FKM v Republic (Criminal Appeal 130 of 2018)
[2025] KECA 24 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 24 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 130 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JANUARY 17, 2025

BETWEEN

FKM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (D.S. Majanja, J.) dated 16th October 2018 in HCCR.A. 33 of 2018)

JUDGMENT

Introduction

1. The appellant, FKM, was convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section (2) of the *Sexual Offences Act*. The particulars of the charge were that on 24th December, 2012 in Imenti North District within Meru County, he intentionally caused his penis to penetrate the vagina of MM, a child aged 11 years.

2. The appellant pleaded not guilty to the charge and the prosecution called five (5) witnesses in support of its case.

3. Dr. Nicholas Koome Guantai (PW1) was a Medical Officer based at Meru Level 5 Hospital. It was his evidence that he filled the P3 form and that upon examining PW2 he observed that she had reddening on her inner thighs and that there were no injuries on her vagina but the hymen was absent. He produced the P3 form the Post Rape Care (PRC) form and the Immunization card, which indicated that PW2 was born on 8th December 2000.

4. MM (PW2) testified that she knew the appellant who was her uncle and who lived in the neighbourhood. PW2 testified as follows:

> " I saw F ahead of me. I knew him. He appeared very drank (sic). I did not fear him because he is my uncle and used to frequent our home. We passed each other then suddenly he held me further near. He held the neck and took me to their shamba. He took me to the maize shamba and ordered me not to scream else he strangle me dead. I kept quiet. I was wearing a black striped (sic) white MM(1). Also I wore a red T shirt MM (2). He then removed my panty. He also removed his trouser. He then inserted his penis into my vagina. I was wearing a black panty MM (3). I screamed and one AK came. I told her what had happened."

5. BM (PW3) who is PW2's grandmother testified that on the material day at about 5.30pm, she sent PW2 to the shops but she did not return home immediately. It was her further evidence that subsequently, PW2's mother telephoned her and informed her that PW2 had been defiled. It was her further evidence that she went home whereupon PW2 narrated the ordeal to her. It was PW3's evidence that the appellant is a relative and that she has no grudge against him. It was her further evidence that she took PW2 to Kienderu Police Post where they were referred to Meru Level 5 Hospital for treatment.

6. LK (PW4) testified that she was a casual labourer in the locality and that on the material day at about 5.30 pm she was at her home when she met PW2 crying and upon enquiring why she was crying, PW2 narrated her ordeal to her. It was PW4's evidence that the appellant was well known to her. It was her further testimony that she called PW2's grandmother who took PW2 to the hospital.

7. CPL Vincent Dado (PW5) was based at Kienderu Police Base and was the Investigating Officer. It was his testimony that he was handed a file by one CPL Mengu who was proceeding on transfer. That the file had exhibits including inner pants, one red T-shirt, a sleeveless black striped dress, a P3 form, immunization Card indicating that PW2 was born on 8th December, 2000 and was 11 years old at the time of the commission of the offence. It was his further evidence that the appellant was arrested on 13th January, 2013 and charged.

8. After the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence but called no witnesses. The appellant denied committing the offence. The appellant stated that he was drunk and could not recall what had taken place on the material night.

9. The trial court dismissed the defence and found in part as follows:

> "The minor complainant herself told how she had (sic) that the accused was drank but that she did not fear him because he was her uncle and well known to her. They passed each other and he had suddenly paused (sic) on her neck carried her to a maize plantation where he proceeded to undress her and defile her. I believed her evidence. She struck me as an honest and credible witness. Moreover, she immediately reported what happened to her mother L (PW4) and grandmother, BM. On their part, the mother and grandmother did not waste time but immediately took the child to the hospital and when she was examined by Dr. Koome (PW1) findings were positive for defilement. The evidence is simply overwhelming of the accused person...I have also considered the statement of defence by the accused person but find that drunkness (sic) cannot be an excuse for such a heinous crime as the one committed...Drunkness (sic) cannot be a defence to this offence...I find him (the appellant) guilty on the principal charge of defilement and convict him as by law provided."

10. Aggrieved by the conviction and sentence, the appellant appealed to the High Court which after re-evaluating and analyzing the evidence on record, found in part as follows:

> " I am satisfied that the testimony of PW2 was clear and credible and indeed established that the appellant, whom she knew caused an act of penetration. The proviso of section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth...Thus, the testimony of PW2 was sufficient to support a conviction without further corroboration... The question of age of a child is a question of fact proved by available evidence. For purposes of the offence, there is no dispute that the child was below the age of 18 years. As regards the apparent age of the child, which is relevant for determination of the sentence, the immunization form produced in evidence showed the child was 11 years old at the time the offence was committed. Under section 8(2) of the *Sexual Offences Act*, the life sentence is mandatory. I affirm the conviction and sentence and dismiss the appeal."

11. Undeterred, the appellant filed an appeal to this Court raising grounds inter alia that: the prosecution did prove to the required standard that the appellant defiled PW2; that his defence was not considered; and that the sentence was harsh and excessive.

Submissions

12. At the hearing of the appeal, the appellant who was acting in person submitted that the prosecution did not conclusively prove that he defiled PW2. It was his submission that the prosecution failed to prove that PW2 was 12 years old at the time of the commission of the offence. Further, that the prosecution failed to prove that there was evidence of penetration and that the appellant was the perpetrator. Further, that PW2's evidence that the appellant defiled her was that of a single identifying witness. The appellant further submitted that there was a grudge between the appellant and PW2's family, which led to the appellant being framed for her defilement.

13. The appellant submitted that the trial court did not consider his defence and that while he informed the court that he was drunk, this was not an admission that he committed the offence.

14. Regarding sentence, the appellant submitted that the sentence imposed by the trial court and upheld by the 1st appellate court was harsh and excessive as PW2 was aged 12 years at the time of the commission of the offence. The appellant further submitted that he has undertaken various courses while in prison. He urged this Court to allow his appeal on conviction and sentence.

15. Ms. Nandwa, the learned prosecution counsel opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt and proved all the ingredients of defilement that is PW2's age, penetration and the identity of the perpetrator.

16. Regarding PW2's age, counsel submitted that the prosecution proved that PW2 was 11 years old at the time of the commission of the offence.

    PW2 testified that she was 11 years old when she was defiled. Further, an immunization card which was produced proved that PW2 was born on 8th December, 2000 which clearly proved that PW2 was 11 years old at the time of the sexual assault.

17. Counsel submitted that on penetration, PW2 submitted that the appellant defiled her. Further, that PW2 immediately reported to her mother and grandmother (PW4) that the appellant had defiled her.

Counsel further submitted that PW2's evidence was corroborated by the evidence of PW1 who testified that upon examining PW2, he found that she had reddening of her inner thighs and the hymen was absent. In the doctor's opinion, there was penetration.

18. Counsel further submitted that the trial court observed PW2's demeanour and stated in its judgment that it believed PW2 and that she was an honest and credible witness. Counsel relied on the decision of J.W.A. vs Republic [2014] eKLR where this Court stated as follows:

> " We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. the trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error on the part of the High Court in concurring with the findings of the trial magistrate."

19. Counsel further submitted that medical evidence was not in any way contradictory but was consistent with the evidence of PW2. The PW3 form clearly stated that there were minor lacerations on the labia minora and that the hymen was absent. Counsel asserted that PW2's testimony was sufficient to prove the offence without further corroboration.

20. On the identity of the perpetrator, counsel submitted that PW2 identified the appellant positively. That PW2 testified that she had known the appellant before the incident, that he was her uncle and that he used to frequent their home. Counsel further submitted that the defilement occurred at about 5.30pm and there was therefore sufficient light for PW2 to identify the appellant as the perpetrator. Counsel asserted that the conditions for identification of the appellant as the perpetrator were therefore favourable.

21. On the appellant's defence, counsel submitted that the appellant testified that he did not remember anything and raised the defence of intoxication. Counsel submitted that the appellant asked PW2 questions during cross-examination despite the fact that his defence was that he was drunk and did not remember anything. Counsel asserted that this clearly showed that the appellant's defence was an afterthought. Counsel further asserted that if the appellant was drunk up to the point that he was not able to remember anything, he would not have committed the heinous crime against PW2. Counsel relied on the persuasive decision of the High Court in Evans Mark Oongo v Republic [2021] eKLR where R. Wendoh, J. stated as follows:

> " The defence of intoxication is only available in circumstances set out in Section 13. So that a person who commits an offence when intoxicated is not automatically excused from the consequences of his act. The first instance where the defence will be availed to an accused is where there [is] involuntary intoxication, that is, where intoxication is caused without one's consent or through a malicious or negligent [act] of another. Secondly, the defence is available where, by reason of intoxication one is temporarily insane so that he does not know what he is doing or that it is wrong and lastly under section 13(4) of the Penal Code where accused by reason of intoxication is incapable of forming a specific intent."

22. Counsel submitted that by parity of reasoning, the defence of intoxication is not available to the appellant.

23. Regarding the sentence, counsel submitted that the sentence imposed on the appellant was not excessive but was well within the law. That the trial court and the 1st appellate court took into consideration the trauma that the incident had on PW1 both emotionally and physically. That the appellant was a person who PW2 trusted yet he betrayed the trust and defiled her. Counsel relied on

the decision of Onesmus Musyoki Muema v Republic Criminal Appeal No 104 of 2021 where this Court stated as follows:

> " the sentence of life imprisonment imposed on the appellant is a lawful and legal sentence, and this Court has no basis upon which to interfere with it. The appeal against the sentence is also dismissed."

24. Counsel also relied on the Sentencing Guidelines, 2023 (Part 11 at which states that:

> " where the law provides mandatory minimum sentences the court is bound by those provisions and must not impose a sentence lower than what is prescribed."

25. Counsel submitted that the trial court and the 1st appellate court took into consideration the appellant's mitigation as well as the circumstances of the case and found that the sentence of life imprisonment was an appropriate sentence for the offence for which the appellant was found guilty and convicted. Counsel urged this Court to dismiss the appeal both on conviction and sentence for lack of merit and uphold both the conviction and sentence.

Determination

26. We have considered the record of appeal, the appellant's submissions, the authorities cited and the law. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of Karani vs Republic [2010] 1 KLR 73 the Court stated as follows:

> " This is a second appeal. By dint of the provisions of Section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

27. We discern three (3) main issues for determination in this appeal:

    whether the prosecution proved its case beyond all reasonable doubt, whether the appellant's defence was considered, and whether the sentence imposed on the appellant by the trial court and upheld by the 1st appellate court was harsh and excessive.

28. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three (3) key ingredients: the age of the victim; that there was penetration;

    and the positive identification of the perpetrator. See: Charles Karani vs. Republic, Criminal Appeal No. 72 of 2013.

29. In the instant appeal, regarding PW2's age, the Medical Officer (PW1) testified that PW2 was 11 years old at the time of the offence. He produced the P3 form and PRC form, which both indicated that PW2 was 11 years old at the time of the offence. PW1 also produced PW2's Immunization Card which indicated that she was born on 8th December, 2000. Further, PW2 also testified that she was 11 years old at the time of the commission of the offence. We therefore find that the prosecution proved that PW2 was 11 years old when the offence of defilement was committed.

30. On penetration, PW2 testified that the appellant defiled her on the material day. Medical evidence produced by PW1 proved that upon examination of PW2, his findings were that there was reddening of her inner thighs, minor lacerations on the labia minora and that the hymen was absent. PW1 found that penetration was present.

31. On the identity of the perpetrator, PW2 testified that the appellant defiled her in a maize plantation near his home. PW2 testified that the appellant was well known to her as he was her uncle. PW3, who is PW2's grandmother, also testified that the appellant was PW2's uncle. Notably, the offence took place at 5.30 pm on the material day and the conditions for identification were favourable. PW2's identification of the appellant was therefore by recognition. In the circumstances, we find that the prosecution proved the requisite three (3) ingredients of the offence of defilement to the required legal standard.

32. On the appellant's defence, the appellant testified that he did not remember anything regarding the events of the material day. The appellant simply stated that he was drunk and did not know what had happened. Counsel for the State submitted that the appellant asked PW2 questions during cross-examination despite the fact that at his defence hearing he stated that he was drunk and did not remember anything. The appellant's defence was therefore that of intoxication.

33. Intoxication has been provided for as a defence to a criminal charge under Section 13 of the Penal Code which provides as follows:-

> " 13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> 2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -
>
>   a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
>   b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 3. Where the defence under subsection (2) is established, then in a case falling under paragraph
>
>   a. thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
>
> 4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> 5. For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs." (Emphasis supplied]

34. In the case of Kangoro s/o Mrisho vs. R, [1956] 23 EACA 532 the predecessor to this Court, the Court of Appeal for East Africa referred to the case of Cheminingwa vs. R, EACA Cr. No. 450 of 1955 (unreported), in which it was stated:

> "It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."

35. This Court in the case of Kupele Ole Kitaiga vs. R, [2009] eKLR, CR. No. 26 of 2007 stated as follows:

> "A clear message must also go out to those of the appellants ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of section 13 of the Penal Code it will not avail an accused and does not avail the appellant in this particular case."

36. By parity of reasoning we find that the defence of intoxication was not available to the appellant.

37. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We therefore find that the appellant's conviction was safe.

38. On the issue of sentence, this Court in the recent decision of Octavious Waweru Kibugi V Republic Criminal Appeal No. 41 of 2018 stated as follows:

> "On the issue of sentence, we defer to the recent decision of the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA} & 3 others {Amicus Curiae) (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the *Sexual Offences Act* remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361 (2) of the Criminal Procedure Code, outside our remit."

39. In the circumstances, we find that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR