Waiganjo v Republic (Criminal Appeal E033 of 2022)
[2024] KEHC 3955 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E033 OF 2022

AK NDUNG'U, J

APRIL 23, 2024

BETWEEN

SILAS MAINA WAIGANJO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 33 of 2020– B.M Mararo, SPM)

JUDGMENT

1. The Appellant in this appeal, Silas Maina Waiganjo was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. On 01/04/2022, he was sentenced to twenty five (25) years imprisonment.

2. The particulars were that on the night of 28/06/2020 at Kieni east subcounty within Nyeri county unlawfully and intentionally caused his penis to penetrate the vagina of EMK a child aged sixteen (16) years.

3. Being dissatisfied with the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 11/04/2022 challenging the conviction and the sentence on the following grounds;

    i. The learned magistrate failed to note that ingredients of the offence, more specifically the age was not proved since evidence on age was contradicting.

    ii. Th learned magistrate failed to note that the investigating officer did not conduct any investigation since he failed to visit the scene of crime.

    iii. The learned magistrate failed to note that positive identification of the assailant was not possible since the ordeal was alleged to have happened at night.

iv. The learned magistrate rejected his defence without cogent reasons.

v. The learned magistrate failed to note that there was no evidence that was produced to prove that PW1 was a student.

4. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the circumstances surrounding identification were not easy for the complainant to identify the assailant in that the attack was at night, her head was covered, she lost consciousness and she had no light. There was need for identification parade since the complainant told the court that it was her first time to see the Appellant and the clinician testified that he was informed that she was defiled by someone unknown to her. Reliance was placed on the case of Charles O. Maitanyi vs Republic & Kariuki Njiru & 7 others vs Republic where it was emphasised that on evidence of identification, court must evaluate the believability of the witness, witness intelligence, capacity for observation, reasoning and memory. The accuracy of witness testimony depends on the opportunity the witness had to observe and remember that person and whether the victim knew the person before. Thus, there was need for identification parade.

5. On penetration, he submitted that the clinician evidence cast doubt on whether defilement occurred since he stated that fresh broken hymen could have been caused by any other means other than sexual penetration. Further, a missing hymen is not automatic proof of penetration as was held in PKW VS Republic (2012) eKLR. Therefore, it was upon the prosecution to establish that complainant's hymen was torn by the act of defilement.

6. He further submitted that the prosecution evidence was riddled with contradictions in that PW1 testified that the material date was 28/08/2020 whereas the charge sheet indicated 28/06/2020 and PW3 testified that it was on 28/06/2021. Further, PW1 testified that she did not know how he was arrested and she did not know him whereas PW6 testified the complainant led Madam Mueni to his arrest and that the complainant knew him. That the inconsistencies affirmed that the prosecution's witnesses were not believable and credible. Evidence of PW4 also casted doubt on whether she identified him. Therefore, the contradictions in the prosecution's case went to the root of the matter hence, his conviction was not justified.

7. That the complainant did not disclose to the investigation officer how the offence was committed which created doubt as to whether the offence was committed. That the witnesses were not truthful and therefore not believable. That the prosecution's case lacked credibility, was inconsistent and contradictory and therefore they failed to discharge their duty of proving the case beyond reasonable doubt. As to sentence, he urged the court to interfere with the sentence in line with developing jurisprudence.

8. In rejoinder, the Respondent's counsel submitted that the element of penetration was established as PW1 testified that she was bleeding from her private parts and PW5 confirmed that there was forceful penetration. As to age, her age was proved by the birth certificate produced as Pexhibit1. As to identification, she submitted that PW1, 2, 3 and 4 they all positively identified the Appellant as the assailant. PW2 and 3 testified that they rushed to the scene and found the Appellant on top of the complainant. PW4 also found the Appellant at the scene and was able to identify him as a customer whom she had earlier served at her hotel. Therefore, all elements of defilement were proved and was sufficiently corroborated.

9. As to consistencies, she submitted that no two people remember the exact set of facts in the exact same way hence, contradictions in the prosecution's case are often a sign of forthrightness not insincerity. Reliance was placed on the case of MTG V Republic (2022) eKLR where the court held that

contradictions that would be fatal must relate to material facts and must be substantial and must deal with reals substance of the case. That there were no contradictions on who defiled the minor and there were no contradictions as to age therefore, even if there were contradictions, they would be peripheral hence, inconsequential. On the Appellant's defence, she submitted that his defence was a mere denial and he did not attempt to give an explanation that would cast doubts on the facts set out by the prosecution.

10. On the sentence, she submitted that though the section provides for 15 years imprisonment, the court is not bound by the minimum sentences prescribed as the court balances between the mitigation by accused vis-à-vis the aggravating factors and therefore the sentence was legal. That the trial court considered the aggravating circumstances of the offence and therefore the sentence was necessary. Further, it was upon the Appellant to prove that the sentence imposed was excessive, or the trial court overlooked some material factor or acted on a wrong principle.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

13. The evidence before the trial court was as follows. The complainant testified as PW1. She stated that she was a pupil in form 3 and she was 17 years old. She stated that on the material day, she had gone to her mother's hotel and she left at 8:00pm. While at the gate, she heard someone call her name. It was the Appellant. She inquired what he wanted and he said he wanted sugarcane. She told her father who said there was none and she informed the Appellant. After a while, she was requested by her father to go and lock in the cows with her brother and as they were going to get the cows, she felt her head been covered (sic). She checked and saw the Appellant. He pulled her while she shouted and her brother ran home. She lost consciousness and heard her father's voice saying 'unaharibu mtoto wangu.' Her father was beating up the person she had seen. Her trouser had been removed and she was naked and she was lying on the ground. Her mother also appeared and they went to police station and to hospital.

14. She testified that she was bleeding from her private parts. She stated that she did not know how the Appellant was arrested as she left him at the scene with her father. She maintained that she saw him clearly when he asked for sugarcane and saw him again when she left to get the cows. That she had not seen him before.

15. On cross examination, she testified that he found her at their gate at 5:00pm and there was sufficient light. He did not enter into their home. That they went for cows at 7:00pm and there was sufficient light. That she saw him being beaten and her mother spoke to him when she got to the scene. She testified on re-examination that she saw him at her mother's hotel and at their gate.

16. PW2, the complainant's brother testified that they were told to go and get the cows by their father. The complainant was ahead and someone emerged who held her and covered her eyes with her hood. He was pulling her and he ran home and called their father. They took torches which they lit. They saw the complainant ahead and someone was on top of her. She was not talking. Their father hit him with a bakora and they saw him clearly. He did not speak. He testified that the assailant struggled with their father and he started crying. He did not see his sister stand and he left for home. He had not seen him before but it was the Appellant. His mother said that the Appellant used to take tea at her hotel. He testified on cross examination that it was around 7:00pm and the Appellant was the one.

17. PW3 the complainant's father testified that the complainant returned home at around 5:30 p.m. from her mother's hotel and informed her that someone wanted sugarcane. He had followed her. She told him that there was no sugarcane. At about 7:00pm, he instructed the complainant and PW2 to go and put cows in the paddock and after sometime, PW2 ran to him panting and said that someone had held the complainant forcefully. He got up, called his wife and they took torches and PW2 led him to where he had left the complainant. She had been dragged into a thickest and she was under a person and he shouted 'usiuwe mtoto wangu'. He hit the assailant with his walking stick and noticed that the complainant had fainted and both their trousers were drawn halfway.

18. The Appellant could not flee and he asked for forgiveness. He stated that he had not known him from before. The complainant regained consciousness and started heading home where she met her mother. The Appellant fled. That the complainant said that he had seen the Appellant at her mother's hotel during the day. He contacted the assistant chief who said that he knew the assailant. He produced the complainant's birth certificate as Pexhibit1. On cross examination, he testified that he was on top of the complainant and that he did not know him. He saw him since he had a torch. That he could not run as he was unwell. He testified on re-examination that it was the Appellant who defiled the complainant as he saw him using a torch. He spoke to him as he sought for forgiveness.

19. PW4 the complainant's mother confirmed that the complainant was at her hotel but later left. That she got a call from PW3 who requested her to go as the complainant had been caught by someone. As she was heading home, she met the complainant who was crying and who informed her that someone had defiled her. The complainant informed her that the assailant was at the scene. At the scene, she found the Appellant and she spoke to him. She was using the light from her phone's torch. She testified that PW2 and PW3 had torches as well. That she saw it was Maina who had been at her hotel and had made eggs for him earlier. She confronted him and asked him why he wanted to spoil her child. She left and took the complainant to hospital and she did not know how he was arrested.

20. On cross examination, she testified that she knew him as he used to go to her hotel. That she found him at the scene with trousers drawn to the knees. It was him and he had had eggs at her hotel. They had torches and there was moonlight. That he fled from the scene.

21. PW5, the clinician testified that upon examination, the complainant's external genitalia was bloodish, the hymen was freshly broken, there were few pus cells, no spermatozoa and other tests were negative. She produced the treatment notes, P3 and PRC form as Pexhibit 2, 3, and 4 respectively. She testified on cross examination that the complainant was seen by another doctor who was on transfer. She stated that hymen can be broken by other factors other than sexual penetration. She stated on re-examination that she filled the P3 form on 01/07/2020 and she relied on minor's history and physical examination. That there was forceful penetration.

22. PW6 testified that he took over the matter from his colleague Josephine Mueni who was on transfer. He confirmed that a report was made and the complainant was escorted to hospital. That the complainant led the police to the arrest of the Appellant.

23. In his sworn defence, the Appellant testified that he was called by his sister to help her with construction at Blueline on 14/06/2020. On 05/07/2020, he was arrested while at home by three officers who said that there was a lady who had complained about him and he was taken to police station. He testified on cross examination that he did not know the complainant and saw them in court and that on 28/06/2020, he was at Nyeri town though he had nothing to show that he was in Nyeri.

24. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be

penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

25. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

26. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of 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 for the sentence to be imposed will be dependent on the age of the victim."

27. In the present appeal, age is not disputed. The complainant testified that she was 17 years old at the time of testifying which was confirmed by PW3 and 4. PW4 testified that she was 16 years old at the material time of the offence. PW3 produced her birth certificate as Pexhibit 1 which shows that she was born on 30/07/2003. The offence was committed on 28/06/2020 and therefore she was 16 years at the material time hence, a child for the purpose of sexual offences.

28. As regards to proof of penetration, he submitted that the clinician evidence cast doubt on whether defilement occurred since he stated that fresh broken hymen could have been caused by any other means other than sexual penetration. Further, a missing hymen is not automatic proof of penetration and it was upon the prosecution to establish that complainant's hymen was torn by the act of defilement.

29. The complainant testified that after her face was covered, she lost consciousness and regained it later and heard her father's voice talking to the assailant. Her trouser had been removed and she was naked and she was lying on the ground. She was bleeding from her private parts. PW2 and PW3 testified that when they got to the scene, they saw the assailant who was on top of the complainant. PW2 said that the complainant was not talking. PW3 testified that the complainant had fainted and her trouser and that of the assailant had been drawn halfway. PW4 testified on cross examination that she found the Appellant at the scene with his trouser drawn to the knees.

30. PW5 was the clinical officer. He testified that he did not fill the PRC form but was filled by his colleague who was on transfer. No basis was laid why the medical officer who prepared the PRC form could not be availed. He did not even state whether he was familiar with her handwriting and signature or not. He however stated that he filled the P3 form. The P3 form was filled on 01/07/2020, three days after the ordeal. He stated that he relied on the minor's history and physical examination. According to the P3 form, the complainant's hymen was freshly broken. She had bloody labia majora and minora and hyperaemic, few pus cells were seen and there was also a bloody discharge and his conclusion was that there was an indication of forceful penetration.

31. The Appellant has attempted to discredit the medical evidence adduced indicating that a hymen can be broken by various factors. While I consider the medical evidence in this case cogent, it is an established legal principle that defilement can be proved by the evidence of the victim alone and circumstantial evidence as it has been held in a myriad of cases. In AML v Republic [2012] eKLR (Mombasa), the court stated that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

32. This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

33. In our instant case, there is evidence of eye witnesses, PW2, 3 and 4. PW2 and 3 found the assailant on top of the complainant. Their trousers were drawn halfway. PW4 also testified that when she got to the scene, the assailant's trousers were drawn to the knees. It is therefore my view that penetration was proved to the required standard.

34. As to identity, the Appellant's position is that circumstances surrounding identity were not favourable for a clear identification. He submitted that the attack was at night, the complainant's head was covered, she lost consciousness and she had no light. That there was need of identification parade since the complainant told the court that it was her first time to see the Appellant and the clinician testified that he was informed that she was defiled by someone unknown to her.

35. It is well settled that a conviction resting entirely on identity of an accused person which he disputes invariably causes uneasiness even when the case is that of recognition as opposed to that of identification of a stranger. The principles to be followed when determining whether identification was proper and free from error were set in the case of R vs Turnbull [1976] 3 ALL ER 549, it was stated by the Lord Chief Justice of England and Wales as follows:

> " First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance" (emphasis added).

36. The principles enunciated in this case have been applied in Kenya in several cases. In Cleophus Otieno Wamunga vs. Republic (1989) KLR 424, the Court of Appeal held that;

> " Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

37. Applying the above tests in our instant case, the circumstances surrounding identification were that the Appellant was indeed a stranger to the complainant. The offence was committed at night. Her face was covered when the assailant pulled her and she lost consciousness to wake up and find her father beating

up the assailant. She however testified that she had seen the Appellant's at her mother's hotel during the day. The assailant also approached her while at her gate and he called her by her names. She stated that it was around 8:00pm whereas PW3 testified that it was about 5:30p.m when the complainant informed him that someone wanted sugarcane. She further testified that she was able to see him when she regained consciousness.

38. PW2 and PW3 testified that they were able to identity the Appellant. PW3 testified that by the aid of the torches that he and PW2 had, he was able to see clearly. He further testified that he conversed with the Appellant who even begged for his forgiveness. He stated that he had not seen the Appellant from before.

39. PW4 testified that when she arrived at the scene, she recognised the Appellant as Maina. A regular customer at her hotel and that she had even made eggs for him earlier on that day. She stated that she even asked him why he wanted to spoil her child. She stated that she was able to see through the aid of her phone's torch, PW2 and 3 torches and that there was moonlight.

40. From the above, it appears that the assailant spent a considerable time with the witnesses who were at the scene. He even conversed with them and with the aid of the light from their torches, they were able to see him. PW4 even recognised the Appellant as her customer. Am satisfied that the identification of the Appellant was free from error.

41. As to contradictions, he submitted that the prosecution's evidence was riddled with contradictions in that PW1 testified that the material date was 28/08/2020 whereas the charge sheet indicated 28/06/2020 and PW3 testified that it was on 28/06/2021. Further, PW1 testified that she did not know how he was arrested and she did not know him whereas PW6 testified that the complainant led Madam Mueni to his arrest and that the complainant knew him.

42. When it comes to contradictions, it is trite law as set out in numerous authorities 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 affect the main substance of the prosecution's case as was held in Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).

43. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in Njuki & Other Vs Republic (2002) 1 KLR 771 held that:

> " Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indisrepanincies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code".

44. See also the Court of Appeal in the case of Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR the court stated:-

> " It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main

issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it."

45. It therefore follows that the contradictions and inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful and create doubt as to the guilt of the Appellant. The contradictions noted by the Appellant are minor and did not affect the substance of the charge.

46. As to sentence, it is noted that the Appellant was charged under section 8(3) instead of section 8(4) of the *Sexual Offences Act* since it was established that the complainant was 16 years old at the time of the offence. The charge sheet was not amended and the trial court did not address this anomaly. However, the section relates to the sentence only and thus no prejudice was occasioned upon the Appellant.

47. Section 8(4) of the Act provides that

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

48. The above section set the mandatory minimum sentence at 15 years. The Appellant was sentenced to 25 years imprisonment. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

49. The trial magistrate while sentencing the appellant considered his mitigation and aggravating factor in that the offence was committed in a violent manner and the complainant was scared for life. However, the mandatory minimum sentence under the relevant section of the law being 15 years, I find a sentence of 25 years manifestly excessive. On that ground, am inclined to interfere with the sentence.

50. With the result that the appeal on conviction is fails and is dismissed. As regards sentence, and for reason above stated, I set aside the sentence and substitute thereof a sentence of 18 years imprisonment to run from the date of sentence in the lower court.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024

A.K. NDUNG'U

JUDGE