and that the appellant was the person who committed the offence. Further both courts relied on Section 124 of the *Evidence Act* and properly so in our view. This Court whilst differently constituted elaborated on the import of the proviso to Section 124 of the *Evidence Act* with relevance to defilement cases as follows:-

> " The import of the proviso to Section 124 of the *Evidence Act* is that the trial court can convict an accused facing the charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in George Kioji v Republic Cr. App. 270 of 2012(NYERI)
>
> 'Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to Section 124 of the *Evidence Act* Cap 80 Laws of Kenya, a court can convict an accused person is a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reason for such belief.'"

21. We agree with both courts below on their reliance on the above section as the evidence by the complainant was unshaken and indeed the complainant came out as a truthful witness. The two courts were thus justified in invoking the proviso contrary to the submissions of the appellant.

22. On voire dire examination of the complainant, we agree with counsel for the respondent that the same was properly conducted, and, the appellant subsequently intensely cross-examined the complainant. Accordingly, he did not suffer any prejudice. In any event failure to conduct a proper voire dire examination cannot vitiate criminal proceedings if the appellant did not suffer prejudice or injustice. See the case of *Maripett Loonkomok v Republic* [2016] eKLR. We discern no such misgivings in the circumstances of this case.

23. This Court in the case of *Adan Muraguri Mungara v Republic* [2010] eKLR stated the circumstances in which the court 2nd appellate court may interfere with the concurrent findings of fact by the trial court and the first appellate court as follows: -

> As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless, on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

25. Applying the above yardstick to the circumstances of this case we find no justification at all to interfere with the concurrent findings of fact that were made by the two lower courts.

26. On the issue of the appellant's defence, we have carefully looked at the record and there is clear evidence that the same was considered by the trial court in her judgment. The trial court meticulously summarized and considered the appellants defence before dismissing it. We also agree with 1st appellate court's observation that indeed the appellant's defence was duly considered and rightly dismissed. The appellant advanced the defence of alibi which was completely dethroned by the overwhelming evidence of the complainant whose evidence was believed by the two courts below. The same goes for the alleged grudge between PW2 and the appellant.

27. In the end we find no merit in this appeal. It is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 22 ND DAY OF JULY, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR