Kithinji v Republic (Criminal Appeal E046 of 2022)
[2023] KEHC 20671 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20671 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E046 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

PETER NJOGU KITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* and acquitted of the alternative count of committing an indecent act with a child contrary to section 11(1) of the said *Act*. He was sentenced to serve life imprisonment.

2. Being dissatisfied with the said conviction, he appealed to this court vide a petition of appeal dated October 17, 2022 which was filed on October 18, 2022 by the firm of Maina Karingitho for the appellant. The appellant appealed against both conviction and sentence. The grounds will be considered later in this judgment.

3. Directions were taken that the appeal be canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

4. The appellant gave the factual background and restated his grounds of appeal and submitted (in support of grounds 1 and 2) that the prosecution did not prove the charge of defilement beyond any reasonable doubts for the reasons that PW1 was a child of 2 years of age when the offence occurred and the court found her too young to testify on oath but nonetheless the trial court proceeded to believe in her evidence yet the trial court did not record in the proceedings as to why it was satisfied that she was telling the truth as required under section 124 of the *Evidence Act*. On ground 3, it was submitted that the medical evidence was not sufficient to prove penetration as what would have been expected and resultant penetration to a child of two years old was contrary to the evidence of the medical doctor as to the nature of injuries more so the age of the abrasion. Further that there were missing medical

documents and that he was not supplied with out-patient card but the trial court ordered the matter to proceed without the same having been supplied and the court should draw an inference that the only reason it was never produced is because the same was adverse to the prosecution's case. On ground 4 of the petition of appeal, it was submitted that the evidence by the prosecution was not sufficient on identification of the appellant as she testified two years after the occurrence of the offence and despite the court having found that she was not intelligent enough. That the said evidence had discrepancies which cannot be wished away. The appellant cited the case of *Richard Munene v Republic* [2018] eKLR. On grounds 5 and 6, it was submitted that the trial court misdirected itself in dismissing the appellant's defense. On grounds 7 and 8, it was submitted that the sentence was harsh and excessive despite the appellant having offered mitigation. Citing the case of *Miller v Ministry of Pensiosn* [1947] 2 All ER 372 amongst other decisions, the appellant submitted that the prosecution did not prove the case beyond reasonable doubts and the appellant ought to have been acquitted. He thus prayed that the appeal be allowed and the conviction be quashed and sentence set aside.

5. On behalf of the respondent, it was submitted that age and penetration were proved against the appellant but identification was never proved and thus the conviction was unsafe. The respondent proceeded to concede on the appeal.

6. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* [2005] 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See *Alex Nzalu Ndaka v Republic* [2019] eKLR).

7. Though the respondent indicated that it conceded to the appeal for the reasons that the identification was not proper, it is trite that concession does not mean the appeal must be allowed. The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal but has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence. (See *Odhiambo v Republic* [2008] KLR 565 and also *Norman Ambich Mero & Another v Republic* (Nyeri Criminal Appeal No. 279 of 2005).

8. In summary, PW1 upon voire dire examination having been conducted, gave unsworn evidence upon the court finding her too young to comprehend the nature of oath as she did not possess enough intelligence. She testified that she did not know the accused but that one Guka Kungu did with a big thing on his bed and that he put the big thing in her private parts (she pointed her private parts) and he made her lie on her back and he lay on her. That her mother heard her scream and went to her rescue and she was taken to hospital. In cross examination she testified that she screamed and that her mother took her to hospital and that her mother said that she would beat her up if she did not say that it was Guka Kung'u who inserted something big in her. That it was her mum who said that she should say so.

9. PW2- MW testified that she was the mother to the minor and who was two years as at the time of the incidence. That on 9.03.2019 at around 12.30PM, she went to wash the utensils but PW1 went to the

home of Peter to play with Sharo- his son's daughter (his granddaughter). That she could see PW1 play but after about ten minutes, she noticed that PW1 was not there playing and she decided to go look for her. That as she was looking for her, she heard her cry near the house and she saw Peter holding the child by hand getting out and when she tried talking to her, she did not respond but kept crying and Peter said that he was with the minor cutting window panes and she never thought anything (bad might have happened) as the minor used to go to the home. That she took the minor who was still crying and when they went home she could not stop crying and she even wet the bed that night and she changed her clothes. That she did not sleep that night as she kept on crying and PW2 informed her husband. That they did not go to hospital on the following day as it was on a Sunday but they went on Monday where she was treated and tests done which revealed that she had an infection. That on the 5th day PW1 went to the landlord's place and she followed her and she found her being held by the landlady (Waithera) and PW1 told the landlady that Guka Kung'u did put a big thing in her private parts. That PW2 asked her to repeat what she had said and she stated that Guka Kung'u "mimi" her with a big thing and she repeated the same when the landlady's husband asked her. That she was advised to ask the said Guka Kung'u and when she went and enquired from him, he was hostile and he chased her away after she declined her request that they should not talk about the issue in open but should meet somewhere else. That later the landlady called for a meeting but no witnesses volunteered to testify but PW1 stated in the meeting that it was Guka Kung'u who defiled her. One of the elders proposed that the matter should be settled out of court but she decided to report at Karatina police station and the police took up the matter. In cross examination, she testified that the incident happened on 9.03.2019 and not on 8.03.2019 and further that she took the minor to hospital on 11.03.2019 and she thought that it was just but a urinary infection. She was recalled and produced a copy of the minor's birth certificate which indicates that the minor was born on 12.09.2016.

10. PW3- Dr. Stephen Nderitu produced PRC Form and P3 which had been authored by Dr. Martin Nderitu and whose production was not opposed. He testified basically that the minor reported a matter of vaginal pain and that upon examination, there were no physical injuries but noted, were healing abrasions on labia majora and hymen was broken. That lab tests findings indicated that there was pus cells seen and that she had UTI. In cross examination, he testified that UTI didn't need to be transmitted from another person. As to the broken hymen, he stated that the same can be broken by any object inserted in the vagina. He stated that the vagina was normal save for the abrasion and which can be as a result of physical force and that he did not know that the child had history of urinating on herself.

11. PW4- PC (W) Priscilla Kanyika, the investigating officer stated that she arrested the appellant herein while attending a baraza. In cross examination, she testified that the appellant was Peter Kithinji but that the minor called him Guka Kung'u and the minor's mother also said that the accused was called Guka Kung'u. Further that other witnesses refused to testify.

12. The appellant was placed on his defense and his evidence was basically that he never committed the offence and that he was being framed as he refused PW2 to be hawking cakes in the plot which he owned. That on 23.03.2019, PW2 went and requested to talk to him and she was carrying the minor and the chicken saying that the minor had the evidence. That he told the landlord to call for a meeting between PW2, her husband and the child and PW2 said that he had defiled PW1 but he could not agree to the same and he decided to report to Giakaibei police post and he was issued with an OB Number and was advised to report to the sub-chief but he was arrested on 29.03.2022. His evidence was basically that he did not commit the offence.

13. The appellant called his wife as DW2 and who gave sworn evidence to the effect that DW1 never defiled PW1. That on March 23, 2019, PW2 went to buy a chicken from her home but she didn't pay the

whole of the purchase price and that she did not know anything about the defilement as PW2 didn't say anything in that respect. That PW2 later called the appellant herein and he was furious as he had been told about the girl. That the following day they went to the landlord and later to the chief. Her evidence was that PW2 was a tenant in their premises and that she (DW2) stayed at home. She basically testified that the appellant never defiled the minor herein.

14. It was this evidence which the court analysed and in its judgement found the same sufficient to warrant a conviction for the main count of defilement.

15. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno v Republic (supra) and re-stated in Kiilu and another v R (supra)), the grounds of appeal as raised on the petition of appeal and the rival written submissions, it is my view that the issues this court ought to determine are whether the prosecution tendered sufficient evidence to prove its case to the required standards and whether the sentence meted on the appellant was excessive.

16. As I have already stated, the appellant was charged with the of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

17. Section 8(1) provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". Section 8(2) on the other hand provides that "a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

18. It is therefore clear from these provisions and its indeed trite that for the charge of defilement to stand, the prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. The standard of proof is settled and its beyond any reasonable doubts.

19. As to proof of age, the importance of proving the same was emphasized by the Court of Appeal in *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010 (UR) where the court stated 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."

20. In the case before the trial court, PW2 produced a copy of the birth certificate (Pexbt 4) for the victim and which indicates that she was born on September 12, 2016. The incident allegedly took place on March 8, 2019. Pw2 in her cross examination testified that the actual date was March 9, 2019. That notwithstanding, it is clear that at the time of the offence, the complainant was a child within the meaning of the law. I find that age was proved.

21. The next ingredient I will consider is identification of the appellant as the person who committed the offence. I will consider this as the next one having noted that the respondent conceded the appeal based on the fact that the appellant herein was never identified by PW1 as the perpetrator.

22. Basically, in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. (See *Mercy Chelangat v Republic* [2022] eKLR and which statement I find pursuasive). The evidence before the trial court was that the appellant herein was a neighbour to PW1. PW2 testimony which was never controverted was to the effect that

they used to stay in the same area. In fact the appellant in his defense testified that PW2 went to her home looking for him and that upon her saying what had taken her to his home, he decided to call the landlord who organized for a meeting with her, her husband and the minor. That he was arrested before they could meet. What this evidence brings out is that the appellant, the victim and PW2 were living in the same area. This evidence was corroborated by evidence of DW2 who testified that PW2 used to be a tenant. I find, therefore, that the victim herein knew the appellant as at the time of the offence.

23. I note that in her evidence, she testified that she did not know the accused person but that Guka Kung'u did with a big thing on his bed and he put the big thing in her private part and that her mother went and rescued her when she heard her scream. She testified that Guka Kung'u took her to his bed and made her lie on her back and lay on her and inserted his big thing. Her evidence was that she did not know the accused and that she did not know his names but according to her it was that Guka Kung'u who defiled her. In her cross examination, she testified that Guka Kung'u was on his bed and that her mother beat her up.

24. Though PW2 did not testify as having witnessed the appellant defiling the minor, she was categorical that the minor went to the appellant's home to play with Sharo – a daughter to the appellant's son but after sometimes, she noticed that the minor was not there and she went to check on her on the road, and in a nearby school but the minor could not be found. That she decided to check at Kungu's house, and she heard her cry and near the house, she found Peter holding the child's hand coming out and the child was crying and Peter said that he was with the minor cutting window panes. That she took the baby who kept on crying and later took her to hospital.

25. In my view, despite the minor having not been able to identify the appellant as the one who committed the offence, she was categorical that she was taken to the house by Guka Kung'u and it's where she was defiled. There is also undisputed evidence that PW2 met the appellant with the minor getting out of the house. Her evidence was that her children used to call him "Guka Kung'u". In her evidence she referred to the appellant herein as Guka Kung'u and even PW4 referred to the appellant as such. The appellant did not at any time dispute the said names. It can therefore be said and I so hold that the appellant was also known as Guka Kung'u. The evidence was sufficient in that respect. There is nowhere that the defense counsel raised any doubts as to the appellant being the same as Guka Kung'u.

26. That being the case, the question is therefore whether the said Guka Kung'u and who I have found to be undoubtedly the appellant committed the offence. In my view the circumstantial evidence available in this matter places the appellant at the scene of the offence. The minor was categorical that it was Guka Kung'u who committed the offence on her. The trial court relied and believed in this evidence when it found that the appellant herein was the assailant. The offence having occurred on March 8, 2019 and the victim having testified on February 10, 2021, it is obvious that the victim might have forgotten the identity of the assailant and more so since the uncontroverted evidence was that the family relocated after the incidence (when the child was two years old). I find that the victim was categorical as to the fact that Guka Kung'u was the assailant and all the circumstantial evidence places him at the scene of the offence as of the date of the offence. DW2 even confirmed that PW2 was a friend to her (DW2's) son. The accused did not controvert this strong evidence. In his defense, he did not deny being at the scene but only denied committing the offence. In my view, the evidence herein sufficiently placed him at the scene of the offence.

27. Having determined the issue as to identification, the other issue for determination is whether penetration was proved. In this regard, the evidence by PW1 was that Guka Kung'u did with a big thing on his bed. That he put the big thing on her private parts. The record indicates that she pointed her private parts and that he made her lie on the back and lay on her. That her mother heard the screams and she took her to hospital. It should be noted the trial court conducted voire dire examination and

found the witness not intelligent enough to give sworn evidence. When the appellant was put to his defense, he denied having committed the offence and alleged a grudge between him and PW2 (PW1's mother). The question whether this evidence was sufficient to prove penetration?

28. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proven beyond reasonable doubt and it can be proved either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by section 124 of the *Evidence Act* Cap 80.

29. The said Section 124 of the *Act* provides as thus;-

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

30. The effect of the above provision is that the trial court can convict on uncorroborated evidence of a child of tender years in sexual offences without corroboration provided that the court, for the reasons to be recorded in the proceedings, is satisfied that the alleged victim is telling the truth. This position of law was reiterated by the Court of Appeal in the case of *George Kioji v Republic* (UR) where the Court of Appeal expressed itself as:

> " Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

31. The question therefore is whether the trial court complied with this section? I will deal with this issue having noted that the appellant in his submissions submitted (in support of grounds 1 and 2) that the reasons were never recorded in the proceedings.

32. The trial court having taken the evidence by the victim and the other witnesses found that penetration had been proved. To start with, it is clear the victim was indeed a child of tender years and the court conducted voire dire and found her not intelligent enough to give sworn evidence. The trial court in the course of its judgment noted that (see paragraphs 22 of the judgment) that the victim was a very young child, she was categorical in her evidence and did not contradict herself even in cross examination. That she had no proper words to refer to this unfortunate incident. That she told the court that Guka Kung'u inserted his big thing in her private parts. The court proceeded to state (paragraph 23) that from the evidence tendered, the court was convinced that the child was defiled. The court held in paragraph 25 that the victim had a clear memory of what happened to her.

33. I don't find any reasons for faulting the trial court in the way it recorded the reasons for relying on the evidence of PW1 as to penetration. The record is clear on the reasons for believing the said evidence and the court proceeded to form its opinion or rather finding.

34. Further, the trial court held in paragraph 29 that the said evidence was corroborated by the evidence of PW3 who testified that hymen was missing in two year old girl. In my view, the fact that the offence happened on March 9, 2019 and the examination and filling of the P3 form and PRC form was done on March 27, 2019, it was likely that the injuries suffered on the vagina could have been in the process of healing and it was for that reason that the doctor noted "old healing abrasion marks" on the labia majora. I agree with the trial court that the evidence of the victim corroborated that of the doctor and it was sufficient to prove penetration. I say so having noted that penetration as defined under section 2 of the Act needs not to be complete insertion of the genital organ of a person into the genital organs of another person and that a partial insertion can suffice.

35. I find therefore that the evidence tendered by the prosecution was sufficient to prove the elements of the offence the appellant was facing. Further the trial court was right in relying on the evidence of the minor without corroboration as the same is allowed under section 124 of the *Evidence Act*. The court complied with the said section and noted the reasons why it believed the evidence of the said victim. Further, as I have already pointed out, the trial court found that the evidence by the doctor (medical evidence) was sufficient to prove the charges of defilement. This in my view was just corroboratory evidence and which the court was not bound to consider by virtue of section 124 of the *Evidence Act*. Further as I have already found out, despite the fact that the appellant was not identified at the dock, the victim was very clear as to one Guka Kung'u having defiled her or rather taken her to his bed. The minor having testified two years later, it was possible that she forgot the face or rather appearance of the appellant. However the evidence as to him being referred to as Guka Kung'u in their residence was never disputed. I thus find that the circumstantial evidence placed him at the scene of the offence.

36. It is my view therefore that grounds 1 to 6 of the record of appeal fails. The conviction by the trial court was thus lawful and proper. The appellant having been convicted of the main count, the trial court was proper in acquitting on the alternative count.

37. As to grounds 7 and 8 of the appeal, the appellant submitted that the trial court erred in imposing the maximum sentence of life imprisonment which was harsh and excessive and failing to consider the mitigation. It is trite that this court's power to interfere with the sentence is limited and the court cannot interfere with the 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 excessive 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. This is because sentencing is a matter that rests in the discretion of the trial court. (See *Bernard Kimani Gacheru v Republic* [2002] eKLR).

38. From the trial court's record, it is clear that the appellant was afforded an opportunity to mitigate and the court considered the said mitigation but noted that he was not remorseful at all and that he was only worried of his age and health. The court noted that his mitigation had been noted. The court even noted that no mitigating factors were present towards a diversion from the minimum sentences. The trial court sentenced the appellant to serve life sentence.

39. However, considering the jurisprudence in the case of *Mutuatetu* and the fact it was extended to other mandatory sentences, I find that the sentence was excessive. I hereby set aside life sentence and replace it with 40 years imprisonment.

40. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State