Maroa alias Land Surveyor v Republic (Criminal Appeal 114 of 2022)
[2024] KEHC 17060 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 17060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL 114 OF 2022

RPV WENDOH, J

APRIL 25, 2024

BETWEEN

RAWE PETER MAROA ALIAS LAND SURVEYOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. A. N. Karimi – Principal Magistrate in Senior Resident Magistrate's Court at Kehancha S O NO. E022 OF 2021 delivered on 21/10/2022)

JUDGMENT

1. Rawe Peter Maroa alias Land Surveyor was charged in the Senior Principal Magistrate's Court at Kehancha for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offence Act. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

2. The particulars of the charge are that on 12/5/2021 at Ntimaru Sub County of Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of E. B. M, a girl aged 14 years or that he intentionally and unlawfully touched the vagina of E. B. M., a girl aged 14 years with his penis.

3. After a full trial with the prosecution calling five witnesses and the appellant giving sworn evidence in his defence, the trial court convicted and sentenced the appellant to 20 years imprisonment.

4. Being aggrieved by the said judgment, the appellant filed this appeal through the firm of Abisai & Co Advocates citing 14 grounds of appeal which in my view can be condensed into the following broad grounds:-

    1. Whether the offence of defilement was proved to the required standard;

    2. Whether the court considered the appellant's defence;

3. Whether the sentence of 20 years imprisonment is excessive.

5. The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence be set aside.

6. In support of the Appeal Mr. Abisai filed submissions on 18/3/3023. The appeal was opposed and the prosecution counsel filed his submissions dated 12/6/2023. This being a first appeal, it behoves this court to re-examine all the evidence that was tendered before the trial court, evaluate and analyse it and arrive at its own conclusions as was held in Okeno vs. Republic (1972) EA 32. This court must however make allowance for the fact that it neither saw nor heard the witnesses testify. The evidence before the trial court was as follows: -

> The prosecution called a total of five witnesses namely PW1 E. B. M. the complainant, PW2 Elizabeth Maseke Manager of [Particulars Withheld] Guest House in [Particulars Withheld]; PW3 Moses Nyamohanga the owner of [Particulars Withheld] House; PW4 Francis Sari, a clinical officer at Ntimaru Sub County Hospital and PW5 IP Manasse Agumbo took over as investigation officer from one PC Joshua Otieno.

7. The appellant testified as DW1 and called two other witnesses, DW2 May Mwita and DW3 Felix Wambura.

8. PW1 identified the appellant as a brother to his mother and that on 12/5/2021, she was working in the garden when the appellant found her and on finding that PW1 was away from school because of uniform, asked PW1 to go along so that he could buy her uniform. He took her to Ntimaru, left her in a room as he went to get money. Upon returning, he locked the door, undressed pinned PW1 on the floor and inserted his penis in her vagina and defiled her. During the ordeal she screamed, and he threatened her with death. On finishing, to defile her, the appellant left for the drinking and she cried out and informed those standing outside that the appellant had defiled her and that the man called police; that the appellant tried to flee but he was caught by members of public.

9. According to PW2, the appellant who was their customer at Denmark Guest House arrived at the house, booked room number 2 and asked for two sodas. PW2 opened for him; that the appellant enquired if the rear door was open which she confirmed. After a while, PW2 heard a girl's voice asking in Kiswahili, why the uncle had taken her there and yet he had not bought her uniform as promised; that she went to knock on the door of the room but the appellant told her to leave him alone. PW2 went to look for her boss PW3 but he could not be traced then; that the appellant was apprehended by members of public who were outside the guest house.

10. PW3, the owner of the guest house also identified the appellant as their regular customer at the guest house. He was away when the incident occurred but found when the appellant had been arrested for defiling a minor and the minor was present. PW3 confirmed that the appellant tried to flee but was caught by members of public and handed over to police.

11. PW4 recalled that on 12/5/2021 about 8:00 p.m, PW1 was taken to the hospital with a history of defilement. Upon examination, it revealed a broken hymen, whitish discharge on labia majora on lab analysis; the discharge was found to have spermatozoa. He opined that there was penetrative sexual intercourse. The date of birth was estimated at 14 years having been born on 2007. He produced all the medical documents.

12. PW5 testified that he got a report from the then investigating officer, PW3 reported to the Ntimaru police station that a minor had been defiled at his guest house. He rearrested Accused and took both PW1 and Appellant to hospital for examination.

13. In his defence, the appellant testified on oath that on the material day, he found the complainant staying with his neighbour. He did not know her before but the neighbour informed him that PW1 was his sister's daughter; that the mother of PW1 was mentally unstable and the father had neglected her and so she did not have school uniform. He offered to pay for her uniform and he left with the girl to go and get money from somewhere and waited till 4:00p.m The lady who was to give her money told him to meet him in [Particulars Withheld] and they went with PW1 but could not withdraw money from the bank due to network. He left PW1 to wait as he went to take alcohol. He had no money to pay his bill and promised to pay next day. On going out of the bar, he did not get the girl and was told she was locked up in the bar. Soon thereafter, a police vehicle came, arrested him and it was alleged he had slept with the girl. He was taken to hospital for examination, locked up then charged. He denied defiling the girl. He blamed PW2 for coaching PW1 to tell lies. He denied having been in Room 21.

14. DW2 told the court that the appellant went to her home on 12/5/2021 accompanied by a small girl whom h e referred to as a niece; that she gave them lunch and he left with that girl at 4:30p.m for Ntimaru. DW2 did not go with them.

15. DW3 told the court that on 12/5/2021 he was at Denmark bar when the appellant found him drinking at 5:30p.m and sat with him. He drunk and he left about 5:40p.m as he claimed to have a child he intended to buy uniform for; that he returned and they drunk till about 6:00p.m; that the waiter asked for payment and the bar owner went with appellant outside and came with a small girl. He did not know where the bar owner got the girl and he did not see the appellant enter any room.

16. In his submission, Mr. Abisai addressed three issues the first being admission of the complainant's evidence. He submitted that voire dire examination in a criminal hearing is to determine the admissibility or the competency and qualification of a witness. He relied on the decision of Johnson Muiruri vs. Republic (1983)KLR 445 where the court explained the purpose of voire dire. He also relied on the case of Maripett Loonkomok vs. Republic (2016) eKLR where the court held that children under 14 years must undergo voire dire examination. It is counsels submission that the trial court did not conduct a proper voire dire examination; that sworn testimony carries more weight than unsworn and when the court relied on PW1's sworn evidence, the evidence against the appellant carried more weight and hence prejudicial to the appellant.

17. It was the appellant's submission that PW1's testimony is contradictory to that of PW2; that whereas PW1 claimed that PW2 opened the door to the room at the guest house, PW2 denied seeing who was in company of the appellant till she heard the child screaming and counsel therefore wonders who was truthful between the two of them and counsel suspected that PW2 was not entirely truthful.

18. Counsel also submitted that under Section 19 of the *Oaths and Statutory Declarations Act* and Section 124 of the *Evidence Act* on when corroboration will be required. It was his submission that the trial court found that PW5's evidence had been corroborated by PW3 (Medical evidence) but yet there was no evidence to prove defilement; that as held in the case of Benjamin Mwangi & Another vs. Republic (1984) eKLR that the presence of spermatozoa in the complainant's vagina is not of itself evidence.

Penetration:

19. As regards sentence, counsel submitted that the minimum sentence under Section 8 (3) is ten (10) years imprisonment and considering that the appellant was a first offender twenty years was unjustified; that instead the appellant should have been sentenced to the minimum sentence being ten years imprisonment. Counsel relied on the case of Francis Karioko Muruatetu and Others vs. Repulic (2021) eKLR where the Supreme Court declared the mandatory death sentence unconstitutional.

20. In opposing the appeal the prosecution counsel relying on the cases of Kyalo Kioko vs. Republic (2016)eKLR not an ingredient of the offence of defilement and Mwalango Chichoro Mwanjembe vs. Republic (2016) eKLR, on proof of age and Larry Charles Wamukoya Karani vs. Republic Criminal Appeal 72 o f 2013, on proof of penetration, that the offence was proved to the required standard.

21. On sentence counsel relied on R vs. *Ruth Kamande Criminal Appeal No. 102 of 2018* where the appellant was sentenced to the death. Sentence for murder and counsel urged the court can still maintain the mandatory sentence which is legal.

22. I have duly considered all the evidence on records, the grounds of appeal and submissions of counsel. The ingredients that need to be proved by the prosecution beyond reasonable doubt in a charge of murder were discussed in the case of Charles Wamukoye Karani vs. Republic Criminal Appeal 72 of 2013 where the court said;

> The critical ingredients forming the offence of defilement are: age of the complainant; proof of penetration and positive identification of the assailant."

On proof of age.

23. In the case of Mwalango Chichoro Mwanjembe vs. Republic (2016) eKLR (supra) the Court of Appeal stated as follows as regards proof of age:-

> The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof.

24. Again Fappyton Mutuku Ngui vs. Republic (2014) eKLR, the court stated as follows:-

> that 'conclusive' proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other."

25. In Francis Omuroni vs. Uganda Criminal Appeal No.2 of 2000 the Ugandan Court of Appeal affirmed the fact that age may also be proved by observation.

26. In the instant case, the complainant said that she is 14 years old and an age assessment report (PEX NO. 1) was produced in which the complainant's age was assessed at 14 years. When the complainant appeared before the court, the court observed that the complainant was a child of tender age and that is why she was allowed to undergo voire dire examination to determine whether she understood the meaning of Oath to determine the child's intelligence or understanding. This court is satisfied that the complainant was 14 years old.

Whether Voie Dire Examination was proper;

27. The appellant has challenged the manner in which the trial court purported to conduct the voire dire examination. Voire dire examination is meant to determine the competency or qualification of a witness and it is conducted in cases which involve children testimonies and the purpose of the procedure was aptly captured in Muiruri's case (supra) when the court said as follows:-

> 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination,

whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

28. In this case the trial court recorded as follows:-

> PW1 – Voire dire examination, my name is E.B. M. I am 14 years old. I cant recall my date of birth. I am in court. I understand that I shall tell the truth. I understand the oath well. I am in class 7."

29. The court ruled that the minor appeared intelligent and composed and understood the Oath and that she would therefore give sworn evidence. From an assessment of this record, it is clear that the trial magistrate went on an enquiry of whether PW1 understood the meaning of telling the truth and consequences of lying. Having satisfied itself that the complainant understood the importance of telling the truth, the court went ahead to take her evidence. At that stage Mr. Muniko the appellant's counsel never objected to the admission of the said evidence. In Japhet Mwambire Mbithe vs. Republic Criminal Appeal No. 24 of 2010 (Malindi) the Court of Appeal when faced with such a scenario, found that the minor's evidence was properly admitted as there was some enquiry made by the court. I find that the court did carry out a proper voire dire examination. The questions asked can even be deduced from the answers recorded.

Of contradictions in PW1 and PW2's testimonies:-

30. There is no doubt that the testimony of PW1 and PW2 are contradictory in some material particulars. The question is whether the said contradictions vitiate the prosecution evidence. The court considered how contradictions in evidence should be handled by the court.

31. The case of Twahengane Alfred vs. Uganda Criminal 139 of 2001 (2003) UGGA6 the court said that not every contradiction narrates negotiates of evidence. The court said: -

> with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

32. The court has to ask itself whether the contradictions are so grave as to affect the substance of the charge. The Nigeria case of David Ojeabuo vs. Federal Republic of Nigeria the court stated thus,

> Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

33. In Philip Nzaka Watu vs. Republic (2016) Criminal Application 29/2015, the court said:-

> The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

34. The issue is therefore whether the contradictions in PW1 and PW2's testimonies went on to vitiate the prosecution case. The contradictions in the testimonies of PW1 and PW2 are as follows; whereas PW1 told the court that when they arrived at the lodging with the appellant, the appellant called a woman called "Mama guest", she was asked to lock PW1 in a room as he went to get money for repair of her uniform which she did and that the room had a bed.

35. To the contrary, PW2 told the court that the appellant came to the lodging alone, booked a room and aske d for two sodas which she delivered to him but she did not enter the room and that she first learnt of the complainant's presence at the lodge when she heard screams from the room appellant had him and went to the girl's rescue. It is not undisputed that the appellant was with the complainant on the material date.

36. DW2 confirmed that on 13/5/2021, the appellant passed by her home in company of a girl he referred to as his niece and left with her for Ntimaru about 4:30p.m. DW3 confirmed that while at the bar, the appellant told him that he was with a girl he was paying fees for. DW3 said that the appellant left him several times but he did not knew where he was going. It seems DW3 was not present at the time the appellant was arrested. According to the appellant, he left the girl on the veranda of the bar. However PW1 was consistent in her narration of the events of the day. She was even recalled later as a witness and repeated the same narrative. The appellant was identified as PW2 and PW3's customer and there would have been no reason to frame him. This court is satisfied that the appellant and complainant were at the said Denmark on the said date and there is no reason to doubt PW1's testimony which was unshaken. In my view, PW2 may have denied seeing PW1 before the incident to protect herself because it is an offence for her to allow a man to take a child to such lodging for immoral purposes.

37. PW1 said that she screamed for help which PW2 confirmed hearing and corroborated her evidence that she first ran out of the room followed by the appellant. PW1, PW2, PW3 all testified that the appellant tried to escape from the scene but was caught by members of public and returned to the lodge. I have

no doubt that there is sufficient evidence placing the appellant at the scene with the complainant. The court finds the contradictions in PW1 and PW2's evidence did not go to the root of the charge. And in the above analysis, there is no doubt that the appellant was identified as the perpetrator.

Proof of penetration:

38. The next question then is whether penetration was proved. PW1 was alive with the complainant but screamed and attracting PW2 to the room. PW1 narrated what happened between her and the appellant at line 20 -24 of the Record of Appeal, she said:-

> On opening the door of the room he removed his trouser. I screamed for help. He ordered me to keep quiet or he would strangle me. He used his legs to pin me down on the ground. I fell on the floor "akanitomba." He did bad things to me after removing my pant. He used his penis to do those things to me he was naked. He penetrated my vagina."

39. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> The partial or complete insertion of the genital organs of a person into the genital organs of another person."

40 In Mark Oiruri Mose vs. Republic (2013) eKLR (Criminal Appeal No. 295 of 2012) the court of Appeal fortified what Section 2 of the Sexual Offence Act provides when it said:-

> Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ...."

41. In this case, the complainant was examined by PW4 who found whitish discharge on virginal swab, which under microscopic examination, revealed presence of spermatozoa she had a broken hymen. PW4 concluded that there was penetrative vaginal intercourse because of the presence of spermatozoa in the vagina and it showed friction due to the penile penetration. There is no doubt that PW1 had taken part in a sexual act. She vividly narrated what the appellant did to her, and was with the appellant at the bar. The appellant failed to give any plausible explanation as to what he was doing with a young a child at the bar come lodging. In the end, I find that the prosecution proved beyond any doubt that the appellant defiled the complainant. The conviction is sound and I affirm it.

42. The appellant also complained that the sentence is excessive. Under Section 8(3) of the *Sexual Offences Act*, the mandatory minimum sentence is 20 years. the sentence was therefore lawful. The courts are however moving away from minimum mandatory sentences for reason that they tend to fetter the court's discretion. Although the appellant took advantage of a minor and stole her innocence, in exercise of this court's discretion, the appellant having been a first offender, I hereby set aside the sentence of 20 years. I substitute it with a sentence of 15 years imprisonment. The sentence will commence on 17/5/2021 when the appellant was arraigned in court for plea. The appeal succeeds to that extent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL, 2024

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Ms. Ikol for state

Ms. Abisai for Appellant

Appellant present – Kisumu Main

Emma Court Assistant