Kathu v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 2183 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 2183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E005 OF 2023

RK LIMO, J

JANUARY 25, 2024

BETWEEN

MUSYOKA KATHU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Sexual Offence Case No. 84 of 2014 in Kitui by Hon. R. Ombata (SRM) delivered on the 30th day of May, 2019)

JUDGMENT

1. Musyoka Kathu, the appellant herein was charged vide Kitui Chief Magistrate's Court Sexual Offence Case No. 84 of 2014 with the offence of defilement contrary to Section 8(1) as read with Subsection (2) of the Sexual Offence Act No. 3 of 2006.

2. The particulars are that on the 12th September, 2014 at around 4PM at Katutu Location, Kasakini Sub-County did an act of penetration to MM a child aged 6 years by inserting his penis into her genital organ namely vagina.

3. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006 but was convicted of the main charge and the conviction is the subject of this appeal.

4. The Prosecution's case against the appellant was based on the evidence tendered by five witnesses.

5. The Complainant (PW1) a child aged 6 years old giving unsworn evidence owing to her tender age, testified that she was in her home alone on 12/9/2014 at around 4PM when the appellant went in and asked her to drive their donkey and as the girl did so the appellant followed her into the shamba and got hold of her and took her to a bridge where he defiled her there.

6. The minor further testified that she went home after the ordeal but did not tell her mother what had happened to her. She stated that she did tell her mother the following day upon which she was taken to Kauwi Hospital for treatment.

7. PW2 EMM the complainant's mother told the court that she noticed that PW1 was walking with her legs apart on 13/9/2014 and when she inquired about the same, PW1 told her that she had been defiled by the appellant. She stated that she examined PW1's private parts and noticed that they were reddish. That she made a further inquiry about the scene of the offence and PW1 took her to a terrace. She stated that she later took PW1 to Kauwi hospital from where they were referred to Kitui General Hospital where PW1 was treated. She stated that PW1 was six years old at the time.

   She stated that the minor reported to her that the person who defiled her was the appellant, whom she knew as he was employed at her friend's (Lucy) home. She clarified that L was a daughter to KN child. She denied owing the appellant anything as she had not employed him.

8. Malombe Kalundu (PW3) the Area Assistant Chief testified that the Complainant's mother took a letter from Kabati Police Station on 14/09/2014 asking for his assistance to apprehend the appellant on allegations of defilement. He testified that he knew the appellant well as an employee of one KN. He stated that with the assistance of Police Officers he arrested the appellant.

9. Kennedy Musyoka Kioko (PW4) a Clinical Officer testified that he examined the victim on 15.09.2015 and assessed her age to be 6 years. He tendered age assessment as P Ex 1. He testified that the minor was taken to hospital on 13/09/2015 with a history of having been defiled and that on examination he found the hymen broken and the vagina was very red which he opined was a sign of friction.

   He was of the opinion that there was penetration and tendered the P3 Form as P Ex 3 (a) and PRC Form as P Ex 3 (b). He testified that there was a clear evidence of defilement on the minor.

10. PC Francis Muema (PW5) a Police Officer based at Kabati Police Station stated that he arrested the appellant from his home.

11. When placed on his defence, the appellant opted to remain silent.

12. The trial court evaluated the evidence tendered and found that all the necessary ingredients of the offence had been proved against the appellant to the required standard. It convicted the appellant and sentenced him to serve life imprisonment.

13. The appellant felt aggrieved by the conviction and sentence and filed this appeal raising the following grounds namely: -

    i. That the learned trial magistrate erred in law and fact by rendering a conviction when the victim did not testify.

    ii. That the trial court erred by not considering inconsistencies in the Prosecution's case.

    iii. That the trial court erred by finding that the Prosecution's Case had been proved when the evidence tendered did not support such a finding.

    iv. That his defence was not considered.

    v. That the trial magistrate failed to consider the existing grudge between the appellant and the complainant's mother.

    vi. That he was framed by the Complainant's family in order to settle scores.

14. The appellant in his written submissions added new additional grounds to his appeal but without leave as stipulated under Section 350(iv). The new grounds are therefore, incompetent and improper for want of leave from this court.

15. The appellant in his written submissions faults the trial court for convicting him on the strength of the testimony of the Complainant (PW1). He contends that the evidence by the Complainant was not subjected to cross-examination and has urged this court to find that the trial as such was a mistrial.

16. He further submits that the Complainant was mentally retarded that is why the trial court directed that she testifies through an intermediary. That however, is incorrect. The record of appeals shows that the trial ordered for an intermediary because it noted that the child was shy and refused to speak. The child was of tender years and given the trauma inflicted on her it was understandable that she faced difficulties in narrating the ordeal.

17. The appellant further submits that the prosecution failed to prove its case beyond reasonable doubt because penetration was not proved.

18. The State through the Office of the Director of Public Prosecution has conceded to this appeal on grounds firstly that the trial was conducted in a language that the appellant did not understand and secondly that the appellant was not accorded an opportunity to cross-examine the Complainant, The State however prays for a retrial.

19. This Court has considered this appeal and the response/concession by the State. The mandate of this court as the first appellate court is to re-evaluate/re-assess the evidence tendered with a view to making own conclusions.

20. The appellant has raised 2 pertinent issues in this appeal which are: -

    i. That the language used in court was Kiswahili which he was not familiar with and

    ii. That he was not accorded a chance to cross-examine the Complainant.

21. I have gone through the record of proceedings and although the record shows that the trial commenced on 17/10/2016, the handwritten proceedings indicate that the appellant took plea on 16/9/2014 and the charge was read over to him in Kiswahili language. Some portions of the record particularly when the matter came up for mentions indicate that there were indeed translations of the proceedings in Kikamba. Such instances were on 26/9/2016, 10/10/2016 and 24/10/2016. However, the Appellant indicated to the trial court on 30/11/2015 that he did not understand Kiswahili and consequently, PW2 was stood down. When PW2 was recalled on 9/9/2016, the record indicates that she was sworn in Kikamba and Kiswahili. One cannot tell the language she testified in but on that day, the appellant cross-examined her by asking her one question. The record shows that PW3 testified on 30/5/2016 and his evidence was taken in Kiswahili even though the appellant had indicated to the trial court that he only understood Kikamba.

22. *The Constitution* provides that an accused has a constitutional right to have the trial conducted in a language which they understand at Article 50(2)(m), (3) which provides:

    (2) Every accused person has the right to a fair trial, which includes the right—

    (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

    (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

23. The Criminal Procedure Code also deals with language at criminal trials at section 198, which states as follows:

Interpretation of evidence to accused or his advocate

1. Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

3. When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili

24. It is a Constitutional imperative that for a trial to meet the threshold of fairness, then the trial inter alia must be conducted in a language that the accused understands. A trial court is obligated to record the language in which the accused is familiar with and if a witness is testifying in a language the accused does not understand, an interpreter has to be sought. This ensures that the accused fully understands the nature of the evidence tendered and is able to challenge the same and defend himself rather than being dragged through proceedings he does not understand.

25. The record does not indicate that the trial was conducted in the language the accused person preferred or understood. There is also an indication that PW4 and PW5 testified in English and Kiswahili respectively after the appellant had indicated to the court that he understood Kikamba. He therefore did not receive a fair hearing. The principles set out under Article 50 (2) (m) and (3) were not adhered to.

26. The appellant contends that his right to a fair trial were violated because he did not have an opportunity to cross examine the complainant. The record seems to support him because PW1 initially testified on 10/8/2015 and a further hearing was scheduled for 30/11/2015 but she did not testify then. She was recalled on 9/9/2016 but was stood down after the court recorded that she was shy and she had refused to speak, consequently, the court directed appointment of an intermediary and a mention for confirmation of the appointment was scheduled for 26/9/2016. Come 26/9/2016, the court was informed that the children's officer Jacinta had been informed (it's not indicated of what) but was available. The hearing was then scheduled for 9/11/2016. What followed was a series of mentions and eventually, PW1 was not recalled. It is not clear why the trial court had allowed the appellant to cross examine the child but failed to ensure that he got the opportunity.

27. Article 50 (2) (k) of *the Constitution* provides as follows;

2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence.

28. The right of an accused person to cross examine witnesses is further provided for under section 150 of the Criminal Procedure Code which provides;

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

29. In addition, section 302 of the Criminal Procedure Code provides;

> 302. Cross-examination of witnesses for prosecution
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> The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to be re-examination by the advocate for the prosecution

30. The right to cross-examine witnesses extends to all witnesses including minors.

The Court of Appeal in the case of Gailord Yambwesa Landi v Republic [2019] eKLR rendered itself on cross examination of minors as follows;

> In the case of Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006, this Court cited with approval the decision of the Supreme Court of Uganda in Sula vs Uganda [2001] 2 EA 556 thus;
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> "The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".
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> And recently, in the case of Paul Kinyanjui Kimauku v Republic [2016] eKLR, this Court whilst addressing a similar issue further observed thus;
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> "...the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of *the Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."
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> .....DK testified as PW2 and gave unsworn evidence. The record further shows that after DK testified, the appellant did not cross-examine her, but instead, the court went on to hear the evidence of PW 3, without either DK or her mother who was the court appointed intermediary being subjected to cross examination by the appellant.
>
> Clearly there was a misstep or omission on the part of the trial court. It was the appellant's right to test the child's evidence through cross examination. In this case the court had appointed an intermediary to assist the child. Having made such appointment, there was all the more reason for the trial magistrate to ensure that DK's evidence was subjected to cross examination. The election on whether to cross-examine or not is the prerogative of the accused and not of the witnesses or of the court. And the record does not show the appellant was afforded the opportunity and elected not to cross examine the child. In view of this

apparent lapse in the trial process, we are satisfied that the appellant was not afforded a fair hearing, which was contrary to the stipulations of *the Constitution* and the law."

31. This Court finds that the trial court erred by failing to adhere to its earlier directions that the minor be re-called for cross-examination with the assistance of an intermediary owing to her age and state of mind when she testified. The omission to recall the minor may well have been due to some inadvertence but at the end of the day, the appellant's right was violated.

32. This court has also noted from the record that the exhibits are missing from the court file from the Lower Court and it is quite difficult to know if the same is linked to some mischief. However, there is no denying the fact that the Complainant from the evidence adduced appears to have undergone traumatic experience. It is therefore, fair that for the ends of justice to be met for both the victim and the appellant, the plea by the Office of the Director of Public Prosecution for re-trial may be the only option available in the circumstances.

    I will therefore, allow this appeal for the afore-stated reasons by setting aside both the conviction and sentence. The case is referred back for a retrial before a different court with requisite jurisdiction. The appellant will be produced in the Lower Court for a re-trial on 30th January 2024 or any other possible date depending on the logistics to be produced from where he is serving sentence.

DATED, SIGNED AND DELIVERED AT KITUI THIS 25TH DAY OF JANUARY, 2024.

HON. JUSTICE R. LIMO-JUDGE