Kiragu v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 18675 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E049 OF 2022

SC CHIRCHIR, J

MAY 31, 2023

BETWEEN

PETER IRUNGU KIRAGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. I. Gichobi delivered on 12th may 2022 at the chief Magistrate's court at Kangema)

JUDGMENT

1. The Appellant herein seeks to quash the conviction and sentence in Kangema chief Magistrate's court SO case No. E013 of 2021 where he was convicted for the offence of defilement of a 5 years old girl contrary to Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 (The Act) .
2. The particulars of the charge were that on 3rd day of September 2021 at around 15.30 hours at Kahuhia location within Murang'a County, he intentionally caused his penis to penetrate the vagina of S.M.I a child aged 5 years.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. He was convicted of the main charge and sentenced to life imprisonment
5. The appellant was aggrieved by the judgment and has proffered this appeal.

Petition of Appeal

6. The Appellant in his amended petition of Appeal has set out the following grounds:

a. That the trial magistrate erred in law and in fact in failing to find that the identification evidence brought forward by the prosecution did not conclusively prove that the appellant had committed the alleged crime.

b. That the trial magistrate erred in law and fact by failing to find that the prosecution's case was marred with material contradictions and inconsistencies especially on the evidence adduced by various witnesses.

c. That the trial magistrate erred in matter of law and fact by failing to note that the essential witnesses were not availed thus some of the pertinent issues were not brought to light.

d. That the trial magistrate erred in law and fact by falling to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt and that the trial was a miscarriage of justice.

e). That the sentence was harsh and excessive.

The Appellant's submission

7. On identification it is the Appellant's submission that there was contradiction between the testimony of PW2 and PW3 on the person they saw near the crime scene. That while PW2 told the court that she saw a man wearing a yellow trouser lying on a child at a coffee plantation, PW3 claimed to have seen a person running down a boundary wall very fast while wearing a brown Trouser.

8. He further submits that the medical evidence did not prove penetration. He stated that PW5 told the court that when the complainant went to the hospital, she had changed clothes. He contends that the injuries on the complainant's genitalia, the broken hymen and the soil found in her private parts were not sufficient to prove defilement. He further argues that a DNA test should have been done on him to ascertain whether he was the perpetrator.

9. On the contradictory and inconsistency of the witnesses, it is his submission that the complainant was not a credible witness; that PW2 and PW3 contradicted each other on the colour of the clothes he allegedly wore on the material day. He further points out that while PW4 claimed that the minor had not changed her clothes PW5 the clinical officer, claimed that the child had changed clothes. He relied on the case of Stephen Njoroge Kigochi to buttress his submission that contradictory evidence cannot be used to convict.

10. On the essential witnesses who were not allegedly availed, he names a fellow child named M, who was said to have been in the company of the complainant as they walked from school, the child's grandfather and the " chama members" who were allegedly with PW3 as well as the member of the public who allegedly arrested the Appellant.

11. The Appellant faults the trial court for failing to accept the explanation he gave regarding his whereabouts on the date of the incident. The explanation was that he was at a shopping centre at the alleged time of the incident and his conduct thereafter was not consistent with that of a person who had just committed a crime. He insist that he could not have possibly committed a crime and goes on to stay put within the vicinity. He also submits that the court failed to take into account the fact that there was a feud between his family and that of PW2 and PW3.

12. It is his final submission that the court did not comply with section 216 and 329 of the Criminal procedure code and that the sentences prescribed by the Act deprives the court of the discretion to determine an appropriate sentence.

The Respondent's submission

13. It is the Respondent's submission that the prosecution proved its case beyond reasonable doubt, as all the the key ingredients of the offence to were proved .

14. On the age of the victim, the Respondent submits that a birth certificate was produced showing that the complainant was born on 1st August 2001 and therefore was 5 years the date of defilement.

15. On proof of penetration, it is submitted that the evidence of the complainant, the PW2 , PW4 and PW5 proved that penetration had taken place.

16. On positive identification of the perpetrator, the respondent submitted that PW1 was able to point out the person who defiled her as the accused on the dock. That Pw2 saw the appellant as he laid on top of the girl and that the incident happened in broad daylight.

17. Further PW2told the court that the Appellant was not a stranger as her sister was married in the same homestead as that of the Appellant .She also knew the Appellant as an employee of the Wa kimani .

18. It is further submitted that though the complaint testified that she did not know the appellant, she was able to identify him. That PW2 who found him on top of the appellant was able to identify him since they were related through her sister and that identification was therefore by way of recognition. The prosecution has relied on case of MW vs. Republic (2019) eKLR where the High court stated that "the effect of recognition as opposed to the identification of a stranger is that it drastically reduces the possibility of mistaken identity."

19. On the Appellant's defence it is the Respondent submission that the evidence of DW2 corroborated the testimonies of the prosecution witnesses.

20. On the claim that the case was marred by inconsistencies and contradictions, the same did not go into the substance of the case. Reliance has been placed on the case of Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993 and Eric Onyango Odeng vs Republic(2014)e KLR.

21. On the the Appellant's assertion that crucial witnesses were not summoned ,the Respondent relied on section 143 of the *evidence Act* and submitted that no particular number of witness are needed to prove a fact and that the witnesses they summoned were sufficient to prove their case beyond reasonable doubt.

Summary of the evidence

22. PW1 testified that on 3/09/2021 at around 3.00pm while they were on their way from school, someone took her to a coffee plantation . She pointed at the Appellant by way of identification. She stated that he removed his clothes and removed his stockings and panties and he removed his urinating organ "penis" and did bad things to her. She stated that he did bad things to the part she uses to urinate"vagina" and she felt pain. She testified that mama Kiboko found her crying and lying on the ground and when she came, the accused was gone. She stated that she told her mother what happened and that she did not know the accused prior to the incident. She produced a blue dress , a grey sweater, stockings a pair of dirty socks a t-shirt and panties all being the wearing apparel she had on that day. She testified that her mother took her to the hospital.

23. PW2 told the court that she was coming from her Chama meeting at around 3.30 p.m. As she approached Teresia Nyambura's home, she heard a child screaming inside a coffee plantation and when she went inside the plantation, she saw a man lying on the child . when the man saw PW2 saw he ran away . She testified that she knew the child as Susan and the perpetrator as Irungu. She further told the

court that the Appellant's sister called Helen is married to the same family as her. She also knew that the Appellant as an employee of Mama Kimani. she stated that when she found the minor, she was wearing her school uniform. she identified the uniform and other wearing apparel that the complainant had submitted for identification. She stated that she took the child to where her fellow "chama" women were .

24. On cross examination, she testified that she was walking alone when she heard the child crying, she stated that she picked up the child and took her to the Chama meeting ,while still in school uniform.

25. She stated that the coffee plantation was well hidden for one to hide. She insisted that it was the Appellant who defiled the minor and not any one else. She further testified that she knew PW1 since she was her friend's daughter and that PW 1's mother and her had attended the same Chama. Meeting on that day.

26. PW 3 was spraying water on the grass and uprooting fodder for her when she heard a child crying and soon after that she saw someone running across the boundary dividing her farm and that of Wa kimani. The runner was wearing a brown trouser. That he was dark skinned and was clean shaved. She identified him as peter Irungu Kimani and an employee of wa kimani.

27. On cross examination, she restated that the accused was employed by the Wakimani's and that their homestead and that of Wakimani's was separated by a fence. She stated that she was not related to the complainant She could not do much when she heard the child cry because she had a child on her back. she told the court that she had no differences with the Appellant.

28. PW 4 was the mother to the complainant . She told the court that she knew PW2 ,the woman who rescued her daughter. She told the court that the minor was born on 1/8/2016, and produced a birth certificate in support. She recalled that on 3/09/2021 at 3.30 pm, she was at home when she heard some commotion by the roadside as some women called her to come out.

29. When she went outside, she saw LN carrying the complainant on her back. When she asked the ladies why she was carrying the child, they informed her that she had been defiled by someone employed at mama Kimani's . She further informed the court that she had on that day dressed the child with a t-shirt , her blue checked uniform and the school sweater. She checked and found that the child had semen and soil on her private parts. She took the child to the chief's office. An Administration police officer gave her a note to take to hospital. She did not give the chid a bath The child was examined, treated and given drugs at kangema sub- county hospital. The P3 form was later filled at Murang'a County Hospital.

30. On cross examination she testified that the minor attends [Particulars Withheld] Primary School. She used to take the child in the morning to school but in the evening the child would go home in the company of other children. She denied ever assisting the child to write her statement.

31. PW5 was the clinical officer at Kangema Sub- county Hospital. He told the court that he filed the P3 form for the complainant on 4/09/2021. The complainant was found to have had mild laceration to her genitalia, her hymen was broken and soil was found in her private parts. High vaginal swab did not show any spermatozoa and the test for HIV and syphilis came back negative. She produced the P3 form which she filled, she also produced the treatment notes.

32. On cross examination, she stated that she examined the minor and formed the opinion that the broken hymen was due to defilement.

33. PW6 was PC Richard Mbithuka no. 112276 attached to Mukangu police post. He recalled that on 3/9/2021 at around 5.00 pm while at the post, the complainant S, her mother and one Teresia came

to report about the defilement. He booked the report and took the child's clothing and escorted them to Kangema Sub-county hospital for treatment.

34. He further told the court on the same day, at about 8.10 pm the members of the public managed to arrest Peter Irungu and brought him to the camp. He then arrested and placed him in custody. rearrested him and placed him in police custody.

35. On cross examination, he stated that he visited the scene which was off road in the coffee plantation. That it was the member of public who caught the Appellant but he is the one who re- arrested him. He confirmed that at the time of filling the P3, the child's clothes had been changed.

36. Put on his defence,the Appellant testified that he was a shamba boy at Wa kimani's place. That on the material day he had gone to look for a househelp at the request of his employer. He later undertook other tasks until 7pm when he left for the shopping centre. He met people there who arrested him. who arrested him and took him to Makungu police post .He was then charged .

37. DW 2 was Mary Waiga Macharia aka Wa kimani's/ (Mama Kimani and the Appellant's employer. She testified that he knew the accused as he had been her employee for a period of three months from June 2021 to September 2021. She told the court that in the afternoon of the material day she went for her " Chama" meeting and while there she heard screams and saw and heard Mama kiboko say that she heard a child cry and went and picked her. She was informed that her employee had defiled the child. She went back to her house at 6p.m and found that the Appellant was not there.

38. On cross examination, she confirmed that the accused worked for her from June 2021 to 3rd September 2021 when he was arrested. She also confirmed that he had asked him to look for a househelp as her daughter needed one. She could not tell the whereabouts of the appellant between the hours of 3.00 pm – 4.00 pm.

39. DW3 testified that he knew the accused but he did not know his name. He stated that he did not know the charges the accused was facing and he could not defend him.

Determination.

40. This is a first Appeal , and the mandate of this court is to relook at the evidence , re- evaluate it and make its own independent findings, but while bearing in mind the fact that it is the trial Court that had the advantage of seeing and hearing the witnesses first hand. (See Okeno v Republic (1972) EA 32.

41. The following issues are arise for determination:

    a). whether the prosecutions evidence was contradictory and inconsistent

    b). Whether essential witnesses were not availed

    c). whether the defence case was considered

    d). whether the prosecution proved its case beyond reasonable doubt

Whether the prosecution Evidence was inconsistent and contradictory

42. The Appellant takes issue with the fact that PW2 and PW3 contradicted each other as to the colour of the trouser that he was alleged to have been wearing on the material day. The other contradiction is on whether or not the child had removed her school uniform at the time of medical examination.

43. Whether the Appellant was wearing a yellow or brown trouser in my view is immaterial as identification was by recognition of the Appellant by PW2 PW2 told the court she found him lying on the child

only to take off when he noticed PW2. The other alleged contradiction is whether or not the child had removed clothes. The appearance of the child's clothes would have definitely been additional evidence available to the prosecution. However apart from the clothing, there was enough evidence to establish the Act of penetration and the identity of the perpetrator

44. It is my finding that the said contradictions were so minor , it never made any dent on the prosecution's case. In this regard , I find support in the case of Twehangane Alfred vs Uganda (2003)UGCA 6 cited with approval in the case of Erick Onyango vs Republic(2014)e KLR the court held as follows: "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is 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 a deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

Whether there was failure to summon crucial witnesses.

45. The law on the number of witnesses required to prove a fact is contained in section 143 of the *Evidence Act*. It provides as follows: No particular number of witnesses shall, in the absence of any provision of law to the contrary , be required for the proof of any fact"

46. The Appellant has argued that failure to call the complainant's fellow pupil who had accompanied her from shool, the "other chama women" who were allegedly with PW2 and the civilians who allegedly arrested him, was fatal to the Prosecution's case. The Respondent on the other hand as argued ,quite correctly, that they had a witness who witnessed the defilement and there was no need to add the complainant's then companion. The " other chama women" and the " arresting mob would have only given the court hearsay evidence, which would have been inadmissible . The Appellant submission in this regard is without merit.

Whether the Appellant's defence was considered.

47. The Appellant faults the trial court for dismissing his defence. It is his submission that his conduct on the material day ,that is, undertaking his duties at the employer's home and finally going to the shopping centre for a drink did not reflect a person who had just committed a crime. It is his argument that if he was indeed the perpetrator he would have ran away. I disagree with this argument. Indeed the reverse could have been true. The Appellant could have been trying much as possible to maintain his normal routine to ward off any suspicion from those around him.

48. Further, although the Employer gave an account of the Appellant's movement during the day, she admitted that she could not account for his whereabouts between 3pm and 4 pm. This was about the time the complainant was waylaid as she made her way home from school. Thus the conduct of the Appellant does not exonerate him at all. I too dismiss his defence.

Whether the Prosecution proved their case beyond reasonable doubt

49. The offence of defilement is contained in section 8 of the *sexual offences Act*(The Act).' It provides as follows:-

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

(2) 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.

50. Section 2 of the Act defines penetration as follows: -"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

51. Section 2 of the Children's Act is define a child a as follows: - "child" means any human being under the age of eighteen years;

52. For the charge of defilement to be established , the age of the child , the act of penetration and the identification of the perpetrator must be proved. The standard ,as usual, is beyond reasonable doubt in respect of each of these ingredients.

53. The age of the Complainant at the time of Offence was not an issue in the trial court or in this Appeal. Nevertheless the prosecution produced the complainant's birth certificate , which showed that she was born on 1st August 2016.The complainant was therefore 5 years at the time of the incident.

54. On the matter of penetration, PW1 testified that on 3/9/2021 at around 3.00 p.m. while leaving school, someone pulled her into the coffee plantation, removed her clothes, her stockings and pantie. "He removed his urinating organ and did bad things to her. That he did bad things to the part she used to urinate and she felt pain". The term 'bad things' is what PW1 used to describe the sexual act done against her.

55. The Court of Appeal in the case of Muganga Chilejo Saha vs Republic Criminal Appeal No. 28 of 2016 (2017) eKLR the court held as follows: -"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 court room. 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. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony."

56. Guided by the above decision, am satisfied that what the complainant was describing was an act of penetrative sex.

57. Furthermore, the clinical officer, PW5 testified that on examination, it was established there was injuries to her genitals. There were mild lacerations to the genitalia externally , the hymen was broken and soil found at her private parts. while soil on the child's genitals may not necessarily be a proof of defilement, the other findings certainly are.

58. I have no doubt at all in my mind that penetration was proved to the required standard.

59. On the matter of identification of the accused person, PW2, was able to positively identify the appellant since she found him on top of the minor . She identified him as an employee of Mama Kimani. PW3 further testified that she heard a child cry from the coffee plantation and later saw the appellant ran hurriedly past their fence. she also identified him as an employee of Wakimani. The time was 3pm. And

therefore there was enough natural light to allow for proper identification. Though the complainant told the court that she did not know the accused she pointed him out as the person who defiled her during her testimony. Both the Appellant and DW3 confirmed that the Appellant indeed worked for Wa Kimani. Pw2 and PW3, knew the appellant as a neighbour. PW2 testified that the accused person was Irungu, an employee of Mama Kimani and she knew his sister since they were married in the same homestead. PW3 identified the accused person Mama Kimani's employee.

60. Identification was therefore by recognition. In the case of Peter Musau Mwanzia Vs the Republic 2008 eKLR the Court of Appeal expressed itself as follows: - "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident".

    There was sufficient evidence that the Appellant was well known to PW2 and PW3, prior to the incident.

Whether the sentence was manifestly excessive, harsh and severe.

61. The Appellant has argued against the constitutionality of the minimum mandatory sentence prescribed under section 8 of the Act. He urges the court to adopt the reasoning in Muruatetu case (see Francis Muruatetu & others vs Republic – supreme court petiton No. 15 & 16 of 2015(consolidated))

62. The punishment prescribed under section 8(2) of the Act is mandatory. The supreme court in Muruatetu case (supra) clearly stated that their finding was not applicable to, among others , the offences under *sexual offences Act*. The court held"We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

63. In conclusion this court finds no reason to disturb the findings of the trial court in both the conviction and sentence. The Appeal is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY 2023.

S. CHIRCHIR

JUDGE.

In the presence of :

Appellant- present

Ms. Muriu for the Respondent.