Kimani v Republic (Appeal E006 of 2022) [2024] KEHC 5040 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

APPEAL E006 OF 2022

GL NZIOKA, J

MAY 8, 2024

BETWEEN

CHARLES MWANGI KIMANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Honourable Rawlings Liluma Musiega Resident Magistrate (RM) delivered on 18th January 2022 vide Engineer Principal Magistrate's Court criminal sexual offence case No. 42 of 2020)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court charged vide criminal case S/O No. 42 of 2020, with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act"). He was charged in the alternative count with the offence of committing an indecent act with a child contrary to section 11(1) of the *Act*. The particulars of each count are as per the charge sheet.

2. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. It was the prosecution case that on 2nd August 2020 PW1 M.W.N (herein the complainant) was taking a walk when the appellant approached her and her younger brother and requested to carry them on his motor bike. However, he only carried the complainant as her brother had his own bicycle. That the appellant carried her to Naivasha town at Lake Naivasha. He bought yoghurt, then they went to a barber's shop where the appellant charged his phone as both the appellant and complainant walked around. Eventually they went to Flower Farms and ended up in a lodging into a room. As they slept, the appellant undressed the complainant, and according to the complainant, he did to her bad manners forcefully.

3. That the complainant mother called the appellant inquiring on the whereabouts of the complainant and the deceased informed her that she was at the auntie's place. The following day the appellant gave

her Kshs 50 as fare to go to her auntie's place, as he had lied to the mother that she was the auntie's place. The complainant was then traced, the matter reported to the police, she was taken for medical examination, as the accused was arrested, and charged after investigations.

4. At the conclusion of the case, the appellant was put on his defence. He testified vide an unsworn statement that, he closed his work for the day and went home to his family. That PW2, the complainant's mother, called him to ask for the whereabouts of the complainant and he told her, he had taken her to Naivasha and she was with a boy and he didn't know where the boy had taken her as he left her at the stage.

5. That, the following day the complainant called him to pick her. He informed the mother she was at her auntie's place. That he went with the complainant's mother to pick her and then he was led to the police station to report the matter but was placed in the cells on the allegation that he hid the girl. He denied committing the offence. He also stated that, the evidence of the prosecution witnesses was contradictory, as to where the complainant had gone to before she disappeared. He also accused the investigating officer for detaining him for along time this contravening the provision of Article 47(1) (f) and (g) of the *Constitution*.

6. Further, he was surprised to be charged under section 8(1)(3) of the *Act*, when the documents produced showed the girl was 16 years old. That, the complainant had another defilement case No. S/O 63 of 2018 at Engineer Law Courts. That she and her mother use defilement cases to earn a living. He argued that, had the complainant screamed in the lodging the security person would have heard the screams.

7. At the conclusion of the hearing of the case, the trial court vide a judgment dated 18th January 2022 found the appellant guilty on the main count, convicted him and sentenced him to serve fifteen (15) years imprisonment.

8. However, the appellant appeals against that decision based on the grounds:

    a. That, I pleaded not guilty to the charge.

    b. That, the learned trial Magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.

    c. That, the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence.

    d. That, the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    e. That, the learned trial Magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.

    f. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation, the fact that he was a first offender.

    g. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgement.

    h. That, further grounds shall be adduced at the hearing of this appeal.

    i. That, I wish to be present during the hearing and determination of this appeal

9. The respondent on its part opposed the appeal vide grounds of opposition dated 28th November 2022 which states:

   a. That the age of the complainant was sufficiently proved to be 16 years as provided for under Section 8(3) of the *sexual offences act*. And birth certificate produced as an exhibit.

   b. That the penetration was proved under section 8(3) of the *sexual offences act* through the evidence of PW3 who examined the complainant and produced P3 form and PRC form as exhibits.

   c. That the trial court considered the appellant defence and subsequently dismissed it.

   d. That in the judgment the trial court noted that the complainant evidence was cogent and the court noted that she was a truthful witness whose evidence was unshakeable despite the defence adduced by the appellant.

   e. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *criminal procedure code*.

   f. That the sentence imposed by the trial court was proper and in line with the *sexual offences act*. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant to fifteen (15) years imprisonment.

   g. That I pray that the honourable court be pleased to dismiss the appeal and uphold both the conviction and the sentence

10. The appeal was disposed of vide filing of submission. The appellant submitted that, the ingredient of the offence of defilement as set out in the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR are; age of the complainant, proof of penetration and positive identification of the assailant, and argued that, the prosecution had failed to prove penetration to the required standard.

11. The appellant cited section 2 of the *Act* that defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person and stated that at no point did the complainant state that the appellant inserted his genital organ into her genital organ. He relied on the case of *Julius Kioko Kivuva v Republic* [2015] eKLR where the court stated that the complainant has to be specific to the act of penetration. That the best way to establish penetration was evidence of sensory details such as what the victim heard, saw, and/or felt.

12. Further, the prosecution evidence was marred by contradictions on penetration. That, the evidence of PW1 that it was her first time having sex contradicted the evidence of PW3 the medical doctor who produced the P3 form and who noted that the complainant's hymen was not freshly torn. Furthermore, the complainant was involved in previous defilement case S/O No. 63 of 2018 which could have caused the broken hymen.

13. The appellant submitted that, the trial was unfair contrary to the provision of Article 50 of the *Constitution*. That, on one occasion, the trial Magistrate proceeded with the hearing yet he was not sick thus prejudicing his ability to properly cross examine the complainant. Further, the appellant was arraigned in court ten (10) days after her arrest violating Article 49 (f) (i) and (ii) of the *Constitution*.

14. The appellant further argued that, the sentence meted out by the trial court was harsh and excessive for being the mandatory minimum sentence provided for in the *Act.* That, the Court of Appeal in the case(s) of; *Mwangi v Republic* (Criminal Appeal No. 84 of 2015) KECA 1106 (7th October 2022) (Judgment), and *Okello v Republic* (Criminal Appeal No. 189 of 2016) KECA 1034 (KLR) (23rd

September 2022) judgment) concurred with the case of, *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General* [2021] eKLR where the High Court stated that, lower court should apply their discretion while meting out sentences under the *Sexual Offences Act*.

15. Lastly, the appellant submitted that, the trial Magistrate did not consider his defence which if considered together with the evidence of PW3 would not have convicted him of the offence. He urged the court to quash the conviction, set aside the sentence and set him at liberty.

16. However, the respondent in submissions dated 28th November 2022, argued that, it proved the element of the offence being, identification, penetration, and age beyond reasonable doubt. That, the complainant was able to identify the appellant as she knew him as a bodaboda rider who operated near their home. That, it was the appellant who picked the complaint and took her to the lodging and defiled her.

17. Further, penetration was proved through the evidence of the complainant who testified how the appellant took her to a lodging, laid her on the bed, undressed her and inserted his penis into her vagina. That, the evidence was corroborated by PW3 the clinical officer who confirmed the complainant had been defiled. Furthermore, the age of the complainant was proved by the production of the birth certificate which indicated she was sixteen (16) years old.

18. The respondent submitted that, the trial court in its judgment found the complainant to be a truthful witness who braved intimidation from the appellant. That, section 124 of the *Evidence Act* provides that a court can rely on the evidence of a complainant child where it is satisfied that the child was telling the truth. The respondent relied on the case of; *Erick Onyango Ondeng v Republic* (2014) eKLR where the Court of Appeal referred to section 124 of the *Evidence Act* and took note that, the trial court had specifically noted in its judgment that it was impressed by the evidence of PW2 as a truthful witness.

19. Finally, the respondent submitted that the court heard all the witnesses and found that the evidence adduced was cogent and corroborated the facts of defilement and convicted the appellant. They urged the court to dismiss the appeal and uphold both conviction and sentence.

20. At the conclusion of the arguments by the parties and in considering the same and the submissions, I recognize that, the role of the first appellate court as held by the Court of Appeal in the case of; *Okeno v Republic* [1972] EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

21. 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) EA 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] 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 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"

22. In evaluating the evidence herein, I note that, the appellant was convicted of an offence of defilement provided for under section 8(1) of the *Act*, that states: -

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

23. The ingredient of the afore offence as stated in the case of *Bassita Hussein v. Uganda* Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as;

(i) the facts of the sexual intercourse

(ii) the age of the victim being under 18 years

(iii) participation by the accused in the alleged sexual intercourse.

24. It is based on these elements that, the prosecution has to establish adequate evidence to sustain a conviction and resultant sentence. I shall now analyse the evidence adduced herein on each element and draw my own conclusion.

25. As regards the element of age, the complainant produced a birth certificate showing she was born on 26th July 2004. The offence was allegedly committed on 2nd August 2020, therefore she was sixteen (16) years old as stated in the charge sheet.

26. As regards penetration, PW1 M.W.N testified that, the appellant took her to the lodging, undressed her and defiled her. Her evidence was that, she had not been involved in a sexual activity before. PW3 Dr. Antony Gikanga produced a P3 form filled by Dr. Karanja who examined the complainant after the alleged defilement. That the examination revealed that, the complainant's hymen was broken at 9, 3, and 6 o'clock, and remnants were old and healed. That the P3 form was filled on 5th August 2020. Further a PRC form was filled by Dr. Karanja and produced in evidence alongside the P3 form. The conclusion of the doctor was that, based on the history of the patient of defilement, there was a possibility of penal vaginal penetration.

27. The last ingredient is proof of the perpetrator. PW1 told the court she met the appellant in broad day light. She agreed to board his motor bike and they went to Githabai then Naivasha. Apparently, they spent the whole day moving up and down and ended up into a lodging where they spent the night. The complainant was released the following day at 6.00am. From that evidence, it is clear the complainant was with the appellant for a long time and she was able to positively identify him. Furthermore, the appellant was known to her earlier. She testified that her mother used to send the appellant on errands and she had known him for three (3) weeks, as she used to see him at the stage and that she knew his uncle and brother. That she had no disagreement with the appellant.

28. It suffices to note that, during cross-examination of the complainant, the appellant dwelt on the evidence the complainant had adduced. He did not put to her any question to suggest that he was not involved in the offence or that, the complainant evidence was not true. Therefore any submission to the contrary or allegation that he was not involved in the commission of the offence would be an afterthought. In fact the alleged boy whom the appellant alluded to as having been the one whom he left with the complainant, did not feature in cross-examination.

29. It is also noteworthy that the appellant confirmed he carried the complainant on the material date to Naivasha. He also confirmed that the complainant's mother called him to check on her whereabouts

as stated by the complainant. The appellant's evidence of another case of defilement came in late in the day and he never cross examined the complainant and the mother on it. It was an afterthought.

30. All in all, I find no reason why PW1 would plant charges on the appellant. I find the conviction was safe and I confirm it.

31. As regards the sentence, it is the lawful sentence provided for under the law. It is upheld save for reduction of any days he may have been in custody. Otherwise the appeal is dismissed in its entirety for lack of merit.

32. It is ordered.

DATED, DELIVERED AND SIGNED THIS 8TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:-

The appellant present, virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant