Gachigi v Republic (Criminal Appeal 29 of 2019)
[2025] KECA 132 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 132 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 29 OF 2019

MA WARSAME, S OLE KANTAI & WK KORIR, JJA

FEBRUARY 7, 2025

BETWEEN

SIMON KAMAU GACHIGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Naivasha (R. Mwongo, J.) delivered on 28th February 2019 in Criminal Appeal No. 45 of 2017)

JUDGMENT

1. Simon Kamau Gachigi, the appellant herein, was charged before the magistrate's court with defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence being that on 22nd January 2016 in Naivasha within Nakuru County, he intentionally and unlawfully caused his genital organ to penetrate the vagina of MIH a girl aged five years old. He also faced an alternative charge of indecent act with a minor contrary to section 11 (1) of the *Sexual Offences Act* which charge was based on the particulars of the main count with regard to place, date, time and victim of the offence. He denied the offence but after trial, he was convicted of the main charge and sentenced to life imprisonment.

2. Once convicted, the appellant expressed his dissatisfaction with the judgment of the trial court by appealing to the High Court. However, on 29th February 2019, Mwongo, J. dismissed his appeal. The appellant, once more being dissatisfied with the decision of the first appellate court has moved the Court on a second appeal on the grounds that his defence was not considered; that the offence of defilement was not proved; and that the sentence is harsh and unconstitutional.

3. To recap the evidence in this case, MIH testified as PW1 after being subjected to voir dire examination. She told the trial court that on the material day, she had not gone to school and as she was playing with her friends S. and K., the appellant whom she referred to as Kamau, called her but she did not

oblige. The appellant then went and grabbed her by the hand and led her to his house. Once inside, the appellant undressed and made her lie on the wooden sofa seat which was in his house. The appellant proceeded to defile her after which she felt pain and embarrassed. She did not scream because the appellant had threatened to hit her. After completing the act, the appellant chased her out of the house and she went back to play. She did not tell her mother. But when she went to the loo she felt a lot of pain. Her mum noticed her discomfort, made her to lie on the bed and examined her. She was thereafter taken to the hospital and the police station.

4. VS (PW2) testified that PW1 was her daughter born in August 2010. Her evidence was that on the night of 22nd January 2016 at about 1:00 am, she was woken up by PW1 who wanted to go for a short call. Since they never used to go out at night, she gave PW1 a potty. While PW1 was urinating, she started crying. PW2 inquired what the problem was but PW1 kept mum. However, when PW1 stood up, PW2 noticed a thick whitish substance ooze out. PW2 then laid PW1 on the bed and, on examining her private parts, noticed she was not normal and had stains between her thighs in addition to the thick discharge. This discovery prompted PW2 to take her daughter to Naivasha District Hospital that night where PW1 was treated and given drugs. She was told to return the following morning for more drugs. She also testified that it was PW1 who led them to the appellant's house as two people who shared the name Kamau were living in the area. PW1 even showed them the chair that she was made to lie on.

5. Sylvester Messa (PW3) was a clinical officer at Naivasha District Hospital. He examined the complainant and found her thighs near her private parts were tender. He also observed that her hymen was broken with hyperemia. There was a whitish discharge, but no spermatozoa were seen. She produced the P3 form and the Post Rape Care form as exhibits. PW3 also testified that the complainant's age was assessed at the dental department of the hospital as approximately six years. She produced the age assessment report as an exhibit. Corporal Audrey Cherono (PW4) was next to testify as the investigating officer. Her account was on her investigation leading to the arrest of the appellant.

6. In his defence, the appellant had little to say. He simply denied the offence. He also called SM (DW2) who briefly testified that he was with the appellant on the material day.

7. This appeal came up for virtual hearing on 24th July 2024. The appellant was in person while learned counsel, Mr. Omutelema appeared for the respondent. Both the appellant and Mr. Omuetelema opted to rely on their respective written submissions.

8. In his submissions, the appellant urged that the sentence was passed in its mandatory nature pursuant to section 8(2) of the *Sexual Offences Act* thereby depriving the trial court of its discretion to impose a proportional sentence. He therefore termed the sentence unconstitutional. The appellant also submitted that the sentence was harsh and excessive. He urged us to interfere with the sentence of life imprisonment and hand him a lenient sentence.

9. Turning to his appeal against conviction, the appellant submitted that his alibi defence was not considered or dislodged by the prosecution's evidence. He asserted that his evidence was not weighed against the prosecution evidence as required by the holding in Justus Kiruthu Mwangi vs. Republic, Nyeri CRA 70 of 2015. The appellant stressed that as was held in Victor Mwendwa Mulinge vs. Republic [2014] eKLR, the burden of proof remained with the prosecution at all times. Consequently, he urged that his appeal be allowed in its entirety.

10. In opposing the appeal, Mr. Omutelema reviewed the evidence on record and submitted that the offence charged had been established against the appellant. Counsel also urged that the sentence of life imprisonment was legal and deserved in the circumstances of the case.

11. Our mandate in respect to this appeal is donated by section 361

1.

(a) of the Criminal Procedure Code and is limited to considering issues of law only. On facts, we are required to pay homage to the concurrent findings of the trial court and the first appellate court. By dint of section 361 (1) (b) of the Criminal Procedure Code, severity of sentence is an issue of fact which does not fall within our remit, unless the sentence was enhanced by the High Court or the trial court had no power to pass that sentence. This position was reiterated by the Court in Stephen M'riungi & 3 others vs. Republic [1983] eKLR thus:

> " In conclusion we would agree with the views expressed in the English case of Martin vs. Glyneed Distributors Ltd (ta MBS Fastenings) - the Times of March 30, 1983 - that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."

12. We have reviewed the record as well as submissions in this appeal and, in our view, the issues for determination are whether the offence of defilement was established and whether a case has been made for our interference with the sentence imposed upon the appellant.

13. The offence of defilement is found in section 8(1) of the *Sexual Offences Act*. The elements of the offence are that the victim should be under the age of eighteen years, that there is penetration and that the offender should be clearly identified.

14. On the age of the complainant, the charge read that she was 5 years old. PW2 in her testimony stated that her daughter, PW1, was born in August 2010. In the age assessment report, the doctor approximated the complainant's age at 6 years. For an offence to ensue under section 8(2) of the *Sexual Offences Act*, the complainant should be 11 years and below. As has been held in numerous decisions of the Court, proof of age can be either through oral evidence, documentary evidence or even the evidence of the mother. In her evidence, PW2 stated that the complainant would be turning 6 years by August 2016. We also wish to add that proof of age under section 8 (2) need not be specific and that as long as there is evidence that the complainant is under 11 years, then age shall have been proved. In this case, the offence having occurred on 22nd January 2016, the age having been assessed by a medical officer at 6 years and the mother having testified that her daughter would be turning 6 years in August 2016, we find that the age of the complainant was sufficiently established and proved.

15. Our view find firm footing in Richard Wahome Chege vs. Republic [2014] eKLR where the Court (differently constituted) held that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

16. The next ingredient is that of penetration. The evidence of PW1 was vivid that the appellant grabbed her and took her to his house and defiled her. She even led PW2 and PW4 to the scene. PW3 confirmed that, just as described by PW1, the appellant's house had a wooden sofa seat. PW3 conducted a medical examination on the complainant and affirmed the mother's fears that her little girl had been defiled. The evidence of PW2 and PW3 therefore corroborated the evidence of PW1 that indeed she was defiled.

17. The final element relates to the identity of the offender. The complainant testified that Kamau was the one who defiled her. She also stated that she knew the appellant as he was their neighbour. PW2 on her part testified that she also knew Kamau, the appellant. She stated that the complainant led them to the house of the appellant. She further testified that despite there being two people who shared the name Kamau, PW1 insisted on the appellant as the person who defiled her. The appellant in his defence did not challenge the prosecution's evidence but only proffered a denial of the offence. His alleged alibi defence did not dislodge the evidence tendered by the prosecution.

18. In dealing with the alibi defence, we subject the appellant's defence to the test established in Kimotho Kiarie vs. Republic [1984] eKLR where the Court held that:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; Said vs. Republic [1963] EA 6."

19. The appellant did not speak as to where he was and with who he was with at the time of the alleged offence. His witness (DW2) only alleged that they were together without stating the time and place. Such evidence amounts to mere denial. It was not only a poorly fabricated defence but an afterthought considering that it did not feature during the cross-examination of the prosecution witnesses. From the foregoing, we are satisfied that the identity of the appellant as the person who defiled the complainant was never in doubt.

20. The result is that we find no misapprehension of the law and facts by the learned Judge to warrant our interference with his decision.

21. Finally, on the appeal against the sentence, we reiterate that our jurisdiction is limited to matters of law which does not extend to severity of the sentence. Secondly, we can only entertain the issue of sentence if the same was enhanced by the first appellate court or the trial court had no jurisdiction to impose the sentence. That was not the case here. We are further barred from entertaining the issue of sentence for the simple reason that the issue, as can be discerned from the appellant's grounds of appeal before the first appellate court, was never raised before that court.

22. This appeal is therefore without merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR