Waithaka v Republic (Criminal Appeal E037 of 2022)
[2024] KEHC 3523 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E037 OF 2022

DKN MAGARE, J

MARCH 18, 2024

BETWEEN

JOSEPH KIHARA WAITHAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence in Nyeri CMCR 38 of 2019 given on 26/8/2022. The Appellant was convicted of defilement contrary to section 8(10 as read with 8(2) of the *Sexual Offences Act*. This was on diverse dates from 1/1/2018 to 13/7/2018. The court, however, elongated the period to 31/7/2018.

2. The Appellant filed an appeal and set forth the following grounds of Appeal: -

    a. That the trial court erred both in law and fact by convicting the appellant and failed to notice that a minor childlike the one in question is too young and grown up as the ones charged here-in cannot defile her in two occasions (vaginal and anal pentation) and no sign being noticed on her that she has been defiled until an elapse of one weeks thus occasioned a miscarriage of justice.

    b. That, the trial court erred both in law and fact when convicting the appellant in not noticing that this was a fabricated case of which there was insufficient scrutiny herein hence seeking your intervention.

    c. That the imposed 50 years' imprisonment is excessive when considered with my age.

3. The Appellant is 59 years old. He will be released when he is 109 years. The courts must be Realistic in sentencing. Sentencing must have regard to all factors. The appellant was arraigned in court on 16/10/2019.

Duty of the court

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

6. This was set out succinctly in the case of Okeno Vs. Republic [1972] E.A 32 as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Evidence

7. PW1, The Chief, Jelioth Njeri testified, that he was called that the child had been defiled by 2 people. The two people were an old man and another with one hand. This was reported on 13/7/2018.

8. They were sent to Nyeri Provincial General Hospital and found Dr. Macharia. Lab tests were done and 2 more on Monday. They found the person with one hand and the old man. They went to KMTC where they were told that the person works at KMTC.

9. She stated that she was told that the child was defiled in a mattress in the house of the accused. This contradicted the evidence that this happened in a hotel. PW2 gave unsworn evidence. She stated that she went to the aunties place. The Auntie is Eunice.

10. PW3 – Esther Nyokabi stated that she went to hospital and passed by the sister's place to leave keys with her sister. She was told the child had been raped. The witness did not know the Appellant.

11. PW4 – Dr. William Muriuki testified. He examined the minor on 1/4/2019. The minor had been defiled by 2 men in 2018. The PRC was filled in 2018. She did not have any injury on the body. This was several days. The anus was widened the sphincter muscle was weak. The minor had false incontinence and w could not control the bowel movement. The minor had pus. The witness took High virginal swab. A PRC form was by Dr. Agnes Macharia. The vagina was freshly inflamed.

12. The defilement is said to have occurred between 9/10/22018. PW5 testified that a report was made and on 14/7/2018, at 1 pm she refused a report for defilement of the minor. This was said to have been

done at different dates. The evidence related to both vaginal and Anal penetration. The minor was said to be between 12 and 14 years. Oncross examination the investigating officer indicated that the offence occurred on several occasions. The report that the Appellant was working at KMTC Nyeri was not tied to any person. It was not by an informer.

13. The appellant testified that Uncle died on 2/7/18 and the mother died on 8/7/2018. Burial for the uncle was on 10/7/2018 and mother on 17/7/18. Burial was on 17/7/2018.

14. The appellant went back to Nyeri after burial. He produced photos of the funeral and the burial programme. He called one witness, DW2 who testified that she has a hotel in Nyeri and the Appellant is a customer. She attended the burial on 17/7/2018.

15. Parties filed submissions. The court found the Appellant guilty of the principal charge and he was sentenced to 50 years' imprisonment.

Submissions

16. The Appellant submitted that the trial court erred in convicting him without prove of the elements of the offence.

17. He relied on the case of John Mutia Munyoki v Republic (2017)e KLR to submit that penetration, identity and age were all not proved and the conviction was thus unsafe.

18. He also relied Alfayo Ogombo Okello v Republic (2009)e KLR to submit that age ought to have been proved beyond reasonable doubt.

19. The respondent supported both the conviction and sentence.

Analysis

20. The appeal relates to a charge under section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. No. 3 of 2006. Section 8(1)-(4) same provides as doth:-

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> (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.
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> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

21. The court found that the Anus was dilated. The anal splinter was weak, the outer Genitalia appeared inflamed. There was no discharge. The P3 indicated that the Appellant was assaulted by 2 men who gave her sweets. She had been walking with difficulties. The offence is stated to have been on 9/10/July

2018. The p3 is seen as filed on 16/7/2018. The witness examined the minor several months after the p3 form was filled. The p3 filled on 1/4/2019 is not in court.

22. In the Appeal the state filed a notice to enhance sentence. It was not serious as there is nothing to extend after 50 years.

23. The medical evidence is worrying. It shows defilement. It is however, inconsistent. The examination of 1/4/2019 was testified upon but a report of 16/7/2018 produced. The PRC and P3 were the only once produced. I cannot trace the PRC in the file. What is in the file is PMFI showing the minor was 12 years. The P3 was filled by Dr Maina B. There was no report by either Dr Macharia or Dr William Muriuki. It is as if the prosecution wanted the case to fail from the start. I do not know what to take of the strange P3. It has no probative value to the case. No one identified it. There is no evidence that it was ever produced.

24. The other concern is that the vaginal inflammation should relate to a recent defilement. The doctor examined over 8 moths after occurrence of the incident. He neither produced his P3 nor that of Dr Agnes Macharia.

25. Further, the Appellant set up an alibi. His uncle died on 2/7/2018 and his mother died on learning the death. The Appellant was attending those funerals.

26. The progrmamme produced same shows that there is one Jacob Kabugi Mukuya who died on 2/7/2018 and was buried on 10/7/2018.

27. There was also a burial programme for Serah Warukira Waithaka. She died on 8/7/2018. The same indicates that one of the sons is Samuel Kihara. She is having the same surname as the Appellant. There was a photo. One of the people in the photo at the first deceased's funeral on10/7/2018 was the Appellant. He was standing on the far right, 2nd at back row. I saw the Appellant in court during the hearing of the Appeal.

    The uncle was buried on 10/7/2018 while the mother was buried on 17/7/2018. The 2 periods are within the periods the victim testified that she was defiled. She did not testify on any other extended period in the charge sheet. The Alibi is rock solid. The duty to discount an alibi is on the state.

28. At least for the period 10 – 13 July the Alibi was fully covered. The minor victim indicated that she was defiled on the 9th and 10th. This was the time the deceased was in Othaya for the mother and uncle's burial. This evidence was not displaced.

29. To worsen the situation the court did not allow cross-examination of the minor, this makes her unsworn evidence worthless. Cross examination is part of the right to fair trial. Without the Appellant confronting the accuser, the right to fair trial is affected. It is fatal to the case.

30. The medical evidence was on annual penetration. The minor gave evidence that on 9th and 10th July she was raped. She met 2 people who are in court today.

31. Unfortunately, this was a lie. There was only one person charged in court. She also said "she was raped." This was a term of art. Whatever happened was not described. She is said to have told Eunice. Eunice was never called as a witness on the other hand PW3, went to their home. The minor does not appear to have known Esther. Her evidence was not tested on cross examination.

32. PW3 testified that she went to the minor's home. She received infomation from another person. Her evidence is purely hearsay. There is no connection between her testimony and what she witnessed.

33. Section 124 of the *Evidence Act* could have been useful. However, it is not since the minor was either untruthful or confused. There is no other evidence against the Appellant

34. The worst part of the matter, is that we do not know which part, this particular Appellant is said to have penetrated and with what gadget was used. To makes matters worse, the evidence of the minor is worthless. There is a difference between unsworn evidence given by an accused and unsworn evidence given by a witness.

35. A witness unsworn evidence must still be subjected to cross examination. In this case, the court failed the parties by failing to allow the Appellant to cross examined the minor. Without cross examination the evidence is as if it was never given. That is a lapse in the procedure.

36. The question of identity if the perpetrator remained unanswered. It is surprising that a neighbour was not known. It is also surprising that the first arrest was for a person with one hand. He was however not charged. In a case like this where an old man is suspected an identification parade will have one. None was carried out. Dock identification is the worst flows of identification. In the case of Donald Atemia Sipendi v Republic [2019] eKLR, Justice Mativo J, as then he was stated as follows: -

> "
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> "43. In such matters, the importance of the first statement to the police cannot be downplayed. If the description of the attackers is not given to the police then the evidential value of the identification parade from which the attackers were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid.[20] In Ajode v Republic[21] the Court of Appeal held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. On the validity or otherwise of an identification parade, I rehash the pronouncement in John Mwangi Kamau v. Republic[22] where the Court of Appeal held as follows:-
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> "15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-
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> "A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In Nathan Kamau Mugwe – vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

> "As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'should' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade..."

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja& 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424:-

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable

evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

44. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in Roria vs Republic[23]. It stated:

"A conviction resting entirely on identity invariably causes a degree of uneasiness...That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

37. The first description of the Appellant was an oldman. Notihng was added tyo it there is notihng connecting the Appellant to the offence excepti dock identification. The same also related to 2 men who were in court. This was in evidence that was never tested. There is a lot of uneasiness in relying on such worthless evidence.

38. The appellant was convicted on basis of circumstantial evidence, having to been identified by the minor. There is nothing, other than the minor's allegations to tie the Appellant to the offence. Even circumstantial evidence do not show that the Appellant was the perpetrator.

39. For circumstantial evidence to work, it must be inconsistent wityh the accused's inoocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

" However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way

back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

40. The alternative charge was equally not proved. The period between 11/1/2018 and 8/1/2018 was not covered in the evidence. I note that the minor suffered serious anal injuries. None has been charged with the same.

41. Lastly the court erred in finding that the minor was 10 years old. The minor was said to be between 12 and 14 years. Therefore, the maximum the court would have given, had the offence been proved was 15 years. The court flacked a figure from the air, in total disregard of the sentencing guidelines and sentenced the Appellant to 50 years. Had the offence been proved, given the age of the minor, lack of remorse, age of the Appellant, I will have sentenced him to 15 years.

42. It does not matter that the age indicated in the charge was 10 years. The age proved was 12 – 14 years. No prejudice will have been suffered. The Appellant could have been convicted under Section 8 (2) (b).

43. In the circumstances I find the conviction unsafe. The question is what to do. The court cannot order a retrial for the prosecution to fill the gaping holes in their case. In the case of Osman Hassan Wario & 5 Others v Republic [2005] eKLR

> " Further, Mr. Orinda did not ask for re-trial pointing out that since the time of the trial, too much water has passed under the bridge as confessions are now not available to the Police in the form they were at the time of the trial. He concluded that a retrial would be an exercise in futility adding that some of the important things that were said at that time cannot be said now.
>
> M/S Mwai agreed with what Mr. Orinda said and went ahead to cite the case of Joseph Lekulaya Lelantile and another – vs – Republic being Court of Appeal Criminal Appeal No. 33 of 2000 at Nyeri; also Njeru – vs – The Republic (1980) KLR 108; and Roy Richard Elirema and Another – vs – Republic, Court of Appeal, Criminal No. 67 of 2002 at Mombasa, all to the effect that as it was said in the case of Fatehali Manji – vs – The Republic(1966) E.A. 343:
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> "In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case."

44. I therefore allow the Appeal, set aside the conviction and sentence and order that the Appellant be set free forthwith, unless otherwise lawfully held.

Order

45. In the circumstances I make the following orders: -

    i. The Appeal is allowed both on conviction and sentence. The sentence was harsh. I therefore set aside sentence and set the appellant free, unless otherwise lawfully held.

    ii. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 18TH DAY OF MARCH, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Mr Mwakio for the state

Court Assistants – Milicent/Kimoine