Kariuki v Republic (Criminal Appeal 135 of 2018)
[2022] KEHC 10685 (KLR) (Crim) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 135 OF 2018

LN MUTENDE, J

JUNE 29, 2022

BETWEEN

KAMAU KARIUKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal arising from the original conviction in Criminal Case No. 03 of 2013 at Chief Magistrates Court Kibera by Hon. J. Kamau – RM on 4th June, 2018))

JUDGMENT

1. Kamau Kariuki, was charged as follows:-

   CountI – Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on the diverse dates between the month of March to July 1, 2013 at Kawangware 46 within Nairobi County, unlawfully and intentionally caused his male organ (penis) to penetrate the female genital organ (vagina) of JWN a girl aged 7 years old. In the alternative he faced a charge of committing an indecent act with a child contrary to section 11(A) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on the diverse dates between the month of March to July 1, 2013 at Kawagware 46 within Nairobi County, committed an Indecent Act by toughing a female organ (vagina) of JLN a girl aged 7 years.

   CountII –Defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on the diverse dates between the month of March to July 1, 2013 at Kawangware 46 within Nairobi County, unlawfully and intentionally caused his male organ (penis) to penetrate a female genital organ (vagina) of LMN a girl aged 6 years old. In the alternative he faced a charge of committing an Indecent Act with a child contrary to section 11(A) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on the diverse

dates between the month of March to 1st July, 2013 at Kawagware 46 within Nairobi County, committed an Indecent Act by toughing a female organ (vagina) of LMN a girl aged 6 years.

2. Having been taken through full trial he was convicted for the offence of committing an Indecent Act with a child in respect of the first complainant and defilement of the second complainant, hence sentenced to serve ten (10) years imprisonment on the alternative to the 1st count and life imprisonment on the second count.

3. Aggrieved, he appeals on grounds thus:

    1. Thatthe learned trial Magistrate failed to appreciate the inconsistencies in the evidence tendered which should have been in favour of the accused.

    2. Thatthe learned trial Magistrate failed to appreciate that there was no medical evidence linking the accused to the offence he was convicted of.

    3. Thatthe trial Magistrate erred in law and in fact by not considering that there was no direct and specific evidence linking the accused to the alleged offences.

    4. Thatthe trial Magistrate erred in law by relying on medical reports which were contradicted by another medical report. There was no medical report to reconcile the two sets of contradictory medical reports.

    5. Thatthe conviction and sentence is irregular and bad in law.

    6. Thatthe trial Magistrate erred in law and fact in convicting and sentencing the Appellant against the totality of evidence tendered during the trial.

4. The complainants in both counts testified that the appellant used to call them to his house, give them sweets and biscuits then molest them. On July 1, 2013, PW1 EW was at home when the 2nd complainant, her daughter and two (2) other children went to the house chewing gum . She demanded to know where they got the gum from only to learn that they had been given by the appellant, their neighbour. She interrogated her daughter who revealed that the appellant had been molesting them. She went to inform PW4 NMM the mother of the 1st complainant of the allegations and the matter was reported to the Police who arrested the appellant. The minors were subjected to medical examination, hence the case.

5. Upon being put on his defence, the appellant testified that he was showering when he heard a person at the door who screamed alleging that he was destroying children. A few minutes later she called another lady who joined her. They turned out to be his neighbours. People gathered who wanted to assault him. A few minutes later the Police arrived and arrested him.

6. The trial court considered evidence adduced and found that the prosecution did not prove the offence of defilement on the 1st count but returned a verdict of guilty on the alternative charge for reasons that the act committed by the appellant was indecent. On the 2nd count, the court reached a finding that the minors hymen was torn therefore she was defiled.

7. The appeal was canvassed through written submissions. It was urged by the appellant that the trial magistrate failed to appreciate inconsistences and contradictions of evidence tendered which should have been in favour of the appellant. That evidence tendered was hearsay as there was no evidence of the witness who saw the two (2) complainants coming out of the appellants' house. That no medical evidence linked the appellant with the alleged offence. That the appellant was subjected to medical examination and a P3 form filled but it was adduced in evidence which leaves the prosecution to be

drawn that it was favourable to the appellant. That the medical reports adduced in evidence by PW5 and PW7 were not reconciled.

8. In response thereto, the Respondent urged that PW5 examined both complainants three (3) days later but found their hymen intact but documents presented by PW7 showed that PW2's vagina was hyperemic and her hymen was torn and as both complainants testified that the appellant inserted his penis into their vagina there was proof of penetration and/or indecent acts committed on the minors.

9. That the fact of PW7 who was not the author of the medical report having not been subjected to cross examination and the contradictions in the two (2) medical reports should not be resolved in favour of the appellant .

10. That although PW1's hymen was intact, evidence adduced proved that she was sexually assaulted.

11. On the question of age it was submitted that it was proved beyond doubt as documents, a clinic card and birth certificate were adduced and not disputed.

12. On identification, it was urged that the appellant was the complainants' neighbour therefore he was not a stranger to them.

13. On sentence, the argument was that it was based upon proper law. The Respondent concluded by calling upon the court to find the appellant guilt of the charge of defilement as drawn on count 1.

14. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 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 (Pandya v R [1957] EA 336) and to the appellate courts 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] EA 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 courts' 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 - See Peters v Sunday Post [1958] EA 424".

15. On the main charge of defilement, the prosecution was duty bound to prove each and every ingredient of the offence. Section 8(1) of the *sexual offences Act* provides thus:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

16. In the case of *Charles Wamukoya Karani v 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."

17. The prosecution was therefore required to prove the age of the Complainants, the act of penetration and positive identification of the assailant.

18. In the case of *Kaingu Elias Kasomo vs. Republic,* Malindi Criminal Appeal No 504 of 2010, the Court of Appeal held that:

> " "Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

19. As regards the age of the complainants that is not in dispute, PW8, No. 51937 PC Veronica Thuo adduced in evidence a child health card from the clinic which indicated that JWN, the 1st complainant was born on July 31, 2006 and a birth certificate for LMN, the 2nd complainant who was born on the April 28, 2007. This was proof that the minors were aged, six (6) years and seven (7) years, respectively, at the time of the incident.

20. On the question of penetration, the term is defined bysection 2 of the *Sexual Offences Act* as:

> The partial or complete insertion of the genital organs of a person into the genital organs of another person.

21. It is argued that evidence adduced did not prove the fact of penetration having occurred as medical evidence tendered was not in tandem. The act in question was alleged to have been committed over a period of time between the months of March to July, 2013. The two (2) minors did not complain to their parents, but PW2's sibling aged three (3) years told their mother, PW2, that "Guka' had taken the two (2) complainants to bed. The stated child was not a witness hence that was hearsay evidence.

22. However, following the allegations the minors were taken to hospital for examination on the 2nd day of July, 2013. Post Rape Care Forms adduced on their behalf were filled by Doctors who were unavailable therefore were presented pursuant to section 33 of the *Evidence Act*. According to the information recorded, JW was found to have an intact hymen such that it was suspected that it could have been a case of indecent assault. LMN on the other hand had a hyperemic vagina. The hymen was torn and distended.

23. The minors were also examined by PW5 Dr Zephania Kamau, two (2) days later who opined that their genitals were normal. Both of them had intact hymens. This was contradiction of evidence presented in respect of LMN. In the case of *PKW vs. Republic* (2012) eKLR the Court of Appeal held that:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

24. This means that the fact of a torn hymen may not be proof of the act of defilement.

25. Section 124 of the *Evidence Act* provides thus:

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

26. PW1 JWN stated that the appellant did bad manners to her and her friend LMN on several occasions. That he put his thing that he uses to pass urine into hers and also put it in their mouth. She explained that the act was being done on the sofa set, the big one. He would remove their clothes and make them face upward. He could be on top of them as well. Then he would give them sweets and biscuits. This child testified under oath but the appellant failed to challenge her evidence in cross-examination. He had no question to put to her.

27. LMN Who also gave sworn evidence also stated that the appellant did bad manners to her in the presence of JWN. That he put the thing that passes urine inside hers and she felt pain. That he would call them give them sweets and he committed the act on the sofa having removed their inner clothes. That the act was committed severally. The minors were emphatic that they did not want to be near the appellant whom they referred to as a bad person.

28. In convicting the appellant, the trial court disregarded evidence of PW5 who examined the children later on and considered evidence of PW7 who adduced in evidence the report made by the Doctors who examined the minors at the outset, but, she did not opine on the demeanor of the children as required by section 214 of the *Evidence Act*.

29. Considering that evidence of PW2 was unchallenged and having been corroborated by that of PW3, the children could not be alleged to having not been truthful.

30. The defence put up was a denial. The appellant alleged that the allegations were fabricated. That he was also examined but the P3 Form that was filed was not produced.

31. From evidence adduced, following contradictory medical evidence the fact of penetration of both complainants was not proved to the required standard of proof beyond reasonable doubt.

32. The appellant faced alternative counts of committing an Indecent Act with a child. Section 11(1) of the *Sexual Offences Act* provides thus:

> 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.

Section 2(a) of the *Sexual Offences Act* defines an Indecent Act as follows:

> a. Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

33. The complainants' description of what transpired amounted to an indecent act that was committed as there was no proof of penetration. The assailant's genital organ simply came into contact with the genital organs of the complainants.

34. As correctly pointed out by the learned trial Magistrate the drafting of the charge regarding the provision of the law the appellant was stated to have contravened was irregular. Section 382 of the *CPC* provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

35. In the case of *John Irungu v Republic* (2016) eKLR the Court of Appeal stated that:

> "The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance
>
> with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice."

36. The omission in framing of the charge was not prejudicial to the appellant, as he understood what he was accused of and he defended himself accordingly.

37. On the question of identification, it is not in dispute that the appellant was a neighbour of the complainants. They knew him very well and even referred to him as a grandfather. In the premises identification of the assailant was proved beyond reasonable doubt.

38. From the aforegoing, I affirm the conviction and sentence meted out in respect of firstcount.

39. On the second count, I set aside the conviction and sentence meted out for the offence of defilement which I substitute with a conviction for committing the offence of an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* and sentence the appellant to ten (10) years imprisonment; a sentence that will run concurrently with the sentence meted out by the trial court on the 1st count.

40. Further, I do note that the appellant was arrested on 4/7/2013 and released on bond on 11/6/2014. Pursuant to the provisions of Section 333(2) of the *Criminal Procedure Code*, the appellant shall serve nine (9) years imprisonment on each count from the 4th day of June 2018.

41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF JUNE, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Ngari for Appellant

Mr. Kiragu for ODPP

Court Assistant – Mutai