Githua v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 10593 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10593 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E029 OF 2023

CJ KENDAGOR, J

JULY 29, 2024

BETWEEN

PETER GIKANGA GITHUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence of life imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act in Criminal Case no. 16 of 2020 at Githunguri Law Courts by Hon. Peter Muholi, Principal Magistrate on the 15th March 2023.)

JUDGMENT

1. The Appellant was tried and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* and sentenced to life imprisonment. The amended charge sheet has two counts of the offence of defilement. The particulars of the offence in count 1 are that; on 4th March, 2020 at around 1600 hours in [Particulars Withheld], Kiambu County, he caused his genital organ, namely penis, to penetrate into the vagina of VWM, a child aged 7 years. The particulars in count II have the date of 5th March, 2020.

2. The Appellant also faced alternative counts of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, the particulars being that on the aforesaid date and time, he intentionally touched the vagina of VWM, a child aged 7 years.

3. Dissatisfied with the conviction and sentence, he filed a petition of appeal on 3rd April, 2023, listing seven (5) grounds of appeal:

> " 1. That the learned trial magistrate erred in law and facts by failing to observe that my plea of not guilty was thus infringing my right to a fair trial as stipulated in Article 50 of the *constitution* of Kenya.
>
> 2. That the learned trial magistrate gravely erred in law and facts by failing to consider and find that there was no warning administered to me regarding a conviction that was rendering my life at stake.
>
> 3. That the learned trial magistrate gravely erred in law and facts in convicting me on a charge which was grossly defective and in available to the extent that the particulars of the charge sheet differ from those of PW1, a crucial witness of the prosecution.
>
> 4. That the learned trial magistrate erred in law and facts by failing to note that my plea-taking was un-procedural.
>
> 5. That the learned trial magistrate erred in law and facts by convicting me while failing to observe and find that I was unrepresented, a violation that the trial court took advantage of and commenced a process of trial, yet I had no documented evidence as per Article 25 (c)."

4. The appeal proceeded through written submissions; only the Appellant filed submissions. In the submissions, the Appellant asked the court to amend the grounds of appeal as follows;

> a. That the learned trial Magistrate erred in law and fact by relying on an unestablished element of penetration evidence to convict the Appellant.
>
> b. That the Learned trial Magistrate erred in law and facts to believe and relied on incredible witnesses PW-1, PW-2, and PW-4 to convict without concrete corroboration forthcoming.
>
> c. That the sworn defence evidence adduced by the Appellant was improperly rejected given the shoddy investigations conducted; thus, life sentence remains harsh and issued in disregard of mitigating

5. As a first appellate court, I must reconsider and evaluate the evidence in the court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In *Kiilu & Another v Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

6. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court, and the written submissions filed by the appellant. I have also read the judgment of the trial court. Having done so, I find that the issue for my determination is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt, whether the conviction was safe, and whether the sentence was appropriate or excessive in the circumstances.

8. The complainant was a child of tender years who gave unsworn evidence. The record shows that the trial court conducted a voire dire examination and recorded it in terms. I am satisfied that the trial court employed the correct procedure in ascertaining the child's competence to give evidence.

9. The prosecution called 4 witnesses. PW1, the minor, told the court that she was defiled by the Appellant, her father. According to PW1, the incident happened when she got home from school, and no one else except the appellant was at home. She indicated that the Appellant gave her ten shillings after the incident. She reported the incident to her grandmother, who later informed her mother PW2. PW2 told the court that she was married to the Appellant and that he was the stepfather to the minor. According to PW2, the appellant would remain with the minor when she was at work and sleep at a neighbor's house. PW2 indicated that she interviewed the minor and took her to the police and hospital after the neighbour told her that the child might have been defiled by the Appellant severally. PW3 was the investigating officer, and PW5 was a clinician who examined the minor and prepared the P3 form.

10. When placed on his defence, the appellant stated that PW2 was his estranged wife and that the charge was a fabrication. DW2 testified that he was with the Appellant on February 3, 2021, at work at Gathanji.

11. The ingredients that need to be proved in the offence of defilement are;

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

12. In *Hadson Ali Mwachongo v Republic* [2016] eKLR, the Court of Appeal held that:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello v Republic* Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows; In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

13. The complainant told the court that she was 7 years old. PW2 also told the court that the minor was born on 11th February, 2013 and that she was 7 years old at the time of the incident. PW2 explained that she had misplaced the birth notification and that she had not processed the minor's birth certificate. An age assessment is acceptable evidence of a subject's age.

    According to the age assessment report dated 3rd June, 2020, the complainant was approximately 6 to 7 years old. The age assessment was conducted at the dental department at Githunguri Health Centre

three months after the incident. It is a formal document, and I am satisfied that the child's age was established.

14. The next issue is whether the prosecution proved 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."

Therefore, penetration, as an essential ingredient of the offence, must be proven beyond reasonable doubt.

15. From the record, the minor used descriptive words to narrate what had transpired;

> "I was in my stocking, dress, and sweater. Peter took me to their room and removed my stocking and pant. He then put his 'dudu' for urinating and put it in my 'dudu.' He put me on the bed and laid me. He then laid on me and did 'tabia mbaya' to me."

The question is whether this narration amounted to an act of defilement.

16. In *Muganga Chilejo Saha v Republic* [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse.

> "Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya" (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing" (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement."

17. The descriptive terms were tested in cross-examination in the present case. The minor was consistent. The trial court was satisfied that the reference was to genital organs and that there was penetration. I have reevaluated the evidence, and I am persuaded that, indeed, the minor referred to an act of penetration of her vagina by a penis.

18. From the evidence, as correctly considered by the trial court, the incident was on 4th March 2020. The examination by PW4 was conducted within 5 days of the occurrence, and some laceration was noted in the genitalia. The prosecution explained to the trial court their challenge in securing the doctor's attendance to produce the medical notes. The appellant has submitted that an adverse inference should be drawn from the prosecution's failure to call the doctor and produce the medical notes. Medical notes are very important in proving sexual assault, but each case is examined in totality to establish whether there is sufficient evidence to sustain a conviction. The P3 form was produced in this case, corroborating the minor's testimony and the mother's. The evidence is sufficient to prove that the minor was defiled.

19. The next key question is the identity of the perpetrator. The minor told the court that the incident happened at their home and that the only person present was the Appellant. From the evidence, the Appellant is her stepfather and is very well-known to her. The cross-examination did not displace the testimony of where and when the sexual abuse occurred and by whom. The claims of fabrication did

not hold water. There was no doubt that the minor properly identified the Appellant as the perpetrator of the sexual assault. The evidence adduced by the prosecution displaces the alibi defence given; DW2 gave testimony of 7th March, which was a different date. The trial court gave reasons for discrediting the defence tendered by the Appellant.

20. The Appellant has contended in his submissions that the prosecution failed to call the informant whom the minor and PW2 referred to. Section 124 of the *Evidence Act* has provided that a trial court can convict an accused facing a charge of defilement solely on the evidence of the victim if, for reasons to be recorded, the court is satisfied that the victim is telling the truth.

21. In his petition of appeal, the Appellant indicated that the charge sheet's particulars differed from the minor's testimony. The Investigating officer told the court that the report was made on 10th March 2020, and the minor's mother (PW2) indicated that she learned of the incident five or so days later. The narration of events by the minor mentioned the school days and was consistent. There was certainty as to the date in reference- 4th March 2020. The prosecution rectified the issue of dates through the amendments to the charge sheet that gave two dates for the occurrence - 4th and 5th March 2020. The charge sheet is not defective.

22. The totality of the evidence and the P3 form establish the required standard of proof that it was the Appellant who sexually assaulted the minor.

23. I have examined the lower court record; the Appellant was afforded a fair trial. On the ground that plea-taking was not procedural, I have examined the record and found that the court recorded that the Appellant understood Kiswahili language. His response to the counts and the alternative charges was recorded. The Appellant was also given copies of the witness statements on 26th May, 2020, about six months before the trial commenced on 24th November, 2020. During the trial, he was allowed time to cross-examine the witnesses, to recall witnesses when the charge sheet was amended, and ample time to prepare for his defence and call witnesses.

24. In the end, I concur with the learned trial magistrate that all the ingredients of the offence in count 1 were proved beyond reasonable doubt. The Appellant was afforded a fair trial, and the conviction was safe. The appeal against conviction is accordingly dismissed.

25. I will now turn to the sentence. Under Section 8 (2) of the *Sexual Offences Act*, a person who commits an offence of defilement with a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life.

26. The learned trial magistrate considered the mitigation and called for a pre-sentence report, which was presented on 1st March, 2023. The Supreme Court has now given guidance on minimum sentences under the *Sexual Offences Act* in *Republic v Joshua Gichuki Mwangi* Petition No. E018 of 2023. The court held that where a sentence is set in statute, the legislature has already determined the course unless declared unconstitutional. The trial court meted out a lawful sentence.

27. Jurisprudence has evolved that life imprisonment is not left indeterminate.

In *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) (8th December, 2023) (Judgment) translated life imprisonment to 30 years. They stated as follows:-

> "26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the

convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

27. In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years' imprisonment. The record shows that the appellant was in custody since he was arraigned in court on July 18, 2011. By dint of section 333(2) of the *Criminal Procedure Code*, the imprisonment term of 30 years shall be computed to begin running from that date."

28. Considering the evidence and severity of this case, I translate the life imprisonment to 40 years. In compliance with Section 333 (2) of the *Criminal Procedure Cod*e, the period shall be computed from the date of judgment — 1st March, 2023.

29. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 28 of this Judgment.

30. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 29TH DAY OF JULY, 2024.

.....

C. KENDAGOR

JUDGE

Judgment delivered through the Microsoft Online Platform.

In the presence of:

Court Assistant: Hellen

ODPP: Ms. Kipmwei

Appellant: Peter Gikanga Githua