Gitonga v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 21965 (KLR) (1 September 2023) (Judgment)

Neutral citation: [2023] KEHC 21965 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E013 OF 2022

HI ONG'UDI, J

SEPTEMBER 1, 2023

BETWEEN

CHARLES MBUGUA GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the undated judgment by Hon. Rawlings Liluma at the Senior Principal Magistrate's Court at Engineer delivered on 28th February 2022)

JUDGMENT

1. Charles Mbugua Gitonga hereinafter referred to as the "appellant" was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006.

   The particulars were that the Appellant on the 21st May 2020 in Kinangop within Nyandarua County intentionally caused his penis to penetrate the vagina of EWA a child aged 16 years. In the alternative he faced a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offence Act* No 3 of 2006.

   The particulars are that the Appellant on 21st May 2020 in Kinangop within Nyandarua County intentionally touched the vagina of EWA a child aged 16 years.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling a total of four(4) witnesses while the appellant gave a sworn defence. Thereafter the court convicted him of the principal count and sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the Judgment, he filed this Appeal citing the following grounds

   i. 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

ii. 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.

iii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation thus imposing the maximum sentence which is harsh and excessive, and not informed by the unique facts and circumstances of the offence.

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

4. The respondent filed grounds dated 6th December 2022 in opposing the Appeal

i. That, in response to ground 2 and 4, the prosecution case was proved to the required standard as per the law.

ii. That, in response to ground 3, the trial court properly convicted the accused on account of medical evidence tendered by the clinical officer

iii. That, in response to ground 4, the trial court magistrate considered all factors and used his discretion before sentencing the appellant

iv. That, the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of *Criminal Procedure Code*

v. That, the sentence imposed by the trial court was proper and in line with the sexual offence act.

vi. That, the honorable court be pleased to dismiss the appeal and uphold both the conviction and sentence.

5. The evidence on record is that PW1 then aged sixteen (16) yeas was on 21st May 2020 at 7pm sent by her mother PW3 to buy vegetables near her home which she did. On her way back just before reaching the back gate she found someone standing and she bypassed him. She was wearing trousers. The person came and covered her mouth with a piece of cloth and pulled her. He had a knife which he placed in his mouth. He pulled her to an incomplete house, removed her clothes and defiled her twice.

6. Thereafter he escorted her back. On the way she met her mother and a neighbour (Mama Kimani) who had come looking for her. The perpetrator took off. They went to Ndunyu Njeru police station and reported. She was taken to Engineer hospital the next day, and she was treated. She stated that she was born on 23rd January 2005. She identified the P3 form (Pexh 1), her birth certificate (Pexh 2). She stated that she had just been seeing the perpetrator whom she identified as the appellant in Ndunyu Njeru town. She was able to identify him with the help of the moonlight. She saw his face as he defiled her and the incident took an hour.

7. In cross-examination she said the appellant had a black cap and rastas which she pulled to make him leave her. She had just been seeing the man in town but two days after the incident she saw him greet a friend of hers. Thereafter she sought to know his name from her friend. She was given his name as being Charlo. The friend even knew his wife. PW1, then gave the name to the police the same day. Upon reporting she had learnt from the station that he had other cases. She even mentioned a day when her and the appellant boarded the same vehicle, and when he looked behind she alerted her mother. The man jumped out of the vehicle's window. This was on 22nd June 2020 while she was headed to hospital.

8. PW3 confirmed having sent PW1 to a nearby place to buy vegetables and she failed to return soon thereafter. She got a neighbour (Muthoni) and they went to look for her. She saw PW1 from some dark

place and there was a person following her but he disappeared. PW1 who was crying then narrated to her what she had been through. The rest of her evidence is similar to that of PW1. In cross-examination she said she had not known the appellant before but she had seen him well when he jumped off a moving vehicle which was taking them to hospital.

9. PW2 Dr. Julius Ndwiga introduced himself and his credentials. He produced the P3 on behalf of Dr. Rotich who confirmed that when PW1 was seen 3 weeks after the incident she had already been treated at Engineer hospital on 22nd May 2020. He stated that PW1's hymen was broken with a tear at 3 O'clock, and the penetration was recent. The High Vaginal Swabs (Hv) revealed the presence of red blood cells, and she had a urinary track infection. He produced the P3 as Pexh 1.

10. The investigating officer testified as PW4. She is Cpl Regina Wairimu No 228705. She was not the initial investigating officer. She interviewed PW1, and confirmed all statements by the witnesses. She pointed out that it is PW1 who identified the appellant.

11. In his sworn statement of defence the appellant stated that he was arrested for the offence of assault and brought to Engineer. He was later taken to Kinangop police station and then charged with the current offence. He stated that despite PW1 alleging she was threatened with a knife and her clothes torn none was availed in court. That there was a lot missing from the statements of the investigating officers.

12. The appeal was canvassed by way of written submissions. The appellant's amended submissions are dated 14th June 2023. He does not dispute the age of PW1 who was a child of tender years. He however takes issue with the evidence of PW1 and PW3 on the elements of penetration and identification. On identification he submits that the intensity of the moonlight was not tested. Secondly that PW1 never stated anywhere that she knew him prior to the alleged incident. She relied on the cases of (i) *Joseph Muchangi Nyaga & another v Republic* (2013) eKLR, (ii) *Waithaka Chege v Republic* (1979) KLR 217, (iii) *Gikonyo Kamune & another v Republic* (1980) KLR 23 to argue this point.

13. It's his submission that PW1 went to the police station to identify him after being called by the police as she never gave the police any description of him. He was equally not subjected to any form of identification parade. That the statement of moonlight was not sufficient.

14. Referring to some portion of PW1's testimony he contends that penetration was not established conclusively. He refers to the period of 3 weeks it took to have the PW1 examined by the Doctor. He adds that the lack of hymen in sexual offences is not a complete proof of defilement. He relied on the case of *PKW v Republic* (2012) eKLR in support.

15. On sentencing he submitted that the court has discretion in sentencing. That the court's discretion should not be limited through minimum sentences. He cited the cases of *Regan Otieno* Criminal Appeal No 189 of 2016 (2020) and *Philip Mueke Maingi & 5 others v Prosecutions DPP & the AG* petition No 97 of 2021 at Mombasa High Court to support his argument that the court's discretion in sentencing should not be curtailed.

16. The respondent's submissions are dated 19th December 2022 and filed by Mr. Michuki Alfred for the Director Public Prosecution, Counsel submitted that in line with the case of *Benard Kiptoo v Republic* (2021) referencing the case of *George Opondo Olunga v Republic* 2016 eKLR the prosecution had proved its case on the elements of identification, penetration and age of the victim. Counsel referred to PW1's evidence on having known the appellant physically over a long period. Secondly there had been moonlight and he had defiled her for over an hour. Further that she had seen him two days after the incident and identified him. That PW3 also identified him.

17. Counsel further submitted that penetration was also proved as per the definition of the word under the *Sexual Offences Act*. Counsel referred to the case of Criminal Appeal No 118 of 2013 *Evans Wamalwa Simiyu* (2016) eKLR where the court defined the word "penetration".

On sentence he submitted that the appellant had been sentenced in accordance with the law and after consideration of the circumstances of the offence and mitigation

Analysis and Determination

18. This is a first appeal and this court had a duty to reconsider and re- evaluate the evidence on record plus the applicable law and arrive at its own conclusion. It must remember that it did not see or hear the witnesses. In the case of *Kiilu and another v Republic* (2005), KLR 174 the Court of Appeal held thus;

2. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

3 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.

Further in the case of *Bonu and another v Republic* (20025), KLR 650 the Court of Appeal held that;

(4) A duty is imposed on a Court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal.

19. Upon consideration of the evidence adduced herein, grounds of appeal parties submissions; the law and case law I find the main issues for determination to be:

(i) whether PW1 was defiled

(ii) whether the appellant was identified as the perpetrator

(iii) whether the sentence meted out is lawful.

Issue No (i) Whether PW1 was defiled

19. Section 8(1) of the *Sexual Offences Act* defines defilement as follows;

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

Penetration is hence defined under the same Act as:

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

The *Children's Act* (No 8 of 2001) on the other hand defines a child as follows:

> " Child means any human being under the age of eighteen years"

21. There is evidence on record indicating PW1's age e.g. the birth certificate (Pexh 2) No 18xxxx shows she was born 23rd January 2005 the same having been registered on 6th December 2010. The appellant at page 2 of his submissions agrees with that and states that he does not dispute the age of PW1 (the victim). That being the case I shall move onto the issue of penetration

22. In her evidence PW1 stated as follows at page 17 lines 18-21

> " He then pulled me to an incomplete house. He removed my clothes. He then did so twice. He raped me twice. I could not scream. My mouth was covered. The incident happened on the floor of that house. It had two rooms. The incident happened in one of the rooms. He then escorted me back."

23. The above is what describes what happened on the material night. In the definition of penetration, the *Sexual Offences Act* talks of a partial or complete insertion of the genital organ into another person's genital organ. In PW1's evidence there is no mention of any insertion or genital organs. It is not enough just to tell the court that one was raped or defiled. The learned trial magistrate should have sought for more details as to what PW1 meant by saying she was raped. That is allowed when a minor is testifying. She can even demonstrate by show of signs.

24. PW2 Dr. Julius Ndwiga is not the one who treated PW1 at first instance and neither is he the one who filled the P3 form (Pexh 1). The said form was filled and signed on 15th June 2020 whereas the incident is alleged to have occurred on 21st May 2020 at 7pm. Besides the P3 form there is nothing that shows the alleged tests were conducted on PW1. A P3 usually contains results of tests conducted before a finding is made by the Doctor. There is no such document annexed to the P3 (Pexh 1) in the entire record.

25. More evidence needed to be adduced to support the findings in the P3 form. This coupled with the fact that PW1 was so vague on what was exactly done to her on this particular night leaves a lot to be desired.

Was the appellant identified as the Culprit in this Case?

26. Finally is the issue of identification.

In the case of Kiilu & another (*supra*) the Court of Appeal indicated thus on the need for proper identification

> " Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, point to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

27. In this case PW1 stated that it was actually dark when this incident happened. However she was able to identify the Appellant by use of moonlight and light on the road. How strong was the moonlight? Secondly what was the source of the light on the road? She never said anything about it, and neither did her mother (PW2) say anything about such light.

28. PW2 in her evidence said she saw her daughter come from darkness and someone was following her but was abit far. How was she able to see all that yet she says it was dark and so she could not see the person? Secondly when they went to the police station to report did they give any name or description of the perpetrator?

29. I further note that the issue of PW1's friend giving her the name of the Appellant and the other issue of the appellant and PW1 boarding the same matatu were both raised in re-examination. These are matters which ought to have come in the evidence in chief if they were there. The appellant was not represented to know what to object to or what to respond to after cross-examination. From what PW1 stated in court, their report to the police was of someone they could identify if they saw him. Taking a name to the police station after the initial report should not have changed anything. The police ought to have subjected PW1 to a properly conducted identification to test her evidence. This was never done.

30. In find the testing on this evidence on both penetration and identification, to have been very critical and ignoring it to entirely rely on what PW1, PW2 and PW3 said was not fair to the appellant. There are witnesses who may appear to be really speaking the truth yet they are not genuine. That is the reason why courts are called upon to critically weigh ALL the evidence presented before them to ensure justice for all. In this case an identification parade ought to have conducted in respect of the appellant

31. From my analysis above I have reached a finding that the evidence against the appellant was not strong enough to sustain a conviction on the main count. He was rightly acquitted on the alternative count in view of the fact that there was no evidence of identification of him as the person who was at the scene. It is therefore not safe to have the conviction stand.

32. For my part I find merit in the appeal which I hereby allow. The conviction is hereby quashed and the sentence set aside. The appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

33. Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.

HEDWIG ONG'UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant