Kiplagat v Republic (Criminal Appeal E066 of 2022)
[2023] KEHC 20647 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E066 OF 2022

A. ONG'INJO, J

JULY 20, 2023

BETWEEN

BENARD KIPLAGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered by Hon. David O. Odhiambo, Senior Resident Magistrate on 31st April 2022 in Shanzu Senior Principal Magistrate's Court S. O. No. E075 of 2021, Republic v Benard Kiplagat)

JUDGMENT

Background

1. Benard Kiplagat was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars are that Benard Kiplagat on the 14th day of April 2021 in Nyali Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of GC a girl aged 4 years.

3. In the alternative count, the appellant was also charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

4. The trial magistrate considered the evidence of four prosecution witnesses and the sworn statements of defence witnesses and convicted the appellant on the main charge and was sentenced to serve 40 - years imprisonment.

5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds: -

1. That the learned trial magistrate erred in law in failing to evaluate the evidence before it and come to his own conclusion.

2. That the learned trial magistrate erred in law by misapprehending the evidence of identification.

3. That the trial magistrate erred in law in presuming that any medical evidence of sexual injury relating to the victim to be that of the accused just because it is an offence under the *sexual offences act*.

4. That the trial magistrate erred in law in misapprehending the extent to which Section 36 of the *Sexual Offences Act* and Section 124 of the *Evidence Act* relate to each other and whether the two sections are exclusive of each other.

5. That the trial magistrate erred in law in failing to consider the evidence regarding the scene of crime alongside Section 37 and 33 of the *Sexual Offences Act* and how such consideration affected the defence surrounding circumstances.

6. That the learned magistrate erred in law and misdirected himself in ignoring the meaning and effect of evidence under Section 33, 36 and 37 of the *Sexual Offences Act* depriving the accused of reasonable chances of acquittal in law.

7. That the learned magistrate erred in law in forming his opinion on the truthfulness of the prosecution witnesses without reference to cross examination.

6. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.

Prosecution's Case

7. PW1, GK, the complainant, aged 5 years underwent voire dire examination and testified that her friends in school are A and A and that she does not play with anyone at home. She said that she knew uncle Ben who called her to his room but she could not remember what he was wearing. That uncle Ben locked the door using a padlock and put his susu on her susu. She stated that she could not remember whether she had a dress. That she was sitting on the floor and uncle Ben was sitting on the bed. That he had a vest and a short and that he removed his short. The complainant informed court that she could not remember how she felt, that she did not cry and that he did it several times.

8. PW1 said that her friends were playing and that A went to look for her. She said that uncle Ben opened the door and that she then put on her panty. That she did not tell A what uncle Ben did but told T and that it is T who told A and A told her mother. She also said that she was taken to hospital and the doctor looked at her susu. She said she knew uncle Ben but he was not in court. On cross examination, she said that uncle Ben was seated on the bed and she was seated on the floor and that uncle Ben did not leave the bed and that he put his susu on her when she was on the floor. She said she could not see uncle Ben in court but could remember him if she saw him and that her mum told her what to say.

9. PW2, NCO stated that the complainant is her daughter and that she was born on June 5, 2016. That on April 14, 2021, she arrived home at 8.00 pm and her female neighbour went and told her that the complainant informed her that she was feeling pain in her private parts and that uncle Ben had done bad manners. That uncle Ben called her to his bedroom and locked the door and that when the other kids followed her and knocked on the door. That she came out and told them uncle Ben removed her panty and put his penis on her vagina. That PW2 asked the complainant what had happened and she told her uncle Ben had put his penis on her vagina.

10. That PW2 told her husband what had happened and they agreed as two families to call ben to ask what he knew. That the other family said they did not want to expose their daughter to the police. That PW2 with her husband decided to go to Nyali Police Station where they were referred to Coast General Hospital for treatment. That they then recorded their statement and Ben was arrested. PW2 further stated that they gave consent for the minor to be examined and that she was present when she was being checked. That she had redness on the labia and the hymen was partly broken. PW2 identified the accused in court.

11. PW3, Dr. Nuzla Ali, stated that he had a P3 Form in respect to the complainant aged 4 years. That she had changed clothes and reported she was defiled by someone known to her. That the approximate age of the injury was 2 months and that the hymen was broken at 9 and 11 o'clock and that there were healing abrasions. That the tests done were normal. She produced the P3 Form as PExh-2. PW3 also testified that she had a PRC Form filled on April 16, 2021 and that the complainant stated the perpetrator put his penis on her vagina and that there was healing abrasion and the vagina orifice was 0.5 cm open. She produced the PRC Form as PExh-3.

12. PW4, No 86552 PC Wilfred Nyange informed court that on April 17, 2021, he received a report from a woman who had reported a case of defilement and that the child had been taken to hospital for checkup. He stated that he recorded her statement and that of the minor, and called for some witnesses but they were not allowed by their father to testify. He stated that he obtained a PRC Form and later the accused was arrested and charged in court after interrogation. That the mother of the complainant was informed of the incident by a neighbour who heard it from her children. PW4 said that the minor told him that she was playing with her friends when uncle Ben took her to his house and inserted his dick into her vagina. That the accused said he was sick and denied committing the offence. That the PRC form indicated hymen was broken and that there were lacerations. PW4 informed court that he got the birth notification of the minor showing she was born on June 5, 2017 and identified the accused as uncle Ben. PW4 produced the birth notification as PExh-4.

Defence Case

13. The accused, Bernard Kiplagat Cheruiyot, testified that he knew the complainant herein as well as her mother and father as they were his neighbours but moved out. That he knew the complainant's mother when she disagreed with her husband. That the accused would drop her at work and that at some point they had a relationship. That the complainant's mother was their tenant and that the accused would push for her not to pay rent but the house was given to an agent. That the complainant's mother incurred arrears of Kshs. 30,000 and that the accused promised to pay for her but he got the money and used it elsewhere. That the complainant's mother got mad at him, stopped talking to him and blocked him. The accused informed court that the complainant was not able to identify him and that she said it was not him who defiled her. He said that the complainant's mother had warned him and that the child knows him very well and would not have any difficulties identifying him.

14. DW2, Charles Kipkech Wilson said he knew the accused but they are not related and that he had known him for 4 years. He said that he is a caretaker of a house belonging to the accused and that the complainant's mother was one of the tenants. DW1 said that he stayed in the compound and was always around and that he did not know about the case until the accused was arrested. That there was a time the complainant's mother was screaming that she would kill someone and later the accused was arrested. That DW2 would have been told if there was anything.

15. This appeal was canvassed by way of written submissions.

Appellant's Submissions

16. On ground one of the appeal, the appellant submitted that the prosecution's evidence was inconsistent and/or insufficient as it did not link the appellant to the offence. That the victim in her testimony could not describe how uncle Ben's room looked like. She further told the court that 'aliweka susu yake kwa susu yangu' while the accused person was seated on the bed while she was on the floor. That the victim also told court that 'aliingiza mara mingi' but she could not remember how she felt and that she did not cry. The appellant relied on the case of *Julius Kioko v Republic* (2015) eKLR where it was held as follows: -

> " evidence of sensory details, such as what a victim heard, saw, felt and even smelled, is highly relevant evidence to prove the element of penetration as a victim's testimony is the best way to establish the element in most cases.
>
> There was no specificity in the victim's testimony by use of any of the five senses as proof of penetration."

17. On ground 2 and 3, the appellant argued that in regards to the identification or recognition of the offender, PW1 told court during examination in chief that the appellant was well known to her but the victim could not recognize the appellant in court even after he was asked to lower his mask. That identification and recognition were discussed in the case of *Jag v Republic* (2021) eKLR in which the case of *Anjononi & Others v Republic* (1989) KLR the court held: -

> Recognition is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.

18. The appellant cited the case of *R v Turnbull & Others* (1976) 3 ALL ER 549 where the court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. Lord Widgery CJ also observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.

19. Further in the case of *Francis Muchiri Joseph v Republic* (2014) eKLR viz Wamunga v R. (1989) KLR 424, the court while dealing with the complexities of an identification of an assailant stated as follows: -

...It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

20. On ground 4, 5, 6, and 7, the appellant submitted that the date of the alleged offence is not clear, PW3 the medical officer told the court that he examined the victim about 2 months after the alleged incident. That the complainant's mother did not explain to the court why the medical examination took too long. That in all her testimony on examination in chief, cross examination and re-examination, PW1 (the complainant) did not at any one time mention the date when she was offended or anything about April 14, 2021.

21. That what PW2 was telling the court was neither what she was told by the complainant, A nor any of the other unnamed girls. That neither the complainant, A nor any of the other girls was present during the conversation between N and E. Therefore, the conversation that was narrated to court was hearsay evidence. That PW2 says that after receiving the information from E, she asked the complainant what

happened. That she told her husband, who never testified in court, what happened and a decision was made for the two families to confront Ben but there is no evidence that Ben was confronted on that day or at all.

22. The appellant therefore prayed that the appeal be allowed, the conviction quashed and sentence set aside.

Respondent's Submissions

23. The Respondent argued that the ingredients that need to be proved for the offence of defilement are age of the victim, penetration and the identity of the perpetrator which were proved by the prosecution. On the age of the victim, the respondent submitted that the offence is alleged to have occurred on April 14, 2021. That PW2 testified that the complainant was born on June 5, 2016 and she was therefore 6 years old at the time of the alleged offence. That the child's age was confirmed vide birth notification.

24. On penetration, the respondent contended that the complainant in her evidence stated that the appellant removed her panty and inserted his penis onto her susu. That PW3 also produced the PRC and P3 Form which showed that the complainant had broken hymen and healing abrasions on the vagina. On the identity of the perpetrator, PW1 was able to identify the appellant by name and that she was consistent that the person was uncle Ben, who was a neighbour.

25. On sentencing, the respondent stated that Section 8 (2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of life imprisonment. The respondent submitted that the sentence was therefore in line with provisions of the law.

Analysis and Determination

26. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

27. After considering the grounds of appeal, records of trial court and submissions, the main issue for determination is whether the appellant was properly identified as the perpetrator. The age of the complainant is not in doubt and there is evidence of defilement produced by PW3 who examined the child and established that her hymen was broken at 9 and 11 o'clock and there was healing abrasion and the vaginal orifice was 0.5 cm open.

28. The complainant's mother's testimony was that on April 14, 2021, she arrived home at 8.00 pm and her female neighbor told her that the neighbour's daughter had informed her something. The information was that the appellant called the complainant to his bedroom and locked the door and that when the other kids followed and knocked the door, the complainant came out and on being asked what she was doing in the house, she said that uncle Ben had removed her panty and put his penis in her vagina. That she asked the complainant what happened and she confirmed what the neighbour's daughter had said. PW2 reported to her husband and the neighbour's family and the complainant's family agreed to call

the appellant and ask him what he knew but the neighbour's family backed out saying they did not want to expose their daughter to the police. PW2 and her husband decided to report the matter to the police and they were referred to hospital where the complainant was examined. She was found to have redness of the labia and her hymen was partly broken.

29. When the complainant was initially examined, she said that uncle Ben called her to his home but she could not remember properly what happened. The prosecution applied that she be declared a vulnerable witness and have a guardian testify and the trial magistrate declared the complainant a vulnerable witness on account of age and memory capability.

30. When the complainant was later put in the witness box on November 30, 2021, it is indicated that she was still on oath that was taken on 31.8.2021. She then said that the appellant locked the door using a padlock when she was with him inside and he put his susu on her susu after removing her panty. She said the appellant was seated on the bed while she was seated on the floor and she could not remember whether she had a dress. She said the appellant removed his shorts and did it several times. That when her friend A went to look for her, the appellant went to open the door and she put on her panty and left. She said that she told T what uncle Ben had done and that Tabby told A and A told her mother.

31. In cross examination, the complainant said she could not see uncle Ben in court but could remember him if she saw him and that mum told her what to say in court. She repeated in re-examination that the person who defiled her was not in court.

32. The evidence on identification in the absence of the evidence of the witnesses who allegedly saw the complainant in the appellant's house creates serious doubts as to whether the 4-year-old complainant properly identified the perpetrator as she even said she was not seeing him in court and that it was her mother who told her what to say in court.

33. The doubt raised as to the identity of the perpetrator in the prosecution's case ought to have been resolved in favour of the appellant as the prosecution have the duty to prove their case beyond reasonable doubt.

34. In conclusion, the appeal herein has merit and the same is allowed. The conviction is quashed and sentence set aside.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 20TH DAY OF JULY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Mr. Gikandi Advocate H/B for Mr. Obonyo Advocate for the appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE