Nalkona v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 4019 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E013 OF 2023

LW GITARI, J

APRIL 23, 2024

BETWEEN

BORU NALKONA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment in the Chief Magistrate's court at Isiolo Sexual offence case No. E018 of 2021 wherein the appellant was charged with defilement Contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on 8th August 2021 within Isiolo County intentionally caused his penis to penetrate the vagina of BK a child aged 14 years. The appellant was also charged with an alternative charge of committing an indecent act with a child Contrary to Section 11 (1) of the *Sexual Offences Act* No. 3/2006 in that on 8/8/2021 within Isiolo County intentionally touched the breasts and vagina of BK a child aged 14 years using his fingers and penis respectively.
2. The appellant pleaded not guilty to both charges. After a full trial, the appellant was found guilty on the charge of defilement. He was convicted and sentenced to serve ten (10) years imprisonment.
3. The appellant was dissatisfied with both the conviction and sentence. He filed this appeal based on the nine (9) grounds which he later amended as follows-;
    1. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution side failed to prove their case beyond reasonable doubts as required by law.
    2. That the learned trial court magistrate erred in both matters of law and also a fact where he convicted and at the same time sentenced the appellant herein hence failed to note that the vital and crucial witnesses were not called by prosecution side to testify.

3. That the learned trial magistrate erred in law and fact by misapplying the law where he failed to note that there was an existing grudge between the accused person and the family of the complainant herein.

4. That the trial court magistrate erred in both matters of law and fact where he failed to consider the time that was spent in custody while undergoing the trial as part of my sentence pursuant to Section 333 (2) of the Criminal Procedure Code. CP.C.

5. That the lower Court Magistrate erred in both matters of law and also a fact where he rejected my defence over mare allegations.

4. It is his prayer that the appeal be allowed, sentence set aside, conviction quashed and he be set at liberty.

5. The respondent opposed the appeal and has filed submissions challenging the grounds of appeal.

The Prosecution's Case

6. The prosecution called five (5) witnesses in support of its case. the complainant BK testified as P.W 1 and told the court that on the material night at 4.00 a.m she was at home with her brother aged four (4) years. At 4.00 a.m she realized that there was a person inside the room who was already on her bed. She screamed but was ordered to stop and was threatened with a knife. The person who she identified as the appellant held her neck and blocked her mouth. The appellant then inserted his fingers in the B.K's vagin. The appellant then inserted his penis in her vagina and defiled her. It was her testimony that the appellant told her that he was making her to pay for all that her mother had consumed from his father. The complainant's brother screamed when he saw that the appellant had produced a knife. The complainant held the knife and was cut on the finger. It was the testimony of the complainant that the appellant told her to remove her clothes but when she refused he tore her inner wear i.e the pant. It was the complainant's testimony that she knew the appellant well before that day and his father who is Boru. She further told the court that the appellant forced himself inside the house, he had a torch and it was at dawn and she could see the accused well. In cross examination the complainant told the court that she had told the truth and that he did not know him from before. P.W 2 was R.M who was the complainant's mother. On the material day she was not at home. She had left the complainant with her younger sibling. On coming back the next she found the complainant who appeared shaken. She informed her that the son of Boru had gone to her house during the night and defiled her. The matter was then reported to the police. In cross examination P.W 2 denied that she had asked the appellant's father to sell his plot for his own gain. She further told the court that it is not true that she was the appellant's father's lover.

7. David Maina (P.W 3) was a police officer from Isiolo police station. He testified that he received the report of defilement from the complainant who reported that she had been defiled by a person who was well known to her. He escorted the complainant to Isiolo General Hospital and issued her with a P.3 form. The officer testified that the complainant had sustained an injury on the finger during the ordeal. He produced the complainant's birth certificate as exhibit 3. He also identified the P.3 form which was issued to complainant.

8. FK (P.W 4) is the complainant's neighbour. She testified that the complainant went to her house early in the morning at 6.00 a.m. and reported that somebody had attacked her during the night and attempted to defile her. The complainant revealed to her that the person who attacked her was Boru who is the accused in this case. She then telephoned the complainant's mother who was away.

9. Daudi Dabaso (P.W 5) from Isiolo Teaching and Referral Hospital testified that he examined the complainant B.K who was fourteen (14) years old and presented a case of defilement. On examination,

she walked with difficulties, she had a cut wound on the left finger which was bleeding and swollen. It was also tender. He examined the complainant six hours after the incident. That there were visible bruises within six (6) o'clock of the vagina walls. She was in her menses and thus, had pus cells. The hymen was broken, there is an old scar. Pregnancy test was negative. He concluded that there was penetration due to the bruises on the vagina walls. He filled a P.3 form which he produced as exhibit 1. He also produced the lab request form and the PRC (Post Rape Case.)

Defence Case.

10. The appellant gave his unsworn defence and called one witness who is his wife. The gist of his defence is that he was at his home on that material night with his family and did not commit the offence.

11. The appeal was disposed of by way of written submissions.

Appellant's Submissions

12. He submitted the grounds of appeal and urged the court to rely on Maina Vs Republic (1970). He submits that the case was not proved beyond any reasonable doubts. He argues that the trial magistrate failed to find that the family of the complainant has a grudge with him. On the medical evidence, it is the appellants submissions that based on the evidence of the Clinical Officer who gave evidence as P.w 5 there was no reliable evidence to proof the charge of defilement. He submits that penetration was surrounded by uncertainty, the prosecution had the burden to show the essential link between the penetration and the appellant. He relies on the Court of Appeal decision in David Kuria Mwanangu Vs Republic 2014 eKLR, Philip Mwiruni Ndaruga Vs Republic CR Appeal (2016) eKLR.

13. The appellant further submits that the time spent in custody was not considered when passing sentence. He relies on Ahamad Abolfathi Mohammed & another Vs Republic (2018) eKLR. Finally, the appellant submits his defence was not considered. His contention is that the trial court should have given him the benefit of doubts. He relies on R.V Sukha Singh s/o Wazir Singh and others (1939) 3ACA 145.

Respondent's Submissions

14. The respondent submits that the essential ingredients of the charge of defilement have been proved beyond any reasonable doubts. The respondent refers to the case of Charles Wamukoya Karani Vs Republic Cr. Appeal No. 72/2013 where the court stated that "The critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant." He also relies on Joseph Kieti Seet Vs Republic (2014) eKLR.

15. He urges the court to find that the appeal fails. I have considered the grounds of appeal, the submissions and the proceedings before the trial court. The issues which arise for determination are-;

    a. Whether the prosecution proved the charge of defilement beyond any reasonable doubts.

    b. Whether the defence of the appellant was considered.

    c. Whether the time spent in custody was considered as required under Section 333 (2) of the Criminal Procedure Code.

Analysis and Determination

16. This is a first appeal and this court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and

the appellate court's own independent finding. This principle has been considered in various decisions of this court and those of the Court of Appeal. The leading authority on the subject is Okeno Versus Republic (1972) EA 32.

In this case the court stated-;

> " The duty of the 1st appellate court is to analyze, reevaluate the evidence which was before the trial court and itself come up with its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that. The Court of Appeal in the case of David Njuguna Wairimu Versus Republic (2010) while citing with approval the case of Okeno Versus Republic Supra, stated as follows:- The duty of the first appellate court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may depending on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."
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> The court of appeal further stated that – " an appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (Padya Versus Republic 1975 EA 336) and that the appellate court's own decision on the evidence. the appellate court must itself weigh the conflicting evidence and draw its own conclusions.
>
> In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter's Versus Sunday Post 1978 E.A 424".

17. I will proceed and consider the grounds of appeal-;

    a) Whether the charge of defilement was proved beyond any reasonable doubts

       Section 8(1) of the *Sexual offences Act* defines defilement as follows-:

       > "A person who commits an Act which causes penetration with a child is guilty of the offence termed as defilement.

On the other hand, Section 8(3) of the *Sexual Offences Act* proves as follows-;

> " 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."

18. Based on these definitions, the critical ingredients which the prosecution must establish are the age of the victim, penetration, and the identification of the perpetrator.

    The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic (2016 eKLR stated as follows on the proof of age-;

    > " ... the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible

form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable."

See also the case cited by the respondent – Joseph Kieti Sect Vs Republic, (Supra) where it was stated that "it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence."

In the case of Francis Omuroni Vs Uganda Court of Appeal No. 2/2000, the court held that "in defilement cases medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determined the age of the victim in the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

Proof of age is important in defilement cases as it determines the sentence to be imposed on the perpetrator upon conviction. The younger the victim the harsher the sentence. The appellant in this case has not challenged the age of the complainant that the age of the complainant is not in dispute. The age of the complainant was proved with the production of the birth certificate as exhibit – 3. It shows that the complainant was born on 19th April 2007 and therefore at the time the offence was committed she was fourteen years old. The complainant, (P.W 1) and her mother adduced evidence that the complainant was fourteen years old when the offence was committed. The P.3 form also shows that the age of the complainant was estimated to be fourteen years. I find that the prosecution adduced sufficient evidence to prove that the complainant was fourteen years at the time the offence was committed. The age of the complainant was proved beyond any reasonable doubt.

19. Penetration

Section 2 (1) of the *Sexual Offences Act* defines penetration as -;

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

The appellant has challenged the fact of penetration on the basis of the medical evidence which was adduced by the Clinical Officer P.w 5 and stated – "her hymen was penetrated – old scar". The appellant submits that the Clinical Officer explained that there was no reliable evidence that there was paramount prove of defilement. The record however shows that the Clinical Officer did not give such evidence. What the Clinical Officer stated is as follows-; "I concluded that there was penetration due to the bruises within 6 O'clock i.e the vaginal wall. The penetration was forceful. Lab investigations posted nothing significant " see page 27 of the record lines 10 – 12 . further more the P.3 form notes that the complainant had tenderness on lower abdomen and left leg. On the other hand, the complainant testified that the appellant defiled her forcefully, she went on to say he started by inserting his fingers inside her vagina. After that he inserted his penis inside my vagina. See page 10 of the record line 21 & 22. The medical evidence corroborates the testimony of the complainant that the appellant defiled her. The evidence of the complainant was not challenged in cross examination. She maintained that she told the truth that the appellant defiled her. The contention that the appellant had her hymen broken with an old scar does not mean that she could not be defiled. Defilement is not necessarily proved by presence of freshly broken hymen. This is because a hymen can be broken by other factors and not through defilement only.

This issue was considered in the Court of Appeal in the case of P.K.W Vs Republic (2012 eKLR where the court stated-;

In their analysis of the evidence on record the two courts below do not seem to have direct their minds to those details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only raptured by sexual intercourse. Hymen also known as vaginal Membrane found in the orifice of the female vagina (sic) with which most female infants are born. Inmost cases of sexual offences we have dealt with courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled a prove of the charge. That is however an erroneous assumption. Scientific and medial evidence has proved that some girls are not even born with hymen. Those who have there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, musturbation, injury and medical examination can also rapture the hymen, when a girl engages in vigorous physical activities like horse back riding, bicycle riding, there can also be natural tearing of the hymen. See the Canadian case of the Queen Vs Emanuel Vincent Quintanilla (1999) "AB" "QB" 760.'

20. The findings by the doctor are that there were bruises on the vaginal wall which proved penetration and defilement. I find that with the complainant's testimony and the fact that medical evidence corroborated the testimony of the complainant, there was prove beyond any reasonable doubts that the complainant was penetrated on the material day. The not freshly broken hymen does not rule out defilement. The definition of penetration on the other hand is that it can be partial or complete insertion. The court must look at all the evidence present before it to determine whether there was penetration- partial or complete.

Identification of the Perpetrator

21. The complainant testified that the appellant was the one who defiled her. She told the court that the appellant had a torch and that it was at dawn with sufficient light to identify the assailant. The testimony of the complainant is that the appellant took sometime with her and he was talking. The appellant was well known to the complainant, a fact which the appellant admitted. The prosecution called P.W 4 who testified that the complainant went to her house early in the morning at 6.00 a.m. She learnt that somebody had attacked her the night before. The child revealed that the person who attacked her was Boru who she identified as the appellant in this case. The fact that the complainant mentioned the appellant soon after the ordeal is prove that she identified the perpetrator. The appellant submits that he was implicated due to a grudge. The appellant is the one who raised the issue of the grudge. Looking at what he has alleged it is more likely that he is the one who attacked the complainant to settle scores with her mother. This alleged grudge cannot be interpreted in any other way. I find that the prosecution proved beyond any reasonable doubts that the appellant was the perpetrator of this crime.

B) Whether the defence of the appellant was considered

22. At page 40 of the record, the trial magistrate considered the defence and stated that the defence was a mere denial thus doubtful. That she did not believe the testimony of the witness. The trial court did consider the defence of the appellant and gave reasons to rejecting it. I have considered the defence tendered. It was an alibi defence. It is trite law that the defence of alibi must be raised at the earliest stage to enable the prosecution to investigate it. This is because even where the appellant (accused) raises that

defence he has no obligation to prove his alibi. In criminal cases the burden of proof does not shift. In this case of R.V – Sukha Singh S/o Wazir Singh and others (1939) 6 E.A C.A 145 the court held that-;

> " if a person accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can, because firstly if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuine, proceedings must stop."
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> This remains the position to this day. The Court of Appeal in the case of Kiarie Vs Republic (1984) KLR stated as follows on defence of alibi -;
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>> "An alibi defence raises a specific defence and an accused person who puts an alibi defnce does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduced in the mind of a court a doubt that is not unreasonable"
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>> When the defence of alibi is raised at the defence stage, it should not escape the scrutiny of the court. The prosecution no doubt required adequate notice to investigate the allegation of alibi defence. The governing principle on alibi defence is that it must be disclosed early enough in the proceedings to permit it to be investigated by the police. That determines the weight the court will give to it.
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>> In this case the appellant raised the defence too late in the day. Nevertheless, I have considered this defence and find that the appellant may have spent the night in his house and woke up early in the pretext of going to the mosque. The testimony of P.W 1 is that the appellant said he was rushing to go to the mosque. The defence advanced by the appellant has been dislodged and the fact that he went to the complainant's house and defiled her is credible. The trial magistrate acted properly in rejecting the defence.

(c) Whether the time spent in custody was considered

23. Section 333 (2) of the Criminal Procedure Code provides as follows-;

    (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. "

    It is clear from the section that the period spent in custody must be taken into consideration.

    Ahamad Abolfathi Mohammed & another Vs Republic [2018] eKLR where the court of appeal held that-;

    > "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 33(2) of the Criminal Procedure Code. By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellant had been in custody, he ordered

that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.

It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed that the appellants' sentence of imprisonment, to run from the date of their arrest on 19th June 2019.

3. The same court in Bethwel Wilson Kibor Vs Republic (2009) 2009 eKLR expressed itself as follows-;

> "By proviso to Section333 (2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month."

24. Thus taking into account the period spent in custody requires that the period spent in custody must be taken into account to reduce the sentence which the court eventually passes on the accused person. In this case, the trial magistrate did not take into account the period spent in custody. When passing the sentence, the appeal on this ground has merits.

25. The appellant had raised the ground that vital and crucial witnesses were not called. No submissions were advanced on this ground. Be that as it may, it is trite law that no particular number of witnesses are required for the proof of a fact. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that "No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact."

26. In the case of Keter Vs Republic (2007) E.A 135 it was held that –

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

Thus, the prosecution has the discretion to determine the witnesses it wishes to call and can only be faulted if it fails to call crucial witnesses for ulterior motives. This is because it bears the burden to proof it case beyond any reasonable doubts and must therefore exercise discretion to determine who to call as a witness to discharge that burden. In this case I am of the view that the prosecution called all the key and crucial witnesses to support its case. See section 143 of the *evidence act*.

Conclusion

27. I find that the trial magistrate considered all the evidence presented before her and properly convicted the appellant and exercised her discretion in sentencing. The learned trial magistrate only erred in failing to consider the period the appellant spent in custody. In this regard the appeal partially succeeds. I therefore order as follows-:

    1. The appeal on the sentence succeeds. The sentence of ten years shall run from 16th August, 2021 in order to take into account the period the appellant spent in custody awaiting trial.

    2. The appeal on the other grounds is without merits and is dismissed.

    3. The Deputy Registrar to serve the Officer in Charge of the prison where the appellant is serving sentence with an amended committal warrant and a copy of the judgment for compliance.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF APRIL 2024

In presence of

Court assistant – Tupet

Appellant

HON. LADY JUSTICE L. GITARI

HIGH COURT -JUDGE