KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mwangi v Republic (Criminal Appeal 11 of 2016) [2021] KECA 345 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 345 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 11 OF 2016

DK MUSINGA, RN NAMBUYE & S OLE KANTAI, JJA

DECEMBER 17, 2021

BETWEEN

SHADRACK MAINA MWANGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya (M. Kasango, J.) dated 7th April, 2016 in Nanyuki HC Criminal Appeal No. 39 of 2015))

JUDGMENT

1. This is a second appeal arising from the judgment of M. Kasango, J. in the High Court of Kenya at Nanyuki in Criminal Appeal No. 3 of 2015 dated 14th April, 2016.

2. The background to the appeal, albeit in a summary form, is that the appellant was arraigned before the Chief Magistrates' Court at Nanyuki in Criminal Case No. 123 of 2012 on a charge of defilement contrary to section 8(1) as read with subsection (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 23rd December, 2011 at [Particulars Withheld] village in Nyeri County within the Republic of Kenya, he intentionally and unlawfully caused his penis to penetrate the vagina of JWW a child aged 10 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the same date and place, he unlawfully did an indecent act with JWW a child aged 10 years by touching her private organ namely, vagina.

3. The appellant denied both the main and alternative charges prompting a trial in which the prosecution tendered evidence through seven (7) witnesses to prove the charge, while the appellant was the sole witness in his defence.

4. At the conclusion of the trial, the trial magistrate (V.K. Kiptoom, SRM) analyzed the record, identified issues for determination and proceeded to make findings thereon. On the evidence tendered, the

trial magistrate found the evidence of PW1, the minor complainant, consistent and credible; that the witness was categorical that she had run away from home for fear of being disciplined by her mother, met the appellant, who she knew before, who lured her into his house, on that very day of 23rd December 2011, defiled her twice, chased her out of his house early the next morning and threatened to kill her if she ever divulged information to any one regarding what had befallen her the previous night.

5. The trial magistrate found PW1's evidence that she spent the night of 23rd December, 2011 away from her parents' home corroborated by her mother, MW, PW2 who testified that PW1 did not spent the night of 23rd December, 2011 at home. It was also the trial magistrate's finding that the appellant did not rebut PW1's evidence in cross-examination. There was no mistaken identity as PW1 knew the appellant very well as he had worked for her mother.

6. On medical evidence, the trial magistrate made findings that: the clinical officer who examined PW1, ten (10) days after the commission of the alleged offence found the minor had been defiled as there was evidence of penetration; PW1 was taken to hospital ten (10) days after the commission of the offence because she did not disclose the fact of the perpetration of the offence perpetrated against her on account of the threats of death the appellant had unleashed against her with a view to silencing her.

7. There is also observation that disclosure arose from appellant's move of inviting PW1 into his home for the same purpose thwarted by the action of an alleged Mama Ben who found PW1 in Nyahururu Town and took her home and upon being interrogated on what she was up to in Nyahururu Town where she was found by Mama Ben is when she disclosed the appellant's move towards her and what had in fact transpired between them in the appellant's house on the night of 23rd December, 2011 when she spent the night away from home.

8. On the age of PW1 as at the time the offence was perpetrated against her, the trial magistrate relied on the entries made in the P3 form filled by PW5 the clinical officer in the presence of PW2 the mother of PW1 and which gave the age of PW1 as 10 years as at the time the offence was perpetrated against her. Lastly, the trial magistrate found the evidence of PW6 and PW7 corroborative of the evidence of PW1, PW2, PW3, PW4 and PW5 hence the finding that the prosecution evidence was consistent and cogent and therefore reliable.

9. It was on the basis of the above conclusion that the trial magistrate ruled that the prosecution had proved its case against the appellant to the required threshold of proof beyond reasonable doubt, found the appellant guilty of the offence charged in the main count, convicted and sentenced him to life imprisonment.

10. The appellant was aggrieved and filed Criminal Appeal No. 51 of 2014 in Nyeri High Court raising various grounds. The appeal was subsequently transferred to the High Court of Kenya at Nanyuki and allocated Criminal Appeal No. 39 of 2015. The appeal was heard by M. Kasango, J. who delivered the impugned judgment dated 14th April, 2016. The approach the learned Judge took to determine the appeal was first of all to remind herself of the role of a first appellate court as enunciated by the predecessor of this Court in *Okeno vs. Republic* [1977] E. A 32 and restated by this Court in the case of *Mark Oiriri Mose vs. Republic* [2013] eKLR, namely, the duty to revisit the evidence tendered before the trial court, evaluate and or analyze it afresh and come to its own independent conclusion thereon, bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and therefore give due allowance for that.

11. Having reminded herself of her role as a first appellate court Judge, the record is explicit that the Judge reevaluated the record in light of the complaints then raised by the appellant and the rival submissions of the respective parties before her. It was the Judge's position that upon due consideration of the above, she came to the conclusion that the appellant's major complaint against his conviction was

that it was unsustainable for lack of corroboration for PW1's evidence, considering that the complaint touched on an alleged perpetration of a sexual offence against PW1. The appellant had anchored the above complaint on the decisions of the predecessor of this Court with regard to proof of sexual offence which required corroboration before the amendment to section 124 of *Evidence Act* which introduced a proviso to the effect that a victim's evidence is sufficient where the court seized of the matter is satisfied that the victim is truthful and gives reasons for reaching that conclusion.

12. The Judge found that there was sufficient basis for the trial court reaching the conclusion, that PW1 was truthful and that it was therefore safe to act on her evidence as basis for convicting the appellant. The Judge further found corroboration for PW1's evidence in the testimony of the mother who said PW1 spent the night of 23rd December, 2011 away from home and medical evidence that there was defilement and on that account dismissed the appellant's appeal on its evidence.

13. Supporting the appeal, the appellant contends that existence of unresolved inconsistencies, glaring gaps and extenuating gaps in the prosecution case rendered the evidence tendered by the prosecution unreliable, insufficient and therefore vitiates the credibility of witnesses. Those highlighted by the appellant, albeit in a summary form, are PW1's failure to mention that the mother met her at their toilet at 6.30am soon after leaving the appellant's house at dawn; discrepancies as to how the offence was reported to the area Chief PW4; who between PW2, mother of PW1 and the area Chief PW4 reported the incident to the police; and, how i.e personally or through the phone, and that of the police as to whether the reportee who reported the offence to the police named the perpetrator of the offence. Lastly, discrepancy in the dates when the offence was committed as reported to the police.

14. The appellant has relied on the case of *Ndung'u Kimani vs. Republic* [1979] KLR and *Maina vs. Republic* [1970] E. A 370 in support of his submissions that although he appreciates that by virtue of the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya a conviction on a sexual offence may be based on the sole evidence of the victim, in the instant appeal, the prosecution evidence having been vitiated on account of lack of credibility founded on unresolved inconsistencies highlighted above, it was imperative for the court to call for corroboration for PW1's evidence and since none was availed, the appellant's conviction is sustainable.

15. The appellant also relies on the case of *Njuguna Wangurima vs. Republic* [1953] 20 E.A.C.A 1961 and submits that medical evidenceas tendered by the prosecution, which merely talked of healed bruises, and broken hymen was insufficient basis for finding that a sexual offence had been committed.

16. On want of proper proof of the victim's age, the appellant relies on the case of *Kaingu Elias Kasomo vs. Republic* Criminal Appeal No. 504 of 2010, *Gilbert Miriti Kanampiu vs. Republic* [2013] eKLR, *Alfayo Gombe Okello vs. Republic* [2010]eKLR and Mark Oiruri Mose vs. Republic [2013] eKLR, all on the threshold for proof of age in sexualoffences and submits that the oral testimony of PW2 and the contents of the P3 were insufficient basis for finding conclusively that the victim was of the age attributed to her. This lack of proof of age on the part of the prosecution rendered the particulars of the charge defective and could not therefore form basis for determining the appropriate sentence to be meted out against him in the circumstances.

17. In rebuttal of the appellant's appeal, the approach the State took in opposing the appellant's appeal was first of all identifying issues for determination as discerned from the appellant's own grounds of appeal and written submissions as more particularly set out in their written submissions; and secondly, to remind this Court of its mandate as a second appellate court namely, as set out in section 361 of the *Criminal Procedure Code* and aptly enunciated in numerous of its decisions among them John Kariuki Gikonyo vs. Republic [2019] eKLR.

18. On the role of a first appellate court, it is the State's submission that the record is explicit that the first appellate court properly appreciated the offence the appellant faced at the trial and was convicted of namely, defilement contrary to section 8(1) as read with subsection (2) of the *Sexual Offences Act*; that the first appellate court was obligated in law to determine whether the ingredients for proof of the offence of defilement as were stated by the court in the case of *Charles Wamukoya Karani vs. Republic* Criminal Appeal No. 72 of 2013 and approved in the case of *Kyalo Kioko vs. Republic* [2016] eKLR, namely, proof of age of the complainant, proof of penetration and positive identification of the perpetrator of the offence were established by the trial court as basis for finding a conviction against the appellant.

19. On proof of age, the State relies on the case of *Mwalango Chichoro Mwanjembe vs. Republic* [2016] eKLR on the threshold on the mode ofproof of age in sexual offences and submits that the Judge properly appreciated this legal threshold when she appraised the evidence on record and was satisfied with the victim's response to a question put to her during voire dire examination that she was 10 years old. The Judge also relied on the contents of the P3 form, which gave the estimate age of the victim as 10 years. The Judge went further and made observation that the said evidence had not been subjected to cross-examination by the appellant and was therefore properly acted upon by the trial court as sufficient proof of the age of the victim and accordingly affirmed that position.

20. On proof of penetration, the State relies on the definition of penetration as set out in section 2 of the *Sexual Offences Act* and the case of *Mark Oiruri Mose* [supra] and submits that the evidence on this ingredient was properly appreciated by the Judge who was satisfied as the trial court was that the victim's evidence that the appellant indeed penetrated and defiled her was cogent. Second, that the same had also been corroborated by medical evidence.

21. On the identity of the perpetrator, the State submits that the Judge cannot be faulted for pinning responsibility on the appellant for the perpetration of the offence against the complainant, as PW1 was not challenged on her evidence as supported by her mother, PW2, that the appellant was known to both of them having worked for PW2 as a shopkeeper. PW1 was also explicit that the offence took place when the lights were on. PW1 testified that she saw the appellant very well all of which according to the Judge sufficiently pinned responsibility on the appellant for the commission of the offence.

22. On whether the appellant's defence was considered, the State submits that the record is explicit that the Judge took into consideration the totality of the evidence as tendered by the prosecution and the appellant and their respective submissions on appeal and found no basis for disturbing the trial court's finding that the appellant's defence was a mere denial.

23. On the issue of an alleged defective charge, the State urged the court to adopt the position taken by this Court in the case of John Kariuki Gikonyo vs. Republic [2019] eKLR and decline to address this issue as it was never raised and addressed by the two courts below.

24. On alleged lack of conduct of voire dire on the minor victim before giving her testimony, the State relies on the threshold set by the court itself in the case of *Johnson Muiruri vs. Republic* [1983] KLR 447 and submitted that the correct procedure as laid down in the above case was employed by the trial court, a position properly appreciated and affirmed by the first appellate Judge. On the totality of the above submission, the State prayed for the dismissal of the appeal in its entirety.

25. This is a second appeal. This Court's mandate under section 361 (1) of the Criminal Procedure Code is limited to considering matters of law only. In *Dzombo vs. Republic* [2014] eKLR, the Court stated, inter alia, as follows:-

> " As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court. See Okeno vs. Republic [1972] E.A.32.
>
> By dint of the provisions of section 361 1(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below consider or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.
>
> "Accordingly, we must not "interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

See also *Njoroge Macharia vs. Republic* [2011] eKLR and *Chemagong vs. Republic* [1984] KLR 213.

26. We have considered the record in light of the rival submissions highlighted above. The issues that fall for consideration are the same as those raised by the appellant in his grounds of appeal and as rephrased above by us.

27. Starting with the first complaint, namely, that the charge sheet was defective, the approach we take in resolving this complaint is that taken by the court in the case of *John Kariuki Gikonyo vs. Republic* [supra] and decline to express ourselves on this complaint for the very reason that the court gave when it declined to address the issue it had been invited to express itself there in the said case, namely, that it was being raised for the first time before us. We wish to reiterate that the above is the correct position in law in terms of our mandate as prescribed both statutorily and constitutionally.

28. Section 3 of the *Appellate Jurisdiction Act* is the statutory provision that donates our mandate. It provides, inter alia, as follows:

> " 3. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law."
>
> ....

29. Our take on the construction of the above provision is that our mandate is limited to us pronouncing ourselves on what the court below has expressed itself thereon in the case of a first appeal, and the two courts below in the case of a second appeal. Turning to the Constitutional provision, Article 164(3) provides, inter alia, as follows:

> " (3) The Court of Appeal has jurisdiction to hear appeals from-
>
> a. the High Court; and
>
> b. any other court or tribunal as prescribed by an Act of Parliament."

Likewise, our constitutional mandate is also limited to expressing ourselves on what the High Court or any other Court or Tribunal as the case may be, has already expressed themselves thereon as the matter(s) forming basis to this Court.

30. Based on the above succinct provisions of both the statute and the Constitution, we decline the appellant's invitation for us to address a matter that the two courts below were never invited by the appellant to express themselves thereon.

31. On voire dire, the approach we take is that crystallized by this Court in the case of *Johnson Muiruri vs. Republic* [supra]. We find nothing in the said case to suggest that the procedure for voire dire is cast in stone. What the holding lays emphasis on is that there must be evidence or semblance of evidence on the record of questions put to the minor and the minor's responses thereto, on the basis of which, the court could form an opinion, firstly, with regard to the minor's intelligence and or competence to understand the nature of the proceedings and, second, the obligation to speak the truth. The record herein is explicit that PW1 appeared before the trial court on 15th March, 2012. The prosecution put her through a question and answer session on the basis of which the court ruled as follows:

> " Court - I note from the above that the child possesses sufficient intelligence to know about an oath as such same shall be administered."

As already mentioned above, no rigid format was suggested by the court in the *Johnson Muiruri case* [supra]. We find no basis to fault the format adopted by the trial court to arrive at the conclusion reached, the minor's intelligence to understand the proceedings and obligation to speak the truth. The appellant's complaint on this issue is therefore rejected.

32. On proof of the age of PW1, the position we take is what now forms a well-trodden path. We find it prudent to highlight a few. Starting with *Kyalo Kioko vs. Republic* [supra], we wish to reiterate the position thatthe age of the victim of a sexual offence is one of the necessary ingredients that the prosecution must of necessity prove before any conviction can be sustained.

33. On the mode of proof of the age of such a victim, we take it from the decision in the case of *Mwalango Chichoro Mwanjembe vs. Republic* [supra] that, this may be established through documentary evidence such as a birth certificate, baptismal card or by oral evidence of the child if the child is sufficiently intelligent to give such evidence. Alternatively, oral testimony of the parents or guardian. Medical evidence may also be resorted to as a means of proving the age of the victim. See also the case of *Hudson Ali Mwachango vs. Republic* [2016] eKLR for this Court's reiteration that proof of age in a sexual offence of defilement is an essential ingredient for proof of the offence as the sentence to be handed down against the perpetrator is dependent on the age of the victim.

34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993,that:

> " In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.
>
> In Kimei vs. Republic [2002] I KAR 757, it was stated that "it is not every conflict or contradiction in evidence, even of a minor nature that vitiates a trial. To lead to such eventuality, the contradiction involved must be of such a nature as to create doubt in the mind of the court regarding the guilt of the accused."

In Njuki & 4 Others vs. Republic [2012] I KLR 771, it was stated that "where discrepancies, in the evidence do not affect on otherwise proven case against the accused, a court is entitled to overlook those discrepancies."

35. The alleged discrepancies and gaps complained of by the appellant and as already highlighted above related to events occurring after the act and not the perpetration of the offence against PW1 whose sole witness was PW1. The trial magistrate, who had the advantage of witnessing the minor give evidence, did find her truthful. Her testimony was unchallenged by the appellant on material particulars pertaining to the perpetration of the offence against her by the appellant and on that account found PW1's evidence cogent and safe to base a conviction thereon, a position affirmed by the first appellate court. We find no reason for us to depart from that position especially after ruling that the inconsistencies complained of by the appellant related to events after the fact and were therefore inconsequential to the cogent proof of the charge against the appellant.

36. On alleged want of proof of the charge against the appellant to the required threshold of proof beyond reasonable doubt, it is not in dispute that the appellant's conviction rested majorly on PW1's testimony found truthful and therefore cogent by the two courts below. She was never challenged on the salient aspect of her testimony that she spent the night in the appellant's house on the night of 23rd December, 2011 during which night, the appellant whom she knew very well defiled her twice. The appellant's own defence was a one-liner, which the two courts below found, did not oust the prosecution's case. We find no basis to interfere with those concurrent findings.

37. There is nothing on which this Court can rely on as basis for vitiating the prosecution case, the two courts below found cogent. The offence the applicant was charged with was defilement of PW1. PW1 narrated the ordeal. The Medical evidence confirmed defilement. The recognition of the assailant by PW1 placed the appellant at the scene of the commission of the offence.

38. The upshot of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH OF DECEMBER, 2021.

D. K. MUSINGA, (P)

....

JUDGE OF APPEAL

R. N. NAMBUYE

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR