Fondo v Republic (Criminal Appeal E004 of 2023) [2024] KEHC 1849 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E004 OF 2023

A. ONG'INJO, J

FEBRUARY 22, 2024

BETWEEN

ATHMAN DENA FONDO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment delivered by Hon. N. W. Kariuki, Principal Magistrate on 17th November 2022 in Shanzu SGBV Court S. O. No. 30 of 2018, Republic v Athan Dena)

JUDGMENT

Background

1. Athman Dena Fondo was charged with the offence of defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars are that Athman Dena Fondo on diverse dates between 22nd April 2017 and 20th March 2018, at Bamburi Location within Kisauni Sub-County in Mombasa County, intentionally caused his penis to penetrate the vagina of T. K. a child aged 16 years.
3. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The trial magistrate considered the evidence of the 5 prosecution witnesses and evidence of the appellant and his 2 witnesses, and convicted the appellant who was sentenced to serve 16 - years imprisonment.
5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -

1. That the learned trial magistrate court erred in points of law and fact by imposing 16 years without observing that the prosecution failed to prove all the ingredients of the offence of defilement as stated in the case of *Remmy Wanyonyi Wanjoki v Republic* (2020) eKLR.

2. That the learned trial magistrate erred in points of law and fact by failing to observe that the prosecution side failed to proof its case beyond reasonable doubt.

3. That the learned trial court magistrate erred in law and fact by relying on the evidence of the prosecution which was unreliable, contradicting and full of glaring inconsistencies.

4. That the learned trial magistrate finally erred in in the point of law by failing to exercise discretion in the present case.

5. That the learned trial court erred in both law and fact by recording a conviction in the matter in contravention of Section 200 of the *Criminal Procedure Code*.

6. The appellant prayed that the appeal be allowed, conviction quashed and sentence meted on him set aside.

7. This appeal was canvassed by way of written submissions. The appellant filed his submissions on 28th November 2023.

Analysis and Determination

8. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

9. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

   i. Whether the trial magistrate complied with Section 200 of the *Criminal Procedure Code*

   ii. Whether the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt

   iii. Whether the evidence of the prosecution was unreliable, contradicting and full of glaring inconsistencies

   iv. Whether the trial magistrate exercised discretion in this case

Whether the trial magistrate complied with Section 200 of the Criminal Procedure Code

10. Section 200 (3) of the *Criminal Procedure Code* provides: -

> Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

11. A perusal of the proceedings of the trial court indicates that evidence of PW1, PW2 and PW3 was taken by Hon. Florence Macharia, Chief Magistrate, but on 28.6.2022, the matter was reallocated to Hon. Nelly Kariuki of the specialized gender based court. Upon taking over the conduct of the proceedings, a date for further hearing was fixed for 2.8.2022 and on the material date, evidence of the doctor, PW4, was taken. Subsequently, on 25.8.2022, evidence of the investigating officer was taken before the appellant was placed on his defence.

12. There is no indication in the record of the trial court that the trial magistrate complied with the mandatory requirement under Section 200(3) of the *Criminal Procedure Code* of informing the appellant of the right to apply for resummoning or recalling of witnesses.

13. The effect of such failure on the part of the trial magistrate renders the proceedings a nullity and/or mistrial and calls for an order for retrial.

14. In *John Bell Kinengeni v Republic* (2015) eKLR, the Court of Appeal held: -

> " ...the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate."

15. In the case of *Abdi Adan Mohamed v Republic* (2017) eKLR, the Court of Appeal held: -

> " For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable."

16. In consideration of the mandatory provisions of Section 200(3) of the *Criminal Procedure Code* and in consideration of the holding in the above 2 authorities, this court finds that the appellant was not accorded fair trial by being informed of the right to resummons witnesses to be reheard and therefore there was a mistrial which would ideally warrant the matter to be referred back for retrial. However, considering that the appellant was arraigned in court in 2018 and was in remand custody for 3 years 5 months and 16 days before he was convicted on 17.11.2022 and sentenced on 20.12.2022, making an order for a retrial would not be a feasible option and it would be prejudicial to the appellant who has been in custody for a further 1 year and 2 months after sentencing.

17. Considering there was a mistrial at the trial court, it would not be necessary to analyse the other grounds of appeal as it will be an academic exercise.

18. This appeal for all the reasons given must succeed. It is accordingly allowed, the conviction quashed and sentence set aside. The appellant shall forthwith be set at liberty unless for any lawful reason held.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 22ND DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE