Nandasaba v Republic (Criminal Appeal 6 of 2023)
[2024] KEHC 16950 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 6 OF 2023

F WANGARI, J

MARCH 15, 2024

BETWEEN

GEOFFREY NANDASABA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot, Senior Resident Magistrate in Msambweni SPMCSO No. E059 of 2022 dated 24th May 2023)

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot, Senior Resident Magistrate in Msambweni SPMCSO No. E059 of 2022 dated 24th May 2023.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars were that on 27th November 2022 at 1300 hrs at [particulars withheld] Village in Lungalunga Subcounty of Kwale County intentionally and unlawfully caused your penis to penetrate the vagina of LM a child aged 16 years. There was also an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*, 2006.

4. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded. The Trial Court considered the case and rendered the Judgement on 24th May 2023. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to 15 years imprisonment.

5. The Appellant, aggrieved, lodged this Appeal. The Appellant preferred 4 grounds of appeal. The Appeal is on both conviction and sentence.

Evidence

6. At trial, PW1, the minor testified that she was 17 years old. It was her testimony that she rented a house with her friend Maria. Further, that the Appellant came at the door of the house when she was inside and demanded to enter the house. She refused to let him in. At the same time, her friend Maria came and found the Appellant outside. Maria then entered the house and the Appellant also entered. As Maria was getting our, the Appellant held her but she begged him to let her go and he did so.

7. After Maria left, the Appellant then closed the door with the complainant inside and demanded to have sex with her. The Complainant refused but because of persistent and harsh demands, he forced her onto the bed and defiled her. That she was on her monthly periods and had blood. She produced the clothes that she was wearing at the time of the defilement in evidence. She also asserted that the Appellant used the clothes to wipe his genitalia after the act.

8. On cross examination, it was her case that she did not know the Appellant's name. She found out from others. However, that they had spoken on phone through Mama Masika's phone. It was her case that the Appellant lay her down on a mattress and had sex with her from around 1 pm to 4 pm.

9. PW2 testified that he was the Police Officer. He testified that the results of the investigations pointed to the Appellant and had reasons to believe that he was an offender and so they arrested him.

10. PW3 was the Clinical Officer. It was her case that there were no lacerations and bruising, no hymen but there was blood discharge.

11. PW4 was Maria, the complainant's friend. She testified that she came from church and found the Appellant at the door to their house and the complainant was inside. That she entered the house and when she was getting in, the Appellant prevented her but she pleaded with him and he let her go.

12. That she did not know what then transpired behind the closed door.

13. PW5 was Mwanamvua Juma, one of the persons that rented the house with the complainant. It was her case that she arrived home at around 5p.m and saw the Appellant leaving the house.

14. The Appellant also testified. It was his case that he was an Administration Police at the Lungalunga police station. That he did not know the Complainant prior to the incidence. Further, it was his case that he did not defile the complainant and all were but lies.

15. Directions were given for parties to file submissions. I have seen only the Appellant's submissions. The Appellant filed submissions on 23rd January 2024. He submitted that the prosecution had not proved age, penetration and him as perpetrator. He relied on the case of Remmy Wanyonyi Wanjoki v R (2019) eKLR.

16. The Appellant also submitted that there were inconsistencies in the prosecution evidence. He also submitted that the sentence was excessive and should be set aside.

17. I have perused the authorities relied on by the Appellant and appreciate their value to this Appeal.

Analysis

18. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.

19. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

20. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

21. I note that the complainant testified that she was a minor aged 16 at the time of the alleged defilement. The Complainant identified the Appellant by recognition. The prosecution also proved penetration to the required standard.

22. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> > " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

23. On my re-evaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence. The evidence of PW3, the medical officer confirmed the unlawful act.

24. I consequently have no reason to interfere with the finding of the Trial Court on conviction. I dismiss the submission by the Appellant that there were inconsistencies in the Prosecution witnesses.

25. On sentence, the Trial Court imprisoned the Appellant to 15 years. In any case the sentence should be proportional. The Court of Appeal in the case of Thomas Mwambu Wenyi – vs- Republic (2017) eKLR stated as follows: -

> "A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence".

26. I am also alive to the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant

27. I am well guided that the Trial Court was not wrong in imposing a custodial sentence. However, the sentence of 15 years was in my view excessive. I am guided by the facts and circumstances of this case. I reduce the sentence from 15 years to 10 years.

28. In the circumstances, I make the following Orders:

i. The Appeal on conviction is dismissed.

ii. The sentence of 15 years is set aside and replaced with 10 years' imprisonment.

iii. The sentence shall consider the time spent in remand.

iv. Right of Appeal 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA, ON THIS 15TH DAY OF MARCH, 2024.

.....

F. WANGARI

JUDGE

In the presence of: -

M/S Mwaura S.C for State

Appellant p.i.p

Barile, Court Assistant