Kamau v Republic (Criminal Appeal E032 of 2021)
[2024] KEHC 6372 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6372 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E032 OF 2021

GL NZIOKA, J

MAY 30, 2024

BETWEEN

PAUL KIMANI KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against decision of Hon. D. N. Sure, Senior Resident Magistrate (SRM) delivered on 26th October 2021 vide Criminal Case Sexual Offence No. E030 of 2021 at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide criminal case sexual offence No. E030 of 2021 with the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006 (herein "the Act"). He was also charged with an alternative count of indecent act with a child contrary to section 11(1) of the *Act*. The particulars of each charge are as per the charge sheet.

2. The appellant pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution case is that, on 21st April, 2021 at about 5:00pm, PW1 "P.W". (herein "the complainant") and her mother PW2 Margaret Wanjiku went to the appellant's house who is the complainant's uncle. That, they found the appellant's wife DW2 Jane Wangari and her daughters Njeri and Wangui in the kitchen and joined them.

3. That, the appellant who was in the sitting room called the complainant to the siting room to watch the television and the complaint joined him. That, while the complainant was seated on a sofa set, the appellant touched her breasts and vagina and told the complainant not to tell anyone.

4. However, when the complainant left she traced her mother who had left in the house in the company of the appellant's wife and told the mother what happened.

5. That the complainant's mother PW2 Margaret called the appellant's wife who had gone back to the house and informed her what the complainant said had transpired. The complainant's mother and the appellant's wife went back to his house and his wife called the appellant out but he refused to come out of the house.

6. The complaint's mother PW2 then reported the matter to Dishon Maina, the appellant's brother and a family meeting was convened and the next day, PW2 Margaret the complainant's mother reported the matter to the police station. Thereafter, the accused was arrested and subsequently charged accordingly.

7. At the close of the prosecution case, the court ruled the appellant had a case to answer. He was placed on his defence. He denied committing the offence and alleged that he was framed. That, he was with his family in the house and therefore he could not have committed the offence.

8. The appellant wondered why matter was reported to the police the next day yet the police station was very close. The stated that he learnt of the allegations herein the following morning and was arrested.

9. That PW2 Margaret and his wife DW2 Wangari tried to have him released but the police refused stating that he had been charged and in any case it was not a matter for reconciliation.

10. The appellant called his wife, DW2 Jane Wangari, who stated that, she was in the kitchen when the complainant's mother visited them in the company of the complainant.

11. That, there was no space in the kitchen and therefore the complainant sat in the sitting room with the appellant. Later she escorted the complainant's mother but realised the complainant had been left behind. As she was on her way to call the complainant, she met the complainant and went home.

12. That shortly thereafter, the complainant's mother returned with the complainant alleging that the appellant had defiled her. That she tried to call the appellant but did not respond as he was drunk and asleep.

13. At the conclusion of the trial the learned trial Magistrate delivered a judgment dated; 26th October, 2021 and found that there was no evidence that the appellant tried to penetrate the complainant and acquitted him on the main count.

14. However, the learned trial Magistrate held that the prosecution proved case on the alternative charge, convicted the appellant and sentenced him to ten (10) years imprisonment.

15. Being aggrieved by the trial court's decision, the appellant has appealed against both conviction and sentence vide amended memorandum of appeal which states:

    a. That the learned magistrate erred in law and fact when she misdirected herself by finding the appellant guilty for the charge of committing an indecent act with a child.

    b. That the learned Magistrate erred in law and fact by failing to properly analyze the evidence to an exhaustive examination and scrutiny so as to recognize that there are doubts and gaps in the prosecution case.

    c. That the learned Magistrate erred in law and fact by relying solely on the evidence which was overly inconsistent, uncorroborated and therefore inconclusive to sustain a conviction.

    d. That the learned Magistrate erred in law and fact by disregarding the appellant's defence.

    e. That the learned Magistrate erred in law and fact and misdirected herself in her evaluation of the evidence adduced by the parties to the suit.

f. That the learned trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent contradictory and conflicting testimonies.

g. That the learned trial Magistrate erred in law and fact by failing to note that the prosecution case was not prpved beyond reasonable doubt.

h. That the learned trial Magistrate erred in both law and fact by failing to note that the prosecution did not call any independent witnesses to support the complainant's allegations.

i. That the learned trial Magistrate erred in both law and fact by failing to note that the doctor's report does not support the allegations adduced by the witnesses.

j. That the learned trial Magistrate convicted the appellant on the basis of evidence that did not establish his guilt to the required standard of proof beyond reasonable doubt.

16. However, the appeal was opposed by the respondent vide grounds of opposition dated; 13th December 2022 which states:

a. That the learned Magistrate properly convicted the appellant on the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* after carefully analyzing the evidence on record.

b. That the prosecution proved its case against the appellant to the required standard of beyond reasonable doubt.

c. That the sentence that was meted out by the trial court was legal.

d. That the appellant's appeal lacks meirt and should accordingly be dismissed.

17. The appeal was disposed of vide filing of submissions. The appellant in submissions dated; 19th December, 2022 argued that the prosecution did not prove its case beyond reasonable doubt. He relied on the case of; Republic vs David Ruo Nyambura & 4 others criminal case No. 116 of 1999 where the court held that the legal onus is always on the prosecution to prove the guilt of the accused beyond reasonable doubt and that the accused does not assume the burden to prove his innocence.

18. That, the prosecution was required to prove beyond reasonable doubt that there was unlawful and intentional indecent act committed against the complainant. That, section 2 of the *Act* defines an unlawful intention act "as contact between any part of the body with the genital organs, breast or buttocks of another".

19. He relied on the case of; *Paul Otieno vs Republic* Criminal Appeal No. 3 of 2019 where the court outlined the ingredients of the offence of committing an indecent act with a child as; the victim is a child, there was contact with any part of the body of the accused with the genital organ, breast or buttocks of the victim, and that the act was intentional.

20. The appellant submitted that the particulars of the alternative charge indicated that the appellant touched the appellant's vagina with his penis, however this was not proved as no evidence was led as to what part of the body made contact with the complainant's vagina and whether it was intentional.

21. The appellant further submitted that the trial Magistrate relied on the sole evidence of the complainant without cautioning herself of risks of convicting an accused based on the evidence of a sole witness as held in the case of; *Chila & another vs Republic* (196) E.A. 72-77.

22. Further, the trial court did not conduct a proper voire dire examination test as to the credibility of the complainant and did not make a comment on her competence. The case of; *Josephat Githaiga Kimani*

vs Republic Criminal Appeal No. 56 of 2013 was cited where the Court of Appeal held that a voire dire is to be conducted beforehand so as to establish whether the child understands the meaning of an oath and if not, to ascertain the intelligence of the minor on the importance of telling the truth.

23. The appellant further submitted that none of the other people who were in the house were called to testify without justification despite the fact that PW2 Margaret, the complainant's mother did not witness the offence. That, in the case of *Bukenya vs Uganda* (1972) E.A. 549 it was held that failure to call a crucial witness without giving any reason leads to an adverse inference that such evidence would be adverse to the prosecution case.

24. Lastly, the appellant submitted that the trial court imposed the maximum sentence without giving any reason or their being extraneous circumstances. He cited the case of; *Brain Myachio alias Daddy vs Republic* Criminal Appeal E041 of 2021 where the High Court relied on the case of; *Daniel Kyalo Muema vs Republic* Criminal Appeal No. 479 of 1999 where the Court of Appeal held that the term "shall be liable" expressed that the court had a discretion to impose the stated sentence. That, the High court substituted the trial court's sentence of ten (10) years with a sentence of five (5) years for the offence of committing an indecent act with a child.

25. However, the respondent in submissions dated 14th February, 2023 argued that, the prosecution proved its case beyond reasonable doubt. That it was the complainant's evidence that the appellant touched her. Further the appellant was well known to her.

26. That, section 124 of the *Evidence Act* states how children's evidence should be treated when it comes to corroboration. That where the only evidence is that of the victim, the court can convict an accused person if the court is satisfied the alleged victim is telling the truth.

27. That, the trial court found the complainant to be forthright and her evidence not shaken in cross-examination and was satisfied she was speaking the truth.

28. The respondent submitted that, the sentence of Ten (10) years imprisonment is well deserved in the circumstances of the case That, the offence the appellant is charged with is heinous and demeaning and leaves the victim traumatized for lifetime. Further, the appellant chose to keep quiet during mitigation depicting a person with no remorse. Furthermore, the sentence is the minimum sentence prescribed in law.

29. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that the role of the first appellate court is to re-evaluate the evidence adduced before the trial court afresh and arrive at its own conclusion taking into account the fact that, it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32.

30. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

31. To revert back to the matter herein, the appellant was convicted of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

32. The subject provisions state that:

> "(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

33. Pursuant to the aforesaid the prosecution has to prove inter alia: the age of the victim, the body contact as stated under the law, the act was intentional and that the accused committed the offence.

34. In the instant matter the prosecution produced a birth certificate of the complainant that proved the age as stated in the charge sheet. She was 12 years old, thus a child as defined under the *Children Act*.

35. As regard whether the appellant committed the indecent act, it is noteworthy that the complainant was the only one who gave direct evidence on the alleged commission of the indecent act. The appellant denied committing the offence. Therefore, it is the evidence of the complainant as against the appellant.

36. To reconcile the matter as to whether the indecent act was committed as stated or not, the circumstances of the case need to be considered.

37. In that regard, I find the following facts are not in dispute. That, the complainant and her mother visited the appellant's home on 21st April 2021. The evidence of the complainant was that the appellant whom she identified as Paul Kimani and her uncle, called her from the kitchen in his house where she was with the appellant's daughters Njeri and Wangui.

38. That the appellant's wife and complainant's mother were in the kitchen. That she heeded the appellant's call and went with him to the sitting room to watch the television.

39. It suffices to note the complainant's evidence was corroborated by her mother PW2 Margaret Wanjiku and the appellant's wife that, the appellant wanted to sit with them in the kitchen and the complainant's mother told him not to sit with women.

40. That he tapped the complainant's shoulder and told her, they go to the sitting room to watch the television and they went. It is in evidence of these witnesses that the kitchen door was locked. Therefore it is not in dispute that while all the other four ladies were in the kitchen, the appellant was all alone with the complainant in the sitting room.

41. The complainant further testified that after the incident the appellant told her not to tell anyone. However, she went looked for her mother and told her what the appellant had done. PW2 Margaret Wanjiku, her mother corroborated that evidence by testifying that, when the complainant approached her she requested to tell her something.

42. That, she started crying while telling her that Baba (pointing at the accused) the appellant had touched her here and here, pointing at the breast and private parts.

43. Further evidence reveals that when the complainant's mother informed the appellant's wife what had happened the appellant's wife and complainant's mother went to the appellant's house and when his wife called him out, he did not respond and/or come out of the house.

44. The question is: why would the appellant refuse to come out of the house and yet the complainant and the mother had just left his house, and indeed, it was his wife who was calling him to come out?

45. Further, the complainant testified that, when the appellant took her to the sitting room, he locked the kitchen door. That evidence was corroborated by her mother that, the kitchen door was locked and she could not see what was going on in the sitting room. The question that arises is why was the appellant locking the door?

46. It suffices to note that there is no evidence that there was bad blood between the appellant's family and the complainant's parents. The complainant testified that she "had no issues with the accused before the incident"

47. It is also noteworthy that during cross examination of the complainant (PW1) and her mother (PW2), there was no indication of bad blood between the two families to warrant the complainant aged twelve (12) years old, to allege that the appellant touched her in an indecent manner.

48. Further, after the matter was reported to the complainant's uncle one; Dishon he directed, the complainant to his mother who is also the appellant's mother. That the matter was discussed by family members, including the appellant's sister, appellant's elder brother Dishon, complainant's father and it was resolved it be reported to the police. The question is why would the family not dismiss the matter as non-issue when they learnt of it if indeed they did not believe the complainant and or the mother (PW2).

49. In addition evidence, Doctor Owour produced the P3 form stated, where the complainant's gave a history of "sexual harassment by an uncle at around 5pm". That the complainant was referred to psychological support and safe centre.

50. It is also on record from the evidence of the complainant that, the appellant told her not to tell anyone what he had done. But she did not waste time in informing the mother. Doesn't that show that she abhorred what had been done to her.

51. On the other part, the appellant in his defence allege that he is being framed. However, as he testified through unsworn statement, he denied the prosecution an opportunity to cross-examine him on his defence. To the contrast, he cross-examined the complainant.

52. Furthermore, he did not deny the facts that, the complainant and the mother were in his house on the material date and that he was in the sitting room with the complainant while the other people in the house were in the kitchen. He did not expressly deny touching her on the breast and vagina and simply said that he could not do such a thing.

53. He alleged that his house was a single room and one could see the sitting room from the kitchen but never put it to PW1 the complainant and the mother when they stated, he closed the kitchen door.

54. In addition he alleges he sold his land and the complainant's mother wanted the money, however, that is an allegation not proved or put to PW2 the complainant's mother when she testified. It therefore remains an afterthought.

55. The evidence of DW2 Jane Wangui, the apellant's wife confirmed that, the complainant was seated in the sitting room as there was no room in her kitchen. She corroborates the complainant's evidence that, she was in the sitting room while the others were in the kitchen. She led evidence similar to that of the complainant's mother, that, she was called by the complainant's mother and informed that, the complainant was saying that, the appellant had defiled her.

56. That, she called the appellant but he was "drunk and asleep". Her evidence confirms that, the complainant reported immediately she left her house that, the appellant had touched her indecently. In cross-examination she conceded she could not say what happened in the sitting room.

57. Pursuant to the aforesaid, the appellant submits that, the evidence of the prosecution witness was inconsistent, uncorroborated and could not sustain a conviction. That, the trial court did not analyse the evidence properly, that the case was not proved beyond reasonable doubt and that, there was no independent witness, neither was voire dire examination properly conducted,

58. First and foremost, the submissions on the manner in which the voire dire examination was conducted is not supported by any of the grounds of appeal. None of the nine (9) grounds in the amended memorandum of appeal relate to the same. Therefore it cannot be an issue for determination.

59. As regards the submissions on lack of corroboration of complainant's evidence I have already dealt with it in the afore analysis as appellant's submission. That the mother and appellant's wife evidence corroborated the complainant's evidence in certain aspects.

60. On the issue of reliance on evidence of a single witness. I note the court cautioned itself and posed a question as to whether it believed PW1 the complainant and stated:

> " I have carefully considered PW1's evidence and demenour and I am convinced that she was telling the truth because her evidence of being in the sitting room with the accused was corroborated by PW2 and DW2".

The court went to state:

> " I have carefully considered the evidence of PW1 and she has no reason to frame the accused, not on her account that of the mother."

61. It is therefore not factually correct to state that, the court did not caution itself on the reliance of the evidence of PW1 the complainant.

62. On whether the defence was considered, the trial court addressed it and stated that based on the evidence of prosecution witnesses the alleged defence of being framed did not arise. The court stated as follows:

> " I have carefully considered the above and on the issue of the accused being framed, I have considered the evidence of PW2 and she stated that her relationship with the accused was cordial. I have considered the evidence of DW2 and she never alluded to a dispute between PW2 and the accused over some sale of land".

63. As regard the sentence imposed, I find that the case of; Brian Nyachio Alias Daddy -vs republic CA No. 4041 of 2021 cited is a decision of the High Court and not Court of Appeal as stated in submission, and is not binding on this court. At paragraph 22 of that decision the court did not recognize the minimum sentence imposed by the law.

64. Further the case of; *Daniel Kyalo Muema -vs- Republic* CA 479 of 1999 where the phrase; "shall be liable" was consideration, is distinct from where under section 11(1) of *Sexual Offences Act* the phrase is; "is liable".

65. Furthermore, the above case was not dealing with an offence under section 11(1) of *Sexual Offences Act* but section was 3(2) (a) of Narcotics Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The sentence under section 11(1) of the Act is a minimum of not less than ten (10) years therefore sentence herein is lawful.

66. Finally, the appellant argues that the prosecution did not prove that the appellant touched the complainant with the penis. But the relevant section is broadly framed and refers to any part and neither did the complainant testify to any other part that contradicted the penis".

67. The upshot is that the appeal is dismissed in its entirety. Right of appeal 14 days explained.

DATED, DELIVERED AND SIGNED THIS 30TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. B. O. Akang'o for the appellant

Mr. Abwajo for the respondent

Ms. Ogutu: Court assistant