Kathuka v Republic (Criminal Appeal E052 of 2022)
[2024] KEHC 4486 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E052 OF 2022

MW MUIGAI, J

APRIL 26, 2024

BETWEEN

MICHAEL MUTISO KATHUKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Hon . E.H. KEAGO (CM) in MACHAKOS CM'S Court S.O Case No. E062 of 20 21 delivered on 7 TH NOVEMBER, 2022)

JUDGMENT

Background

1. The Appellant Michael Mutiso Kathuka was charged with the offence of defilement

2. The information that led to the arraignment of the Appellant before the trial court was as follows: Offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual offences Act* No. 3of 2006 and on the alternative count he was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *sexual Offences Act*

   Particulars of the offences were as follows:

   Michael Mutiso Kathuka: On the Unknown date of the unknown month the year 2021 in Kathiani Sub- County within Machakos County. He intentionally and unlawfully caused penetration with his genital organ penis into the genital organ vagina of F.K, a child of 16 years

3. The Appellant pleaded not guilty to charge and the matter proceeded to full trial.

Prosecution case at the Trial Court

4. Prosecution case was anchored on the evidence of four [4] witnesses.

5. PW1 was F.K who testified that on the unknown date and month, she was sent to the shop by her grandmother and on the way she met the accused who took her to his house and asked her to undress where they had sex. She stated that at another time she met the accused who took her to the bushes and they had sex where she stated that the accused had used his penis to penetrate her vagina. She did not tell anybody as the accused told her not to tell. Later she was vomiting and on being taken to the hospital by her mother, she was examined and found to be pregnant. She told her mother that she had sex with the accused and another person called Kyalo who had sex with her when she was sent to their home for tobacco. She identified the accused on the dock and that he was well known to her as they were neighbours. She could not tell the exact date she was defiled but that she did KCPE in march 2021 and conceived after the results were out. She could not recall the exact date she went to the hospital and that the accused had threatened to kill her if she told anybody. She stated that she was 16 years old as she was born in the year 2005.

6. In cross-examination, she stated that the accused had black clothes, she did not do anything when the accused defiled her and that there was nobody who witnessed the incident. She stated that all the defilers had threatened to kill her if she reported to anybody. She stated that she saw a bed, tables and chairs in the accused house and does not know the exact date he defiled her. She had not produced any treatment notes.

7. PW2 was AN. She testified that F.K was her daughter and was 16 years old having been born on 28/5/2005,she stated that on 7/8/2021, she took her daughter to hospital as she was told she was sick and she found out she was 2 months pregnant. She reported to the village manager and the assistant chief and her daughter told her she had been defiled by the accused and Lawrence Mwendwa. On 11/8/2021, they went to the area chief where the two suspects offered to pay upkeep of the child to be born. She was then referred to Mitaboni Police Station where she was referred to Machakos Hospital where her daughter was examined. The following day the suspect was arrested. She stated that her daughter is a minor and challenged. She also stated that she did not have any issues with the accused and that he was her neighbour.

8. In cross-examination, PW2 testified that when she got the report of defilement, she reported to the village elder and the assistant chief. She stated that she had the p3 form showing her daughter was pregnant and she does not remember the exact date she was defiled. She stated that she had records which showed that her daughter was mentally challenged.

9. PW3 was Simon Mutua, a clinical officer based at Kathiani Level 4 Hospital. He stated that he could see a P3 form in respect of FK aged 16 years. He saw her on 4/11/21 in the company of her mother. It was reported that he had been defiled, she was 5 months pregnant. It was reported that she had been defiled by 3 people. General condition was fair. She was mentally challenged and could not explain herself clearly. He stated that he was the one who filled the P3 form which he produced as exhibit 2, he also produced referral form, a copy of NHIF duly stamped which was used to pay, the ultrascan report which confirmed PW1 as pregnant. He also produced the PRC form for PW1 which was filled on 27/1/22 which stated that she had been defiled by 4 people. On the genetalia, it was normal and no infection detected.

10. In cross-examination, he stated that the complainant came to Hospital while expectant.

11. PW4 was No. 106053 PC Mercy Kamwala Kambala, she testified that on 29/10/2021, a defilement case was reported at Mitaboni Police Post and she was assigned to do investigations. She called PW1 who was in the company of her mother. PW1 informed her that in 2021 on a date and a month she could not recall, she was defiled by 3 people who were known to her by names. She identified Michael K. Kathuka, Maxwell K. Muia and Kimalo Mutindi. The accused had called the complainant while she

was from the shop and took her to his house where he defiled her, the next day he took her to his house again and defiled her at least 5 times. The complainant could not recall the exact date she was defiled by the 3 suspects. She took her to the hospital where she was examined and found to be pregnant. She then arrested 2 suspects while the 3rd one escaped. The accused was later charged in court. The complainant had a disability on her right hand and could not express herself well. She was however able to identify the two suspects.

12. In cross-examination. PW4 testified that the doctor confirmed that the complainant was pregnant and arrested him on the basis of the report filled.

13. The prosecution closed their case.

14. The trial court upon considering the evidence on record found that the prosecution had establishes a prima facie case against the Appellant to warrant him being put on his defence and found that the Appellant had a case to answer.

The defence case at the Trial Court

15. The defence case was anchored on the evidence of one witness who was the accused and he gave unsworn testimony.

16. DW1 Michael Mutiso Kabuga He told the trial court that he was aware of the charges he was facing before court. He was supposed to be in school and that his home and the complainant's house is far. That he has never had any relationship with her. He stated that he was framed on the charges and the Court should do justice

Trial Court Judgment

17. The Trial Court vide its judgment delivered on 7th November, 2022 found that the prosecution had proved their case against the accused person beyond reasonable doubt and was convicted of the offence as charged under Section 215 of the Criminal Procedure Code.

The Appeal

18. Dissatisfied by the judgment on the conviction and sentence, the Appellant filed his petition of Appeal

19. The appeal was premised on the following grounds that:

    1. The Trial Court erred in both law and fact by convicting the appellant when the case against him had not been proved beyond reasonable doubt

    2. That the Trial Court erred in both law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the appellant.

    3. That the Trial Court erred in law by dismissing the appellant's defence and shifting the burden of proof to the appellant.

    4. That the Trial Court erred in both law and fact by reaching conclusions based on his own opinions that the victim was a minor while no age assessment proof was produced.

    5. That the learned Trial Magistrate erred in law by convicting and sentencing the appellant herein on a charge sheet that was defective

6. The learned trial Magistrate erred in law by making and delivering a judgement that was not consistent with the provisions of section 169 of the Criminal procedure Code.

7. The learned Trial Magistrate erred in law by failing to consider the appellant's defence which was not falsified or contradicted was watertight and acquit the appellant herein.

8. That the learned trial Magistrate erred in law and in fact in by making a finding that the appellant committed the offence despite there being evidence that the complainant was sexually assaulted by 3 males.

9. That the trial court erred in law and in fact by failing to find and hold that the prosecution evidence did not support the charges facing the appellant. The patent inconsistencies thereof created doubts which ought to have been resolved in favour of the appellant.

10. That the learned trial Magistrate erred in law by sentencing the accused person to a sentence that was excessive in the circumstances.

20. The matter was disposed by written submissions.

Submissions

Appellant's Submissions

21. The Appellant in his submissions dated 31st October 2023 submitted that PW1 witness was a child yet she was not subjected to voire dire examination to determine if she was possessed of sufficient intelligence to understand the importance of telling the truth. Reliance was made to section 125 (1) of the *Evidence Act* on subjecting a witness of tender age to voire dire examination.

22. Reliance was made to the case of Maripett Loonkomok v Republic [2015] eKLR on the admissibility of the evidence of a child of tender years. It was submitted that the Court fully relied of the evidence of PW1 who had been confirmed as mentally challenged and had difficulty in expressing herself, yet it had not been verified whether the complainant was fit to testify and hence the prosecution case was not proved beyond reasonable doubt.

23. Reliance was made to the case of Eliud Waweru Wambui v Republic (2019)eKLR, it was submitted that the complainant presented herself as a mature girl the fact that she had been with 3 different men on different dates and did not tell anyone is evidence that she presented herself as mature.

24. It was submitted that the appellant herein was not examined despite there being a part in the p3 form reserved for his examination and there was no DNA test to confirm whether indeed the appellant herein defiled PW1.

25. It was submitted that the Trial Court convicted the appellant on hearsay since PW1 is mentally challenged could not recall the dates and the prosecution witnesses relied on the information by PW1 and hence inconsistences in their testimonies and that clinic card produced is not sufficient proof of the age of the complainant as there was no age assessment done and no birth certificate was produced.

26. It was the appellant's final submission that the prosecution did not prove its case beyond reasonable doubt and prayed to the court to set aside the conviction and substitute it with finding that the prosecution did not prove its case beyond reasonable doubt and proceed to acquit the appellant.

Respondent's Submissions

27. Respondent in its submissions date 2nd November, 2023, Mr. Mwongera, submitted that they concede the appeal on the ground that the trial court failed to conduct a voire dire before taking the victim's evidence. Reliance was placed in Section 125(1) of *Evidence Act*, also Section 19(1) of *Oaths and Statutory Declarations Act* and Children's Act No. 29 of 2022

28. Reliance was placed in the case of John Maina Mariga vs Republic(2018)eKLR observed that the manner of conducting voire dire examination.

29. Reliance was placed in the case of Kibangeny Arap Korir vs Republic [1959]EA 92, M K v Republic [2015] eKLR, J G K v Republic [2015] eKLR, Patrick Kathurima v Republic (2015) eKLR and Samuel Warui Karimi vs Republic (2016) eKLR.

30. It was submitted that in the present appeal the trial court failed to conduct a voire dire on the victim despite her being below 18 years yet it was important to do so to ascertain if the child understands the meaning of the oath and it was grossly wrong for the trial court to assume that the child understands the meaning of the oath without subjecting her to the examination.

31. The Respondent urged the Court to vacate the conviction and the sentence imposed by the Trial Court and issue an order for re-trial.

Determination/analysis

32. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic 91972)EA 32 & Pandya Vs. Republic (1975) EA 366.

33. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, 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 made the advantage of hearing and seeing the witnesses.

34. Also in Peter's vrs Sunday Post(1958) E.A. 424 it was held that

> " It is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the Trial Court had the advantage of hearing and seeing witnesses.

35. The Court record reveals that the eye witness was a child. The said witness was not subjected to voire dire examination to determine if he was possessed of sufficient intelligent to understand the importance of telling the truth as this aspect seems to have eluded the Trial Court.

36. Subjecting a witness of tender age to voire dire examination is founded under Section 125 (1) of the *Evidence Act*, which states: -

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

37. In a recent decision of; Patrick Kathurima v Republic, [2015] eKLR, the Court of Appeal held:

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

38. In addressing what age would be appropriate for a trial court to conduct a voire dire examination, this court has also considered the holding in the case of Maripett Loonkomok v Republic [2016] eKLR where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voire dire examination and held that:

> " The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R Criminal Appeal No.16 of 2014* where it categorically stated that the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.

39. The Court additionally stated that:

> " It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

40. From the foregoing, the Court is persuaded that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was a minor and that essential step was not taken in a criminal trial, that trial clearly becomes another problem. In the circumstances the evidence of the minor PW1 was not well received and conviction of the Appellant becomes unsafe to sustain.

41. Taking note that the PW1 the minor testified that she could not remember the exact dates that she was defiled and even that she was defiled by three different people. The minor's Mother PW2 indicated to the court that the minor was not well mentally and this even creates more problems with regard to the veracity of her testimony and failure to conduct a voire dire examination.

42. The issue that remains for determination is whether the court should order for the retrial of the appellant. The law as to when a retrial should be ordered has long been settled. In the case of Fatehali Manji Vs Republic [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer –vs- Republic [2015] eKLR

43. In this case, it was evident from the testimony of the Clinical officer that the victim was pregnant and thus defilement indeed occurred. The accused has been positively identified by recognition by the Prosecution witnesses and that the accused and the victims were neighbours. What brings about problems is the fact that there are missing gaps on the Victim's testimonies which probably would have been cured by her being subjected to a voire dire test.

44. It is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interests of justice on the one hand and those of the accused person on the other.

Disposition

1. Taking all the above into consideration, it is the Court's view that by the fact that an important aspect of Trial was not conducted (voire dire test), and corroboration was not sought and further that the victim of the offence herein deserves justice, it is the Court's considered view that the an order for retrial is granted and the Appellant to be produced in Court and the trial be conducted by a Court different from the Trial Court.

2. This Appeal therefore succeeds.

It is so ordered.

JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 26TH APRIL, 2024. (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE