Sifuna v Republic (Criminal Appeal 68 of 2016)
[2024] KEHC 4231 (KLR) (24 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 68 OF 2016

DK KEMEI, J

APRIL 24, 2024

BETWEEN

FRED WAFULA SIFUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. C Menya (Rm) in Kimilili Senior Principal Magistrate's Court Criminal Case No. 164 of 2014 dated 22.2.2016)

JUDGMENT

1. The appeal herein arises form the conviction and sentence dated 22.2.2016 by Hon. C. Menya (RM) in Kimilili Senior Principal Magistrate's Court No. 164 of 2014 wherein the appellant herein Fred Wafula Sifuna was sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. He had also been charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant was aggrieved by the said conviction and sentence and filed amended grounds of appeal on 9.2.2024 which are as follows:-

    i. That the learned trial magistrate erred in law by imposing a life sentence on him while disregarding the constitutional provisions and sentencing policy guidelines.

    ii. That the learned trial magistrate erred in law in convicting and sentencing him yet the elements of age and penetration were not proved to the required standards.

    iii. That the learned trial magistrate erred in law by failing to accord him a fair hearing as he was not provided with the requisite documents such as witness statements.

iv. That the learned trial magistrate erred in law by denying him the right to cross examine the star witness.

v. That the learned trial magistrate erred in law by not considering the failure of the prosecution to produce key witnesses in his favour.

vi. That the learned trial magistrate erred in law by failing to consider the Appellant's alibi.

3. The appeal was canvassed by way of written submissions. Both parties duly complied.

4. I have considered the record of appeal as well as the rival submissions by the parties. This being the first appellate court, its duty is well cut out namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis and come up with an independent conclusion on whether or not to uphold the decision of the trial court but also to bear in mind that it did not have the benefit of seeing or hearing the witnesses testifying. See the case of *Okeno v R* [1972] EA 32.

5. Pw1 (T.N) a girl aged 8 years old was the complainant. After a brief voir dire examination, she was allowed to tender an unsworn evidence. She testified that she is in class three at [Particlurs Withheld] and that on the material date, she was from school and on arrival she found the Appellant and one Brian Simiyu. That the appellant called her to his sleeping quarters as he needed her to go to the shop and purchase some mandazi. That when she went there to collect the money with which to buy the mandazi, the appellant changed his mind and pulled her into his room where he defiled her. That she screamed whereupon the villagers arrived and found the appellant still on top of her and that they beat him up while she was rushed to hospital. That the appellant had been a herd's boy at their home. She maintained that it was the appellant who had defiled her.

6. There is no evidence that the complainant was cross-examined by the appellant.

7. Pc Abraham Maro (PW2) testified that he is the investigating officer in the matter and that he was alerted of the incident and rushed to Maisha Mapya village where he found a crowd of villagers beating the appellant. That he intervened and learnt that the appellant was alleged to have defiled a child. That he escorted him to the police station and organized for the child to be escorted to hospital for checkup. That he learnt that the appellant used to live in the same compound and that one of the family members namely Biwa had witnessed the incident. That he recorded statements of witnesses and later charged the appellant with the offences. On cross-examination, he stated that he did not witness the incident. That he saved the appellant from the irate public. On re-examination, he stated that he did not examine the injuries on the girl as that was the work of the doctors.

8. Ignatius Okumu (PW3), a clinical officer from Tongaren hospital, testified that he examined the complainant on the 12.4.2014 while he was still working at Naitiri hospital. That he established that the minor had been defiled and that she had discharge of stool from her private parts (vagina) with blood clots. That the hymen had been ruptured. That a H.I.V test turned negative but nonetheless the minor was put on some anti-retroviral (ARv) and antibiotics. He produced the P3 form as exhibit one. On cross-examination, he stated that he tested the complainant and got results from the laboratory tests and that the appellant had no juries. That he tested the girl only.

9. The prosecution closed its case at that juncture. The trial court later established that a prima facie case had been made against the appellant who was thus put on his defence.

10. Fred Wafula Situma (DW1), the appellant herein, tendered an unsworn statement. He testified that he had a disagreement with the mother of the complainant who owed him money and that when he went for his money, the complainant's mother changed her mind and started framing him for a crime

he did not commit. He stated that he was arrested by two unknown people at the market and taken to the police station. He denied knowing one T.N nor her mother's name.

11. After analyzing the above evidence together with the rival submissions, i find the issues for determination are firstly, whether the prosecution had proved its case against the appellant beyond any reasonable doubt and secondly, whether the sentence imposed was appropriate in the circumstances.

12. As regards the first issue, it is now settled law that before a conviction for the offence of defilement can be made, the prosecution is under a duty to prove three essential ingredients of the offence which are inter alia; proof of the age of the complainant; proof of penetration; positive identification of the offender.

13. On the issue of the age of the complainant, it was the evidence of the minor (T.N) that she was aged 8 years old. The prosecutor presented certain documents namely a P3 form, patient record book, birth notification and a child health card which were marked for identification. However, it is only the P3 form which was produced by the clinical officer (PW3) while the rest were not produced. The issue of the age of a victim of defilement is quite critical as it has a bearing on the type of sentence to be imposed upon conviction of the offender. In the case of *Kaingu Alias Kasomo v Republic* (Malindi Court of Appeal Cr Appeal No. 504 of 2010) it was held as follows:

> '' Age of the victim of a sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence as the sentence to be imposed will be dependent on the age of the victim.''

Further, in the Ugandan case of *Francis Omuroni v Uganda* (Court of Appeal No. 2 of 2009) the court held as follows:

> '' In defilement cases, medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificates, the victim's parents or guardian and by observation and common sense.''

A perusal of the trial court's judgement reveals that the learned trial magistrate was really straining on what to do with the issue of the age of the victim as she stated in her judgement (page 29 of the record of appeal) that the age of the girl was not proved as there was no document produced to show that she was 8 years at the time of the commission of the offence. It was her strong view that the victim should not be denied justice on grounds of the prosecution's failure to establish her age and went on the indicate that she had a chance to observe the victim who did not pass for an adult. Indeed, the learned trial magistrate was convinced that the victim was not an adult but even if she was a minor, I find that the age was still crucial for purposes of the various sentences imposed and staggered under sections 8(2), 8(3) and 8(4) of the *Sexual Offences Act* No.3 of 2006. The learned trial magistrate ought to have satisfied herself on the exact age or age bracket of the victim so as to determine the eventual sentence to be imposed in the event of a conviction against the offender. From the record of the lower court, no document such as age assessment, birth certificate, notification of birth, child health card or baptismal certificate were produced and that none of the victim's family members were called to testify regarding her age. It was therefore erroneous for the learned trial magistrate to have used her own view and opinion to ascribe a certain age for the complainant when the prosecution had failed to ensure that the documents that had earlier been marked for identification were eventually produced. It is the duty of the prosecution to prove the guilt of the offender beyond any reasonable doubt. If

the prosecution opted for their own reasons not to produce the said crucial documents by either the doctor or investigating officer, then the trial court being independent ought not to appear to be filling up the gaps for the prosecution. Iam satisfied that the aspect of the age of the complainant was not proved by the prosecution beyond reasonable doubt.

14. As regards the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organ of another person. Hence, complete insertion is not mandatory since even a mere partial contact will suffice for penetration to occur. The evidence of the complainant and the doctor confirmed that indeed there was penetration of the complainant's vagina. The doctor who examined her established that the hymen had been ruptured and that he produced the P3 form as an exhibit. In the circumstances, I find that the said ingredient was proved by the prosecution beyond any reasonable doubt.

15. As regards the issue of the identity of the perpetrator, it was the evidence of the complainant that it was the appellant who had defiled. She further stated that some neighbours found him on top of her and beat him up. She gave the names of the witnesses who later recorded statements but were not called to testify. The learned trial magistrate in her judgement noted that the prosecution did not produce one Brian as well as Robai Nyongesa and Brown Simiyu who were key witnesses to confirm what the complainant told the court. However, she went ahead to find that the complainant's testimony was credible and believed her. Indeed, the provisions of section 124 of the *Evidence Act* allows the trial court to receive the evidence of the victim and proceed to convict the offender if the court is satisfied that the victim is telling the truth. The trial magistrate in her judgement seemed to have trusted the complainant in her evidence right from the observation during the voir dire examination when she pointed out that the child appears intelligent of what had happened and that she looks terrified to face cross-examination. The learned trial magistrate in her quest to shield the complainant from being cross-examined did more harm than good in the prosecution's case. The denial of the right of the appellant to cross-examine the complainant except the rest of the witnesses was an infringement on his constitutional rights to fair trial under article 50 (2) of the *Constitution*. The trial magistrate having found that the complainant was the only witness to the incident ought to have allowed the appellant to cross-examine her so that her evidence is thereby tested on the issue of the identity of the perpetrator. It seems the learned trial magistrate had misapprehended the provisions regarding the issue of unsworn evidence as opposed to sworn evidence between prosecution witnesses and an accused who opts to tender unsworn statement. In the present case, it is noted that the appellant tendered an unsworn statement in which case the prosecution could not cross-examine him. However, the rules of evidence demand that all prosecution witnesses must be cross-examined so as to test the veracity of such evidence. The failure by the trial court to allow the appellant cross-examine the complainant was fatal to the prosecution's case. In the case of *Paul Kinyanjui Kimauku v R* [2016] eKLR the Court of Appeal held as follows:

> ''[23] Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine- the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to fair trial. This includes the right of an accused person to challenge the prosecution's evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including minor witnesses, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under section 211 of the *Criminal Procedure Code* to give unsworn evidence in

his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.''

From the foregoing observations, it is thus clear that the only witness to the incident is the complainant herself since the other two eyewitnesses who allegedly found the appellant at the scene of crime were not called to testify. The complainant's evidence could have passed muster but for the fact that she was not cross-examined by the appellant. The lower court record does not indicate whether the appellant was given an opportunity to cross-examine her and that no questions were posed. Had that been captured, then it can be deduced that the appellant had no questions for the witness. The absence of cross-examination of the complainant therefore becomes a blot in her sole evidence that the appellant was the perpetrator and not somebody else. To that extent, i find that the prosecution did not prove the issue of the identification of the appellant as the perpetrator beyond any reasonable doubt.

16. The foregoing analysis leads me to the conclusion that the finding on conviction by the trial magistrate was unsafe and which warrants this court to interfere with it. It is instructive that the standard of proof in all criminal cases is quite high and which is beyond any shadow of doubt. The evidence presented by the prosecution did not meet this threshold.

17. As regards the issue of sentence, it is noted that the appellant was ordered to serve a sentence of life imprisonment. Indeed, under section 8(2) of the *Sexual Offences Act* No. 3 of 2006, any person found guilty and convicted of defiling a child under the age of eleven years will be sentenced to life imprisonment. As the age of the complainant was not established, i find the sentence imposed was thus erroneous.

18. Finally, and from the foregoing analysis, what emerges is the question whether this court should order a retrial in the matter. The scenario has been brought about by the failure of the prosecution to avail the requisite documents proving the age of the complainant while on the other hand the trial court failed to accord the appellant an opportunity to cross-examine the complainant who was the key witness in the matter. It is trite that an order for a re-trial should not be made if the same will enable the prosecution fill up the gaps in its case while on the other hand an appellant should not be prejudiced if such a route taken. Definitely, a retrial will help the prosecution to seal gaps or loopholes in its case. It is noted that the appellant has been in custody for about eight years and likely to stand prejudiced as a result. I find that an order for a retrial is not appropriate in the circumstances.

19. In the result, i find the appellant's appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence of the trial court dated 22.2.2016 is hereby set aside and substituted with an order acquitting the appellant. The appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL 2024

D.KEMEI,

JUDGE

In the presence of :

Fred Wafula Appellant

Miss Kibet For Respondent

Kizito Court Assistant