Kisangi v Republic (Criminal Appeal E036 of 2021)
[2023] KEHC 2848 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E036 OF 2021

RN NYAKUNDI, J

MARCH 30, 2023

BETWEEN

RODGERS KISANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

1. The Appellant was charged with the offence of defilement of a girl aged 16 years contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that the appellant on 5th November 2019 at [Particulars Withheld] Village within Nandi County intentionally and unlawfully caused his penis to penetrate the vagina of BI a child aged 16 years.

2. He 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 of 2006. The particulars of the offence were that on 15th November 2019 at [Particulars Withheld] Village within Nandi County, he intentionally touched the vagina of BI a child aged 16 years with his penis.

3. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.

4. Being dissatisfied with the said judgement the appellant lodged a petition of appeal filed on 20th October, against both his conviction and sentence.

   Parties filed written submissions in support of their arguments.

Appellant's Submissions

5. The appellant submitted that the prosecution did not adduce watertight evidence in proof of penetration or otherwise of an indecent act to the required standard of proof which is beyond any reasonable doubt.

6. The appellant submitted that the evidence of the doctor did not connect him to the alleged defilement.

Respondent's Submissions

7. Mr. Asiyo J, prosecution counsel in opposing the appeal submitted that on the issue of identification, the appellant was well known to both the complainant and her mother and as such there was no case of mistaken identity. The Prosecution relied on the case of Peter Mwanzia v Republic (2008) eKLR.

8. On the issue of penetration, the respondent submitted that penetration was proved to the required standards.

9. In conclusion, the respondent submitted that the prosecution did discharge its burden of proof. The conviction of the appellant was proper. They therefore urged this court to dismiss the appeal.

10. The respondent relied on the following authorities in support of its case;

    i. Criminal Appeal No. 229 of 2004, Peter Musau Mwanzia Mwanzia V republic (2008) eKLR

    ii. Mombasa Criminal Appeal 84 of 2005, Kassim Ali V Republic (2006) eKLR

    iii. Fappyton Mutuku Ngui v Republic (2014) eKLR

    iv. Erick Onyango Ondeng' v. Republic (2014) eKLR

    v. Nyeri, Criminal Appeal No.22 of 2017, John Bundi Koome vs Republic

Analysis and Determination

11. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32.

    The issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

12. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(4) "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."

13. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

1) Age of the complainant;

2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

3) Positive identification of the assailant.

14. In the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

What does the evidence portend?

Age of the complainant

15. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

16. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

17. The appellant herein has not raised any issue as to the age of the child, an issue therefore that is not in dispute. The trial court rightly found that the complainant was sixteen years old at the time. Particularly, the complainant testified that she was a form two student at [Particulars Withheld] Secondary school; the birth certificate produced as Exhibit-1 showed that she was born on 9th August, 2003 which confirms that the complainant was sixteen years at the time of the offence. This is the law as demonstrated in the case of Francis Omuroni –vs- Uganda Criminal Appeal No.2 of 2002 where it was held thus: " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine 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..."

I find the age of the victim was 16 years old.

Penetration

18. 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."

19. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

20. In light thereof, it is totally indefensible the argument by the appellant that the medical examination report showed that the victim had engaged in sexual intercourse regularly without necessarily pointing out the accused person's identity.

21. PW4- Patrick Kenei; the Clinical Officer who examined the complainant, clarified in his testimony that even though there were no visible injuries to the complainant's genitalia, it did not rule out penetration. He added that penetration is still possible in the circumstances as visible injuries cannot be detected in the genitalia of the victim where the perpetrator engaged in regular sexual activity with the victim. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that since there was no possible injuries was not proof of penetration.

22. PW1 testified that they had been in a sexual relationship with the appellant since April 2019 and that this was the third time they were having sexual intercourse.

23. The submission by the appellant that the medical report did not state anywhere that any swabs were taken to link him with the said defilement case may not yield much for purposes of proof of penetrations. I find that the medical evidence supports there was penetration of the child.

Was the appellant the perpetrator?

24. On matters of identification/recognition of an offender and placing him at the scene of the crime, the guiding principles are now well settled as can be seen from the case of R-vs- Tunbull & Others (1976) 3 ALLER 549 which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

> " .The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 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? Recognition may be more reliable than identification of

a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

25. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

26. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

27. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

28. Even on Appeal the court has a duty to evaluate the personal and individual circumstances of the convicted person. The nature and gravity of the offence , the character and record of the convicted person, the factors that might have influenced the conduct that caused the offence, the design and execution of the offence subject matter of the Appeal the possibility of reform and social re- adaptation in the event an alternative sentence is found to be suitable. On the other hand, are the principles elucidated in the case of Benard Kimani Gacheru-Vs- Republic (2002) eKLR the court of Appeal stated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist"

29. The appellant argued that in the absence of a case proven to the required standard, this court should find that the sentence is unlawful. Section 8 (3) of the *Sexual Offences Act* to convict provides 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."

30. The offence is serious. I take into account that the accused is first offender. In the circumstances, 15 years' imprisonment is not excessive but appropriate sentence. When the aggravating and the mitigating factors are weighed afresh in the balance I am satisfied that the Appellant fails to bring himself within the ambit of Benard Kimani Gacheru case (supra). There is no basis for one to make a finding that the sentence is harsh, punitive, or excessive. I see

no reason of interfering with the sentence imposed by the trial court. His appeal on sentence and conviction is dismissed for want of merit.

Right of Appeal explained.

DATED AND SIGNED AT ELDORET THIS 30TH DAY OF MARCH, 2023

.....

R. NYAKUNDI

JUDGE

In the presence of

Mr. Mugun for the State