KKT v Republic (Criminal Appeal 116 of 2024)
[2025] KECA 282 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 282 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 116 OF 2024

SG KAIRU, LA ACHODE & GV ODUNGA, JJA

FEBRUARY 21, 2025

BETWEEN

KKT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (Githinji, J.) dated 5th May, 2022 in HC. CR.A. No. 30 of 2019)

JUDGMENT

1. This is a second appeal by KKT challenging the judgment of the High Court at Garsen (S.M. Githinji, J.) upholding the appellant's conviction and life sentence by the Magistrate's Court at Lamu for the offence of defilement.

2. The background will provide context. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 24th March 2017 at Mkomani Location in Lamu West Sub-County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of LK a child aged nine years. Five witnesses testified for the prosecution. NWM, the mother of LK testified as PW1; LK was PW2; LK's sister MWM (M) was PW3; the clinical officer was PW4 while the Investigating officer was PW5. The appellant was represented by counsel and gave sworn testimony in his defence.

3. At the material time, LK, was living with, and under the care her sister S and the appellant. At the time, S and the appellant were married. According to LK, she had come home from school on the 24th

March 2017 and was in the process of changing her clothes when the appellant (to whom she referred as shimeji) called her. In her words:

> "I went. He removed my clothes. He also removed his clothes. He put his thing in me. I screamed and screamed for help. I put on my clothes and went to the market. The following day, my sister-S-saw I was not walking well. She took me to Anidan. I had not told S what happened to me."

4. She went on to say that at Anidan, she was treated by a doctor and urine and blood samples were taken from her and "the results showed [she] was defiled." That when asked by S who defiled her, she could not say but at S's request wrote the appellant's name; that thereupon the appellant took a stick and beat her, and she ran off to seek refuge at PW3's place; that PW3 then called their mother, PW1, who arrived the following day.

5. LK was recalled to the stand under Section 200 of the Criminal Procedure Act at the request of the appellant when T.A. Sitati, learned Senior Resident Magistrate, took over the conduct of the trial from Njeri Thuku, learned Principal Magistrate, before whom the trial had commenced. Although there was considerable passage of time since LK's initial testimony, she remained clear, when recalled, that on the material day:

> "I left school tuition. I went home. He pulled me by the hand to his bedroom. He removed my panty. He lowered his trousers. He did bad manners to me. He defiled me (alinibaka)."

6. She went on to say that after getting home from hospital in the company of her sister S, she found the appellant in the house; that at night she was asked to say what had happened; that after narrating everything to her sister, "the accused picked up a stick and beat me up a lot. I fled the house and went to my sister Monica's house..."

7. M (PW3) testified that on 28th March 2017, at 6.30 pm, she left work and got home and found her sister LK there and when she looked at her, she noticed swellings on her shoulder blades, neck and back, and when she enquired what had happened, LK informed her that the appellant had beaten her. She called her mother (PW1) and informed her. She stated that LK "said Collins beat her because she wrote his name down because he defiled her"; that after a while "Collins and his wife" came and the following day "we went to Torre hospital where tests were carried out" on LK. Undoubtedly, 'Collins' referred to the appellant for the record captures that Monica went on to state, "Collins is in court (points to him). I know him because he is married to my sister S...".

8. LK's mother, PW1, stated that she is a farmer resident in Mpeketoni; that the appellant "is my son-in-law. He is married to my daughter-S." She testified that LK lived with S and the appellant; that on 27th March 2017 she received a call from the appellant who informed her that people at the market were saying that LK was walking with her legs apart; that she advised the appellant to take LK to hospital and the following day she was taken to hospital; that on the way back from hospital, the appellant "told me that [LK] was defiled that is what the results showed"; that at 7 p.m., PW3 called her and informed her that LK had been beaten, and the next day she decided to travel to Lamu; that she found LK, S and Monica at Tore where the doctor referred them to King Fahad Hospital where LK was examined, and the doctor told her that "he saw her private part was open and there was evidence of penetration."

9. PW1 stated further that LK would not say who had done it to her; that she then went to LK's school and LK "told the teacher that she was changing when the accused took her. He removed his own clothes and then [LK] said Kone put her (sic) thing in her. [LK] said he told her if she told anyone then Kone would kill [LK]" and that she then went to the police and reported that her child had been defiled; that

at the police station, LK "said Kone committed this act on her on Friday. She said she screamed and resisted, and she said after Kone finished, she said he told her if she tells anyone, he will kill her."

10. Nicholas Charo Lewa (PW4) a Clinical Officer at King Fahad Hospital produced a P3 Form in respect of LK which had been completed by his colleague Mr. Nderitu who concluded that LK had been defiled and that her hymen was intact but had abdominal tenderness and frequent urination and she had candidiasis. Under cross examination, the witness reiterated that Dr. Nderitu indicated in the P3 Form that the hymen was intact, and that "it is not possible to conclude defilement took place because her hymen was intact."

11. The last prosecution witness was Police Constable Steven Maiya (PW5) who had recently been posted to Lamu Police Station. He produced a witness statement by Police Constable Ochieng who was the investigating officer and who had compiled all the evidence in the matter but had since left the station.

12. In his defence, the appellant gave a sworn statement and denied the charges against him; he stated that his mother in law, PW1, with whom he had a bad relationship, called from Mpeketoni and found them already at hospital; that he had married the complainant's sister, S, and had taken in the complainant in good faith and treated her as one of his own; that on the evening of the material day, he passed by S's stall at the market, as was the custom, where the complainant was supposed to join them but did not do so at 6.30 pm prompting him to ask S what was preventing the complainant from doing so; that S informed him that earlier that morning she had observed that the complainant was abnormally urinating frequently, and that the appellant advised S to escort LK to hospital; that the following day S took LK to Torre Clinic and the appellant accompanied them there on a second trip where his mother in law, PW1, found them and then he returned to his work place; that no report was filed or made to him of any sexual nature; that he then hosted his mother in law and she left two days later with the complainant after which "the alleged defilement came up"; that he was then detained at Lamu Police Station before being charged in court with fabricated charges.

13. After reviewing the evidence, the learned trial magistrate found that the prosecution had established its case to the required standard, convicted him and sentenced him to life imprisonment.

14. Dissatisfied, the appellant lodged an appeal before the High Court on the grounds: that the prosecution failed to discharge its burden of proof as required by law; that the trial court failed to consider that the prosecution witnesses were untruthful; that the trial court failed to consider his defence and erred in sentencing him to life imprisonment without proper finding that the charge had been proved.

15. After hearing the appeal and considering the submissions the learned Judge of the High Court found that all essential elements of the offence of defilement were proved beyond reasonable doubt and upheld the conviction. On sentence, the Judge stated that considering the facts and the circumstances of the case, there was no basis for interfering with the same. With that, the High Court dismissed the appeal and hence this second appeal.

16. During the hearing of the appeal before us on 23rd July 2024, the appellant relied entirely on his supplementary grounds of appeal and his written submissions. His complaints are that the trial court and the first appellate court failed to appreciate that "the issue of identification was staged on fabrications due to ill will...in the family of the principal victim"; that penetration, as attested to by the medical evidence, was not proved; that there were contradictions in the prosecution case; that his defence was not considered; and that the courts below failed to consider the declaration by the Supreme Court that minimum and maximum mandatory sentences are unconstitutional. According to the appellant "the only ingredient which the prosecution party proved was the issue of age."

17. On identification, the appellant submitted that the same was anchored on bad blood; that the victim did not report the incident and kept it a secret raising questions as to how it happened; that the evidence of PW3 was fabricated; that the appellant's name was not mentioned in the P3 Form or in the occurrence book; and that based on the case of Lesarau vs. Republic 1988 KLR 783, there is no better mode of identification than by name.

18. It was submitted that there was no penetration in this case, and neither was there proof of the same as evidence was led that the victim's hymen was intact and neither was there evidence of injury to the victim's genital organs and consequently the offence was not proved.

19. It was submitted further that the prosecution case was fraught with contradictions; that while Dr. Nderitu who examined the victim concluded there was defilement, PW4 who appeared in court on his behalf disputed that maintaining that the fact that the victim's hymen was intact was inconsistent with a finding of defilement; that there was also inconsistency in the testimony of PW1 and PW3 as to how they got the information about the incident.

20. On the sentence, the appellant submitted that the sentence of the life imprisonment contravened the decision of the Supreme Court declaring minimum or maximum sentences unconstitutional. The case of Jared Koita Injiri vs. Republic, Criminal Appeal No. 93 of 2019 [2019] eKLR was cited.

21. Opposing the appeal, learned Senior Principal Prosecution Counsel Ms. Kanyuira holding brief for Principal Prosecution Counsel Miss. Mwaura for the DPP submitted that all three ingredients of the offence of defilement, namely identification, age and penetration, as held in George Opondo Olunga vs. Republic [2016] eKLR were proved to the required standard; that the appellant was well known to the victim as she lived with them and that this was a case of recognition.

22. As regards penetration, it was submitted that the evidence of the victim, PW2, was cogent; that PW2 testified how the appellant removed her clothes and his clothes before doing "bad manners" to her; that the use of that euphemism by the victim should not negate her testimony and courts have generally accepted the use of such euphemisms by children who are victims of sexual abuse as held in Muganga Chilego Saha vs. Republic [2017] eKLR; that having regard to definition of penetration under Section 2 of the *Sexual Offences Act*, the presence of a hymen does not negate the act of defilement; that the medical evidence of the clinical officer who examined PW2 found there was penetration.

23. On contradictions, it was submitted on the strength of the case of Richard Munene vs. Republic [2018] eKLR that it is only substantial and not trifling contradictions or inconsistencies in the evidence that would create doubt, and that the court will ignore minor contradictions, unless they point to deliberate untruthfulness or if they affect the main substance of the prosecution case. The decision of this Court in Erick Onyango Ondeng' vs. Republic [2014] eKLR was cited in support. It was urged that in this case, all the prosecution witnesses corroborated each other and did not give contradictory testimonies.

24. We have considered the appeal and the submissions. Under Section 361(1)(a), the jurisdiction of this Court on a second appeal is limited to matters of law. See for instance, the decision in Karani vs. R [2010] 1 KLR 73 where the Court held that:

> " 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."

25. It is also established that this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence, or are based on a misapprehension of the evidence, or the two courts below are shown to have acted on wrong principles in making the findings. See Chemangong vs. Republic [1984] KLR 611;Adan Muraguri Mungara vs. R CA Cr App No 347 of 2007 and Samuel Warui Karimi vs. Republic [2016] eKLR.

26. With those principles in mind, the main issue for determination is whether the conclusion reached, by the trial court and the first appellate court, that the ingredients of the offence were proved to the required standard is supported by the evidence. As held by this Court in George Opondo Olunga vs. Republic (above), the ingredients of the offence of defilement as provided for under Section 8(1) one of the *Sexual Offences Act*, which must be established are the age of the victim, penetration, and proper identification of the perpetrator. As regards the age of the victim, the appellant readily concedes that this was established with the production of the birth certificate. In that regard, and as already stated, the appellant stated in his submissions that

> " the only ingredient which the prosecution party proved was the issue of age."

27. On identification, it is common ground, having regard to the testimony of PW1, PW2 and PW3 and the appellant's own testimony that he (the appellant) was married to the complainant's sister, S. He said so himself and went on to say that he regarded the complainant as his own child having taken her in under his care. Although, as captured by the trial notes of the magistrates, the complainant broke down severally during her testimony as she was clearly traumatized by the incident, she stated in her evidence, while pointing at the appellant, that "I call him shimeji" and went on to narrate how, on getting home from tuition, she went to change her clothes and the appellant called her and removed her clothes as well as his, and proceeded to defile her. There is no question of mistaken identity.

28. The trial court considered the alleged grudge between the appellant and the complainant's mother and discredited it being satisfied that the complainant's testimony met the standard in Section 124 of the *Evidence Act* for the reasons recorded. Similarly, the learned Judge of the High Court upon reviewing the evidence concluded that the appellant was positively identified. The Judge stated:

> " ...the victim informed the court that she had been living with the appellant and her sister and she went ahead to narrate the events of that fateful day. She had ample time with the appellant to well support the evidence of recognition beyond reasonable doubt."

29. We respectfully agree.

30. On penetration, the victim's own testimony was cogent. She stated that when the appellant inserted his penis into her vagina, she felt pain and she screamed. In her words, "He removed my clothes. He also removed his clothes. He put his thing in me. I screamed and screamed for help." The trial court was satisfied that the victim's evidence alone was sufficient to support the finding and conviction and recorded reasons in that regard in accordance with Section 124 of the *Evidence Act*.

31. Moreover, Mr. Nderitu, the clinical officer who examined the victim at King Fahad Hospital corroborated the victim's testimony and concluded that the victim had been defiled despite her hymen having been intact. The statement by PW4, when cross examined, that "it is not possible to conclude defilement took place because her hymen was intact" was in our view an expression of an opinion

inconsistent with the definition of penetration under Section 2 of the Sexual Offence Act. As the learned trial magistrate stated, the victim's account:

> "...became more credible because a partial insertion of the penis head and its immediate removal in the nick of time was reasonable explanation for the intactness of the hymenal membrane. By this time, the offence was complete because penetration takes place whether the penis is wholly inserted or partially or partly inserted into the girl's vulva."

32. The learned Judge of the High Court on his part concurred that "the victim was indeed penetrated." The concurrent findings by both courts are well supported by the evidence and we have no basis for interfering with the same.

33. The appellant's complaint that his defence was not considered is not supported by the record. Similarly the complaints that there were inconsistencies and contradictions are an afterthought.

34. As for the sentence, the learned trial magistrate after hearing the appellant on mitigation, ruled that:

> "...the inevitable sentence that can address this situation is a custodial sentence. As to the length of it, the court is satisfied that due to the violence, threat, pretensions and S.T.I manifested in the case, a term of life imprisonment is appropriate sentence which is hereby passed on the convict."

35. The learned Judge on his part found that the sentence was justified stating that the appellant acted inhumanely when he took advantage of a young child who was living with him, and the fact that the appellant did not demonstrate remorse for his actions deserved the sentence that was meted out.

36. Evidently, the learned trial magistrate exercised judicial discretion in sentencing the appellant to life imprisonment, a decision informed by the circumstances of the case and not because the magistrate felt in any way constrained from exercising that discretion. There is no basis for interfering with the trial magistrate's exercise of discretion in sentencing and affirm the decision of the High Court in that regard.

37. All in all, the appeal is devoid of merit. It fails and is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR