Were v Republic (Criminal Appeal E030 of 2021)
[2024] KEHC 6401 (KLR) (30 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E030 OF 2021

SC CHIRCHIR, J

MAY 30, 2024

BETWEEN

DAVID WERE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of Hon. J.R Ndururi, PM delivered on 9th August 2021 in Kakamega Chief Magistrate's court Criminal case No. 111 of 2018)

JUDGMENT

1. David Were (the Appellant was charged with defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 (The Act)
2. The particulars of the offence were that on the 18th day of September 2018 at Kakamega county Intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of BO , a child aged 8 years (* particulars withheld)
3. He faced 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
4. The Appellant was convicted of the main charge and sentenced to life imprisonment
5. He was aggrieved by the outcome and filed a petition of Appeal , and later filed what he referred to as supplementary grounds of Appeal. I have perused both documents and noted that some the grounds are repetitive. I have therefore combined them and paraphrased them as follows:
    a. That the learned trial magistrate erred in law and fact by failing to observe that a substantial injustice had been occasioned on the appellant by failure to observe Article 50 (2) (g) and (h) of *the constitution* of Kenya 2010.

b. That the trial Magistrate erred in law and in fact by failure to observe that the prosecution failed to prove their case to the require standard ,beyond reasonable doubt.

c. That the trial magistrate erred in law and in fact by failure to observe that the identification of the perpetrator had been flawed as no names were given in the first report, occasioning a miscarriage of justice.

d. That the trial magistrate erred in law and in fact by failure to observe that the penetration was not proved to the required standard hence led to an injustice.

e. That there occurred material contradiction evidence and inconsistencies that gave rise to great discrepancies that weakened and destroyed the inferences of his guilt .

f. That the trial magistrate made an error of law on the face of the record and/or made a blatant disregard to the law by failing to observe section 14 of the CPC and section 191 and section 2 of the children's Act hence sentenced to life occasioning a misjudgement.

g. That the trial magistrate erred in law and in fact by failure to record on the proceeding whether he was satisfied that the victim was telling the truth hence misguided.

h. That the trial magistrate erred in law and fact by failure to indicate the points and reasons of the finding leading to an injustice.

i. That the trial magistrate erred in law and in fact by basing on insufficient evidence to convict

j. That the trial t magistrate erred in law and in fact by failure to weigh and evaluate his defence of an alibi and the existing grudge between PW2 hence prejudiced

k. That the Trial court erroneously convicted and sentenced the Appellant to life imprisonment without considering that the Appellant was a child of 16 years at the time of the alleged offence.

l. That the trial court convicted the Appellant without considering that there was no forensic evidence linking him to the offence.

m. That the trial magistrate failed to consider that this was a systematic planned strategy to implicate him in a crime

6. The Appeal was canvassed by way of written submissions.

Appellant's submissions

7. It is the Appellant's submission that there was a great miscarriage of justice as he was not provided with legal representation contrary to Article 50 (2)(g) and (h) . He relied on the case of of Pett vs. greyhound racing Association (1968)2 ALL ER at Page 459 and the case of Ndegwa vs. Rep (1985) KLR 534.to buttress his submissions.

8. He avers that he was mixed with other inmates and imposed with a harsh life imprisonment and relied in the case of 400 and 6 others vs. attorney general and another (2017) Eklr(sic) in which , taking into consideration the pre-trial period, and the fact that the accused were minors , the court ordered for their release.

9. That his age was not ascertained as it was placed between 17-18 years

10. The Appellant further submits that the sentence imposed upon him was unconstitutional , harsh, excessive and inhuman and that in any event mandatory minimum sentences have been declared

unconstitutional. He has relied on the judgment of Mativo J in Edwin Wachira and 13 others vs. Republic (2022)eKLR.

11. On the issue of identification, he asserts that there was a lot of contradiction and inconsistences on the identification by PW1 as there was a lot of discrepancies on the complexion, height, bodily features or the attire he wore.

12. It is further submitted that a missing hymen was not a conclusive proof of penetration and relies on the case of Kisii HCCRA NO. 126 of 2013 Josephat Machoka Nyabwabu vs. Republic .

13. It is his final submission that no DNA was carried out pursuant to section to section 35 of the *sexual offences Act*, and that the court failed to record reasons for believing that the complainant was telling the truth.

Respondent submissions

14. On the age of the complainant , the Respondent submits that an age assessment was carried out which proved the minor was 8 years at the time of the offence.

15. On the element of penetration, it is submitted that the PW3 testimony and the medical documents produced proved penetration.

16. The respondent further submits that the accused was positively identified by the complainant as the person who had committed the offence as David were who was their neighbour. She stated that it was PW1's evidence that the accused was their neighbour known as Kevo but when he was caught she knew him as pastor kevo.

17. On the Appellant's claim that he was denied the right to fair trial specifically the right to legal representation during the trial, the Respondent has submitted that notwithstanding the provisions of section 186 of the children's Act (now repealed) the right is not absolute but has to be qualified where the penalty is not death. The respondent has relied on the case of David Njoroge Macharia Vs. Republic (2011) eKLR Nairobi Criminal appeal No. 497 of 2007 as well as the case of Karisa Chengo & 2 others vs. R (2015) eKLR to back up its submissions.

18. She avers that the accused never mentioned the need to have a legal representation and thus it is safe to conclude that he waived his right to representation.

19. On the issue of sentencing, the respondent submits that the court directed its mind properly to the provisions of section 191 of the children's Act but differ on the life sentence imposed. She further submits that since the Appellant was a minor at the time of committing the offence he ought to have been given a term sentence . She then proposes 15 years while relying on the case of SCN v Republic (2018) eKLR where the sentence for life imprisonment was reduced to 10 years.

Determination

20. It is the duty of this court as the first appellate court to review the evidence afresh, re-evaluate it and arrive at its own conclusion (Ref: Okeno vs Republic (1972) E.A 132)

21. PW1, was the complainant who identified the accused as David Were, his neighbour. She recalled that on 2018, she was walking on the road when she met the accused she alleged that he took her to his home, removed her clothes then removed his clothes placed her on the bed and put his "dudu yake" on hers.

22. She recalled that when he was done, he went to check outside to see if there was anyone and told her to go home. She went home and told her grandmother who took her to the police and later to Navakholo hospital for treatment. The accused was later arrested.

23. During cross examination, she stated that the accused called her and raped her and that no one told her what to say in court.

24. PW2 testified that she was the mother to the complainant. She stated that the accused was their neighbour and was known as pastor kevo; that he pretended to be a pastor but she knew him as David were.

25. She recalled that on 18/9/18 the complainant was playing with other children and when she went to look for the minor but none of the children knew of her whereabouts. She further stated that when the minor came home, she asked her where she had been and that's when she confessed that the , pastor Kevo had taken her to his home and took her to his bed; and that he told her not to scream; and that he did "tabia mbaya' to her.

26. She testified that she examined the complainant and saw blood and whitish substance on her private part. she screamed, and people came. They went to arrest the accused who sought for forgiveness. The people wanted to stone the accused but she stopped them and Malaha AP camp.

27. She stated that the minor was taken to Navakholo hospital where she was treated and that the doctor confirmed that she had been defiled.

28. During cross examination, she stated that the accused identified himself as pastor Kevo but at the station, they came to know him as David Were. That the medical report indicated that the accused had defiled the minor.

29. PW3 was the clinical officer attached to Navakholo sub-county Hospital. He ascertained that he was the one who filled the P3 form on 19/9/2019 and had examined the complainant. He stated that the minor was brought to hospital on 18/9/2019 and the examination was conducted 2 hours after the alleged defilement.

30. On examination , he found that there was fresh blood stains around the hymen; the hymen was freshly raptured and there was whitish discharge on the vulva. He stated that a few spermatozoa were found. He concluded that there was sexual intercourse. He produced the p3 form as PMFI -1 and the treatment note book as PMFI 2. he produced the PRC form which he had filled

31. He further testified that he assessed the age of the complainant to be 8 years . He also assessed the accused and he found him to be between 17-18 years.

32. PW4 the investigating officer told the court that on 18/9/2019, she was handed the case to investigate. She witnesses' statements. she escorted the complainant for medical examination .

33. According to the complainant, she was playing on 18/9/2018 at 3.00 p.m. when the accused took her to his "simba" where he defiled her and warned her not to tell anyone. That the accused was arrested by the villagers and taken to Malaha AP camp and later escorted to Navakholo police station and charged for defilement.

34. The prosecution closed its case and the accused was put on his defence.

35. The accused gave an unsworn testimony and called two witnesses.

36. The accused testified that he had just sat for his KCPE examination that year and he was arrested while in church with other children. He stated that the parents of the complainant took him to their home and told him to confess , otherwise they were going to kill him. He admitted that he was with the complainant at church and not at his home and denied defiling her.

37. He closed his defence case and the court delivered its judgment and found the accused guilty of the offence.

38. The following issues arise for determination

    (i) Whether the Appellant's right to legal representation was violated

    (ii) Whether the prosecution proved its case to the desired threshold;

Whether the Appellant's right to legal representation was violated.

39. The Appellant told the court that he was 16 years old, thereupon which the court ordered for an Age assessment to be carried out. The assessment was done was 19.09.2018 at Navakolo sub- county hospital. The doctor estimated his age at between 16 and 17 years. On October 2020, the Appellant brought a birth certificate which indicated that he was 13 years at the time of the offence. I have looked at the said birth certificate and I have doubts about its credibility, and this is why: a). Firstly ,while the age assessment was done on 19.9.2018, it took the Appellant two years to avail the birth certificate . It raises the question, as to why he didn't he avail the birth certificate before.

    b). Secondly, The alleged purported certificate indicate that the Appellant was 13 years old at the time of the incident. This contradicts the age that the Appellant had given the court, that is the age of 16 years. More significantly the age assessment tallies with the age that the Appellant had given the court at the time of trial. It would appear that the birth certificate was prepared for purposes of this case.

40. Consequently I find the age assessment report more dependable as it tallies with the Appellant own report about his age.

41. Nevertheless, the fact remains that the Appellant was a child at the time of the time of trial. The pertinent question then is , was he entitled to legal representation as a matter of right?

42. Article 50 (2)(g) of *the constitution* obligates the court to promptly informed an accused person of his right to legal representation, and Article 50(2) (h), requires that an advocate be assigned if substantial injustice is likely to occur as a result of non- representation.

43. Under section 36(1) of the *Legal Aid Act* No.3 of 2016, a child is among the persons eligible to receive Legal aid services.

44. Section 43 of the same Act, set out the duties of the court. The section provides as follows-

    1. "A court before which an unrepresented accused person is presented shall-

        a. Promptly inform the accused of his or her right to legal representation

        b. If substantial injustice is likely to result, promptly inform the accused of the right to have an Advocate assigned to him or her

        c. ....."

45. 43(3) of the same Act provides that where a child is brought in proceedings under the children's Act (No. 8 of 2001) (now repealed) or any other written law, the court may, where the child is unrepresented, order the service to provide legal representation to the accused.

46. Section 186 of the Children's Act No.8 of 2001(Now repealed) , and which was the applicable law at the time of trial , provided that a child accused of having infringed any law shall-

> "(a) .....
>
> (b) if he is unable to obtain legal Assistance be provided by the Government with the assistance in preparation and presentation of his defence".

47. Section 77 of the same Act provided that: "where a child is brought before a court in proceedings under this or any written law, the court may, where the child is unrepresented order that the child be granted legal representation".

48. Further Article 40 of the United Nations convention on the rights of the child (UNCRC) a child in conflict with the law has a right to legal or other appropriate assistance in preparation of his defence.

49. The African Character on the rights and welfare of the child provides that a child in conflict with the law has a right to be afforded legal and other appropriate assistance in preparation of his defence.

50. The above Conventions form part of the Kenyan law pursuant to the provisions of Article 2(6) of *the Constitution* and a few of the many other international Instruments that provide for legal representations for children in conflict with the law.

51. Article 53 of our constitution provides that a child's best interest is of paramount importance in every matter concerning the child.

52. Section 43 1(A) of the *Legal Aid Act* provides that in determining whether substantial injustice referred is likely to occur" the court shall take into consideration (a)the severity of the charge ,(b) the complexity of the case and (c)the capacity of the accused to defend himself."(Emphasis added)

53. *The constitution* on the other hand is silent on what constitutes substantial injustice, the courts have attempted to define what substantial injustice is. In the case of Stephen Odong Nyabaya vs. Republic (2020) eKLR,it was held "..... It is clear that with regard to criminal matters, in determining whether substantial injustice, will be suffered a court has a right to consider, in addition to the relevant provisions of the *legal Aid Act* various other factors which include the seriousness or nature of the offence in question, the severity of the sentence and whether the accused is a minor...." (Emphasis Added)

54. In this instant case, the appellant was convicted of the offence of defilement and sentenced to life imprisonment. I have gone through the record. On 28.12.2018, the trial magistrate directed the executive officer to appoint an Advocate for the Appellant. The same directive was given on 27.2.2019. On 29th April 2019 a letter was received from LSK indicating that a particular Advocate had been appointed to represent the Appellant.

55. However on 14. 11. 2020 the lawyer was absent and the court indicated that the hearing will proceed . Thus the hearing began and eventually concluded in the absence of the Advocate.

56. Did substantial injustice occur? It is my considered view that it did . In view of the provisions of section 43 1A of the *legal Aid Act* ,the charge was severe, it attracted a mandatory minimum sentence of life imprisonment.

57. Also looking at the cross- examination, it is evident that Appellant lacked the capacity to represent himself . There is one some witnesses he did not cross-examined at all. In other instances ,the cross-examination was summed up in one or two sentences. It is my that substantial justice resulted as a result of lack of representation.

58. If an accused person, particularly a minor like in this case , was faced with the potential of serving the rest of his life in prison, it behoved the court to ensure that he had the benefit of legal representation.

59. On the date that the hearing began the Appellant told the court that he did not have his lawyer; that he had not talked to him. The court's response was : " The accused person does not have a lawywer on record, his purported lawyer he does not know his name. The hearing will proceed" .

60. The court, having observed correctly earlier on, that there was need for legal representation, It is not known why the honorable magistrate changed his mind.

61. It is my finding that substantial injustice was occasioned to the Appellant. IN this regard I find support on the decision of Stephen Odong(supra) and section 43A of the *Legal Aid Act*.

62. Thus , considered against the above relevant provisions of the Lega Aid Act , the relevant international instruments as aforesaid and the provisions of Article 53 of *the constitution* which requires institutions, and which the court is the foremost of the said institutions to bear in mind the best interest of a child when making decisions, am of the considered view that the trial court failed to take into account the Appellant's rights to legal representation.

63. Consequently I hereby quashed the conviction of the Appellant and set aside the life sentence imposed on him.

64. Having arrived at the aforesaid conclusion I don't find it necessary to go into the merits and demerits of the other issues raised in the Appeal.

65. The next question is whether a retrial should be ordered. In considering this question, the case of Rwaru Mwangi v Republic Cr. Appeal No. 18 of 2006 (ur), provides the necessary guidance. The court of Appeal held: "Ordinarily a retrial will be made where the interest of jusctice require it and if it is unlikely to cause injustice to the Appellant. Other factors for consideration include illegalities of defects in the original trial; the length of time having lapsed since the arrest and arraignment of the Appellant ; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's own making or not see Muiruri vs Republic(2003) KLR 552. It is also necessary to consider whether on proper consideration of of the admissible or potentially admissible e evidence a conviction might result of a retrial..."

66. And in the case of Francis Ndungu wanjau vs Republic (2011) e KLR, the court of Appeal emphasized that interest of justice is of paramount consideration

67. I have taken into consideration the fact that the victim was a vulnerable child of 8 years , she is equally seeking for justice in the same way that the Appellant is. The Appellant is on his 3rd year of serving sentence , and was in trial since 2018 but I also took note of the fact that the hearing was slowed down by the outbreak of the covid pandemic which cannot be attributed to any of the parties. The record further show that the Appellant contributed to the delay but failing to appear in court for a while leading the court to issue a warrant of arrest. Failure to ensure representation of the Appellant was the court's, not the prosecution.

69 In view of the aforegoing an order of retrial would serve the interest of justice.

70. In the end I make the following orders:

a). The conviction by the trial court is hereby quashed and sentence set .

b). The Appellant shall be retried before any magistrate at Kakamega.

c). The Appellant shall be presented before the lower court for plea taking within the next 10 days from the date of this judgment.

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA THE MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

The Appellant

In the presence of :