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Jumapili v Republic (Criminal Appeal 128 of 2022) [2024] KECA 692 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 692 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 128 OF 2022

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JANUARY 25, 2024

BETWEEN

HASSAN JUMAPILI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Voi (Amin, J.) delivered on 27th October 2020inHigh Court Criminal Appeal No. 41 of 2018)

JUDGMENT

1. Following his conviction by the Principal Magistrates Court at Taveta for the offence of defilement contrary to Section 8(2) as read with Section 8(3) of the *Sexual Offences Act*, the appellant, Hassan Jumapili, was sentenced to serve a prison term of 20 years. His first appeal before the High Court at Voi (Farah S.M. Amin, J.) on grounds that the charge sheet was defective; that the age assessment report in respect of the complainant was wrongly admitted; that his rights of fair trial under Article 50 of *the Constitution* were violated; that the complainant, PW1, was a hostile witness whose evidence was wrongly admitted; and that the sentence imposed was harsh, were rejected in a judgment delivered on the 27th October 2010.

2. Still dissatisfied, the appellant lodged this second appeal. His complaints based on his supplementary grounds of appeal are that the High Court erred in failing to find that the conduct of the complainant, PW1, "was not consistent with defilement due to the fact that during the trial she had ran away to Tanzania"; that penetration was not proved to the required standard; that the appellant's constitutional rights under Article 50 of *the Constitution* were violated because he was not provided with witness statements and other documentary evidence by the prosecution; and that the sentence that was imposed was harsh and excessive.

3. The prosecution case was built on the evidence of four witnesses. First to testify was the complainant. SR, who was PW1. She stated that she was a student in E. Primary School in Standard 5 at the time; that she was aged 14 years; that on the 14th of July 2015 she had left school at 5:00 p.m. and went to her aunt's (J) house where she found her cousin R. After cooking, they went to sleep at about 9:00 p.m.; that thereafter, when she went outside the house to relieve herself in the latrine, the appellant, who was well known to her (as he used to look after rice fields) called her and pulled her. In her words:

> " ...when I went out he called me and he held me by my hands and he demanded that I go with him to his home. He pulled me saying that he would kill me if i did not go with him. I was going to relieve myself in the latrine about 30 metres away within the same homestead. He pulled me outside the homestead and took me next to the house of my grandmother which was unused. I told him I would scream and he dared me to go ahead. He then took me to his home which is about 300 meters. He told me to get to his house and I got inside. We did not find anybody in the house which was two roomed. I sat in the sitting room and he held me and led me to his bedroom. He told me to lie on the bed which I did. He then removed my pant and had sex with me."

4. She stated that she had sex with the appellant that night; that the following day the appellant's grandmother arrived and enquired from the appellant whether he had married; that she (the complainant) then left and went to J where her father, PW2, came and beat, and chased her before going for the arrest of the appellant. The complainant and the appellant were then taken to the police station and thereafter PW1 was taken to Taveta Hospital where she was examined and issued with a P3 form. Age assessment was also done at the same hospital. She identified the P3 form as well as the age assessment report which were marked for identification.

5. PW2, the complainant's father, RJ, was at home on 24th July 2015 when his 14-year-old daughter, the complainant, left for school where she was in Standard 5 but did not return. The following day, he looked for her and saw her come from the appellant's house. On enquiring from her, she informed him that the appellant had held her by force and threatened her before taking her to his house. PW2 reported the matter to the village elder, Patrick Bwana Leko, and together they confronted the appellant at his house, who according to PW2, admitted having slept with the complainant whereupon they took him to the police station and reported the matter. A P3 form was issued, and the complainant was examined at the hospital.

6. Peterson Mwapulu, PW3, a clinical officer at Taveta District Hospital examined the complainant who presented with a history of sexual assault. On examination, PW3 noted that the complainant had lacerations in the vaginal wall and the hymen was broken and had "been broken for a long time and there was evidence of sexual penetration." He filled and signed the P3 form which he produced as an exhibit. He also produced the age assessment report dated 8th October 2015 made by Dr. Macharia of the same hospital in respect of the complainant based on which the complainant's age was assessed at 14 years. PW3 stated that he had worked with the maker of that report, Dr. Macharia, for six years and was conversant with his signature.

7. At the material time, Corporal Susan Lelei, PW4, was based at Taveta Police Station in the Gender Section. She was the investigating officer. She recalled that on 25th July 2015, she recorded witness statement from the complainant who claimed that on 24th July 2015, the appellant took her to his home where she spent the night until the following day; that they (the complainant and the appellant) had been lovers and had sex that night; that she took the complainant to Taveta District Hospital where the P3 form was filled out; that she recorded statements from the complainant's parents and from the

appellant who claimed that the complainant was his girlfriend and thereafter charged him with the offence.

8. In his defence, the appellant sought leniency asserting that he was not involved in committing any offence; that some people including Patrick Bwana Leko came and arrested him on allegations that he had their daughter which was not true; that he was beaten up and taken to the police station where it was alleged that he was found with a schoolgirl.

9. Richard Mwanzia, DW2, testified on the appellant's behalf. He stated that on 25th July 2015, he met the appellant, woke him up to go to work and together went to work in Umoja where some people came and arrested the appellant. He stated that he did not know anything about the case.

10. Based on the evidence, the trial magistrate, as already stated, was satisfied that all the ingredients of the offence of defilement had been proved beyond any reasonable doubt and convicted the appellant. In doing so, the trial court expressed:

> "I have considered the evidence in totality and I have come to the conclusion that the accused was properly placed in the scene and that he committed the offence. He was the complainant's boyfriend, a fact that he never denied and that he collected the complainant at night, again a fact that he never challenged and finally that he was arrested by the village elder on allegations of sleeping with a schoolgirl. He offered a weak defence which could not challenge the prosecution's case which I find very consistent as the child's evidence was very reliable and was not shaken at all by the accused. The accused had no questions at all for the investigating officer and all these facts put together only show how accused was caught off guard and was totally defenceless after committing the offence. I am satisfied that the prosecution had fully discharged its onus of proving a case beyond any reasonable doubt and I accordingly convict the accused in the main charge of defilement."

11. As already stated, the High Court upheld the conviction and sentence and hence the present appeal. The appellant submitted that the conduct of the complainant was inconsistent with defilement; that based on the testimony of the complainant's father, the complainant ran off to Tanzania during the pendency of the trial and that it was clear that she was "still engaging in sex with other men" despite being a minor and that there was no evidence that she was forced into the sexual acts; that it was also clear that the complainant had no desire to testify and was persuaded by her father to do so; that the complainant was behaving like an adult and the court ought to have treated her as a grown up. In support, the case of Martin Charo v Republic [2016] eKLR was cited.

12. It was submitted that where, as here, a child under the age of 18 years opts to go into men's houses for sex and then goes home, the court should not conclude that such person was defiled. It was submitted that the appellant should not be condemned for the voluntary acts of the complainant and that in many other jurisdictions, "marriageable age" ranges from 13 years onwards and that it is unfair to imprison "someone to 20 years imprisonment yet the complainant was enjoying the relationship."

13. On penetration, the appellant submitted that the same was not proved; that the complainant did not explain what she meant by having sex; that on the strength of the decision in Julius Kioko Kivuva vs. Republic [2015] eKLR, the complainant should have explained in detail what happened and in the absence of such detail, penetration was not proved beyond reasonable doubt. It was urged further that absence of hymen was not a basis for assuming or concluding that there was penetration as there could be many other reasons why the hymen may be absent. The case of P. K.W. vs Republic [2012] eKLR was cited.

14. On violation of his constitutional right to fair trial under Article 50 of *the Constitution*, it was submitted that the prosecution had a duty to supply the trial bundle in advance; and that although the appellant was supplied with the trial bundle, that was done after the first witness had already testified. The decision of this Court in Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR among others, was cited. That on account of violation of his right in this regard, the appellant was not able to cross examine the witnesses due to ill preparation.

15. The appellant submitted further that the offence which he faced is serious in light of the penalty it carries and that he stood to suffer substantial injustice by proceeding with the trial without legal representation; that in accordance with the requirements of Article 50(2)(g) and (h) of *the Constitution*, he should have been made aware of his rights to legal representation and as this was not done, his rights were violated and the entire proceedings before the trial court are a nullity.

16. On the sentence, it was submitted that the 20-year sentence imposed is not commensurate with the circumstances and facts and the same should be quashed and the appellant set at liberty.

17. The respondent's written submissions dated 10th July 2023 on which Mr. Okemwa, learned counsel for the respondent relied substantially addressed the appellant's earlier grounds of appeal as opposed to the supplementary grounds of appeal. It was submitted that all ingredients of the offence of defilement, namely, age of the complainant, proof of penetration and positive identification of the assailant as explained in Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 were proved to the required standard; that the age of the complainant was proved through the age assessment report produced by PW3 as well as the testimony of the complainant and that of her father PW2; that based on the complainant's own testimony and the medical evidence tendered by PW3, penetration was established; and that the appellant was well known to the complainant, she stayed with him overnight and she positively identified him.

18. It was submitted further that the claim that the charge sheet was defective is baseless; that the age assessment report was properly produced and admitted under Section 77 of the *Evidence Act*; that the claim that the appellant's rights under Article 50 were violated is also baseless as he fully participated in the trial, cross examined witnesses, gave his defence and called a witness and all statements and documentary evidence relied upon by the prosecution were supplied to him.

19. We have considered the appeal and the submissions bearing in mind that under Section 361 of the Criminal Procedure Code, a second appeal should be restricted to matters of law. See Karani v Republic [2010] 1 KLR 73. The issues for determination are whether the conduct of the complainant during the pendency of trial by going off to Tanzania impeached the trial; whether penetration was proved to the required standard; whether the appellant's rights to a fair trial under Article 50 were violated; and whether the sentence imposed is harsh and excessive.

20. In submitting on his complaint that the learned judge erred in "failing to find that the conduct of PW1 was not consistent with defilement" on account of her having gone of Tanzania, the appellant alluded to PW1 being an unwilling and hostile witness who was compelled by her father, PW2, to testify; that PW1 voluntarily and willingly went to his house and the ensuing sexual encounter was consensual; that PW1 held herself out as an adult and the appellant is therefore not criminally responsible.

21. The record of proceedings shows that PW1 first testified under oath before the trial court on 8th October 2015 after the court was satisfied, upon conducting voire dire, that she was sufficiently intelligent and understood the meaning of an oath. She was stepped down on account of not being able to speak. The hearing was to resume on 25th January 2016, but the prosecution did not have witnesses in court. The matter was adjourned to 3rd March 2016 when the complainant's father, PW2, informed

the court that PW1 disappeared from home in December and went to Tanzania "after the headmaster rejected her at school due to indiscipline" and that his efforts to trace her had been futile. A warrant of arrest was issued against PW1. The father, PW2, was directed to make a report of the complainant's disappearance at the police station.

22. Subsequently, on 16th March 2016, PW2 informed the court that he had found PW1 "married to a man in Tanzania" and had persuaded her to come to court. The court noted that the complainant was then in court and ordered that she be detained at Taveta Police Station and for the Children officer to file a report. The trial then resumed on 24th March 2016 when PW1 continued with her testimony and after narrating how she had ended up at the appellant's house stated that "it is true we had a love affair with the accused."

23. Based on the foregoing, there is merit in the complaint by the appellant that the complainant was a reluctant witness. However, that does not, in our view, detract from the finding by the trial court that PW1's evidence was "very reliable and was not shaken". Moreover, as the learned Judge of the High Court correctly stated, there was no finding that the complainant was a hostile witness, she was a compellable witness and neither did she in her testimony contradict the statement she had given to the prosecution. Nothing therefore turns on this complaint.

24. We turn to the contention that PW1 voluntarily and willingly went to the appellant's house and the ensuing sexual encounter was consensual and that PW1 held herself out as an adult. PW1's testimony was that she was in Standard 5 and "14 years old." Similarly, her father, PW2 told the court that PW1 attended E. Primary School "in standard 5 and is aged 14 years." PW3, produced an age assessment report by Dr. Macharia placing the complainant's age, as of 8th October 2015, at 14 years. The evidence on PW1's age was consistent. It is trite that under the *Sexual Offences Act*, a child below the age of 18 years is incapable, legally, to consent to sexual intercourse.

25. The claim that PW1 held herself out as an adult is effectively an attempt, belatedly, to raise a defence under Section 8(5) and 8(6) of the *Sexual offences Act* which provides as follows:

> " 8(5) It is a defence to a charge under this section if-
>
> a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> b. the accused reasonably believed that the child was over the age of eighteen years.
>
> 8(6) the belief referred to in subsection 5(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

26. Apart from the fact that this defence was not raised during the trial there is no evidence at all of what would have led the appellant to believe PW1 to have been over the age of 18 years. On the contrary, evidence showed that PW1 had left school the previous day and was still in her primary school uniform while at the appellant's house.

27. As regards penetration, PW1' s testimony was explicit. She stated that on getting to the appellant's two roomed house, she sat in the sitting room, the appellant held her and led her to the bedroom, and that: "He told me to lie on the bed which I did. He then removed my pant and had sex with me." She reiterated that: "We had sex with the accused, and we only slept with him one day, night and we were arrested the following day." The concurrent findings by the two courts below that penetration was

proved to the required standard are well supported by evidence and we have no basis for interfering with those findings.

28. We turn to the claim regarding violation of the appellant's constitutional rights to legal representation. As the Supreme Court of Kenya stated in Republic v Karisa Chengo & 2 others [2017] eKLR, the right to legal representation is a fundamental ingredient of the right to fair trial and is to be enjoyed pursuant to the constitutional edict without more. However, the appellant's grievance in this regard was raised for the first time before this Court. In Owour v Republic, Criminal Appeal No. 16 of 2019 [2022] KECA 18 (KLR) where the complaint regarding legal representation was taken up for the first time during the second appeal, this Court expressed as follows:

> "We have interrogated the record before us from the trial court to the High Court judgment that led to the present appeal. Nowhere did the appellant raise the issue of legal representation and therefore, the same has no place in the proceedings before us. In fact, the Supreme Court in Charles Maina Gitonga case (supra) said as follows,
>
> "We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the Appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court."
>
> We have considered the record before us and noted that the appellant followed the proceedings very keenly.
>
> This is informed by the fact that he participated in the trial by cross examining the prosecution witnesses on very salient points related to the charges. His detailed defence before the trial court is a further demonstration in that regard. He therefore understood the charges he was facing and the evidence presented. There is no evidence that the appellant was incapacitated in the trial for lack of legal representation."

29. We say no more. See also decision of this Court in Thomas Alugha Ndegwa v Republic [2016] eKLR.

30. The claim that the appellant's right to fair trial was violated because he was not informed in advance of the evidence the prosecution intended to rely on is contradicted by the respondent which maintains that it discharged its duty by providing all the evidence it relied on to the appellant before the trial commenced. The appellant has submitted that the trial bundle was supplied to him after the first witness had testified. Whereas it was the duty of the prosecution to supply the appellant with the trial bundle in advance, there is no indication in the record of proceedings indicating that the appellant at any time during trial raised the issue which gives credence to the conclusion by the learned Judge of the High Court that the complaint was "simply an afterthought.".

31. As regards the sentence, apart from the consideration that severity of sentence is a matter of fact under Section 361 of the Criminal Procedure Code, in this case, the learned Judge of the High Court in upholding the sentence by the trial court considered the circumstances under which the offence was committed before concluding that the "aggravating factors justify the application of more than a minimal sentence". We do not have a basis for interfering.

32. The appeal fails and is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

……………………………….

P. NYAMWEYA

JUDGE OF APPEAL

……………………………….

J. LESIIT

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR