Kithinji v Republic (Criminal Appeal 28 of 2018)
[2024] KECA 1060 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 1060 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 28 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 23, 2024

BETWEEN

JULIUS KITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Meru (S. Chitembwe, J.) dated 18th January 2018 in Criminal Appeal No. 6 of 2016)

JUDGMENT

1. This is a second appeal. Under section 361 of the *Criminal Procedure Code* our mandate is limited to matters of law only. We will not normally interfere with concurrent findings of fact by the two courts below unless it can be shown that they were based on no evidence, or were based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – See *David Njoroge Macharia -vs- Republic* [2011]eKLR.

2. The appellant, Julius Kithinji, was convicted by the Resident Magistrate at Isiolo of defilement contrary to sections 8(1) and (2) of the *Sexual Offences Act* (No. 3 of 2006), and sentenced to life imprisonment. The particulars of the charge were that on 9th February 2015 in Isiolo County in Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina of J.M. a child aged 9 years old. The appeal to the High Court at Meru challenging both conviction and sentence was dismissed.

3. According to the record, the complainant (PW 1) testified that she was aged 8 years old and in class two. She recalled that on 10th February 2015 at about 1700 hours her grandmother had sent her to fetch water from the watering point. She had a donkey and three jerrycans. At the watering point, she found the appellant who helped her to load the three jerrycans of water onto the donkey. The appellant then convinced her to use a different route to go home. On the way, the appellant grabbed her by the

shoulder, gagged her mouth so that she could not scream, and took her into the bush. He removed her clothes and his, and caused his penis to penetrate her vagina, while grabbing her breast. She was in pain. When he left her she ran away naked. The appellant attempted to run after her. She ran to the home of PW 3 (GMK). PW 3 testified that PW 1 came to her gate crying, holding her underwear. She reported that the appellant had done "bad manners" to her. She called Francis Mugwika (PW 4) to her home. He came and was informed about the incident. He noticed that PW 1 was not able to walk. He mobilized a search party after he had visited the scene. They were not able to trace the appellant until the following day. When he was traced he took off running. PW 4 fired in the air to scare him. He ran and hid under a bed in someone's house. He was arrested.

4. PW 2 JM is the grandmother that PW 1 was staying with and who had sent her to fetch water using a donkey. She testified that PW 1 came from school at about 1400 hours. She sent her to fetch water. Between 1500 hours and 1800 hours the child had not returned. This worried her. She went to look for her. She met children who told her that PW 1 had long drawn water. She found the donkey alone. She begun calling, and that was when PW 3 called her to her house where she found PW 1 who narrated her ordeal. The appellant was arrested the following day by a police reservist (PW 4) in the company of others. This is when the incident was reported to the police and PW 1 taken for medical examination and treatment. The appellant was well known to PW 1, PW 2 and PW 3. He was related to PW 4 by marriage.

5. According to the clinical officer, Daudi Dabaso (PW 5) of Isiolo General Hospital, when he saw PW 1, she was unable to walk. She had blood stained clothes and had tenderness of the pelvis. She had redness on her genitalia, her hymen was torn and had a whitish discharge. He established that she had been sexually assaulted.

6. The appellant made unsworn statement in defence and did not call witnesses. He denied that on the material day he had met with or sexually assaulted PW1. He stated that he was a ballast breaker, and that the whole of this day (9th February 2015) he was away on duty, being an employee. He returned home later that day, and that nothing untoward was reported to him. However, on 10th February 2015 he was arrested by police reservists on the allegation that he had defiled a minor. He was shocked by the allegation as he had not done it. He blamed his arrest and prosecution on PW 3 whom he said he had a boundary dispute with.

7. This is the evidence that the trial court considered and found that it had been proved beyond doubt that the appellant had defiled PW 1. The High Court confirmed the finding. The appellant's appeal before this Court was based on the following amended grounds of appeal:-

> " 1. That section 169(1) of the *Evidence Act* was provoked.
>
> 2. That crucial witnesses were not summoned to give evidence contrary to section 150 of the *CPC*.
>
> 3. That the charge sheet was defective contrary to section 214(1) of the *CPC*.
>
> 4. That the case was not proven beyond proof of the allegations contrary to section 36 of the *Sexual Offences Act*.
>
> 5. That the appellant's defence was ignored by the lower court thus violating provisions of section 169(1) of the *CPC*.
>
> 6. That the persisting grudge between the appellant and PW2 leading PW2 to use PW1 to frame the appellant in the instant case."

8. During the hearing of the appeal, the appellant was unrepresented but had filed written submissions on which he elected to rely on. The State was represented by learned counsel Ms. Komu who equally relied on her written submissions.

9. In the submissions by the appellant, the age of PW 1 was not proved as there was material contradiction and inconsistency regarding the same. That PW 1 testified that she was 8 years old whereas the clinical officer said that she was 11 years old. PW 4 testified that she was 9 – 10 years old. He took issue with the fact that the child's birth certificate was not produced. The second contradiction, he submitted, was in relation to the date of the incident. Whereas the charge sheet stated that the incident was on 9th February 2015, PW 1 and PW 2 stated that the incident was on 10th February 2015. Lastly, it was submitted, there was variance regarding where the incident had taken place. PW 1 stated that it was in the bush, and yet PW 2 testified that it was in an unoccupied house. PW 4 stated that he was taken to the scene near the river. The appellant relied on the decision in John Barasa -vs- Republic, H.C. Criminal Appeal No. 22 of 2006 at Kitale in which it was observed that where the evidence is contradictory or inconsistent the court should never rely on the same.

10. The next issue taken by the appellant was that the prosecution had failed to call the owner of the watering point to say whether or not he (the appellant) was at the place with PW 1 at the time of collecting water. This was, according to appellant, a material and a valuable witness who ought to have been called. The appellant, relying on *Bukenya -vs- Uganda* [1972] E.A. 549, submitted that the prosecution ought to have availed all the witnesses even if their evidence was fatal to their side.

11. The last complaint was in relation to the way the courts below had dealt with his defence which had been rejected as an afterthought.

12. Learned counsel for the State submitted that the age of PW 1 had been established to have been nine (9) years old. As regards the evidence of defilement, counsel submitted that PW 1 had been found by the courts below to have been truthful and consistent, and that the medical evidence had corroborated her on the fact of penetration. Learned counsel asked this Court to confirm the findings of the two courts.

13. We have reviewed the evidence and the judgment of the learned Judge. The age of PW1 and the place where the incident happened were questions of fact, and, usually, we are bound by the concurrent findings of fact by the two courts below. Concerning the age of PW 1, it is not lost to us that the trial court did not address its mind on the question. However, the first appellate court dealt with the question in the following manner:-

> " The mere fact that PW 1's age was not properly established cannot be an automatic ground to acquit the appellant. One cannot be held to have defiled an ageless victim. The age of the victim can be deduced from the evidence if no proper document establishing the victim's age is produced. PW 2 is the complainant's grandmother. She did not state PW 1's age PW 3 testified that the child was nine years. PW 4 informed he court that he found a girl 9 – 10 years. PW 5 testified that the child was nine years. The trial court before conducting *voire dire* indicated that PW1 was a minor aged 9 years. PW1 was in class two. It can be safely concluded that the apparent age of PW 1 was below eleven (11) years. She was a minor. I do find that PW1 was nine years as per the evidence on record."

14. It is trite that in sexual offences the age of a defiled child is important, because sentence is determined by such age. Age can be proved by documentary evidence, such as a birth certificate, notification of birth or baptismal card. It can also be proved by the evidence of the child's parent or a close relative who can testify as to when the child was born. It can be established by the evidence of the child if he

or she is sufficiently intelligent. Lastly, it can be proved by medical evidence (See Mwalango Chichoro -vs- Republic, MSA Criminal Appeal No. 24 of 2015 (U.R.)).

15. The record shows that, following voire dire examination, the trial court found the child was intelligent. Twice the child told the court that she was aged 8 years old and that she was in class two. The only other witness who could have given the child's age was the grandmother (PW 2), but the question was not put to her. All the other prosecution witnesses were estimating the child's age to be 9 or between 9 and 10. PW 1's evidence as to age was not challenged. Our considered view is that the child was eight (8) years old, and therefore below eleven (11) years. We consequently adjust the finding by the learned Judge in that regard, and dismiss the appellant's complaint that the child's age was not proved beyond doubt.

16. On the question of where the offence was committed, we consider that PW 1 was the only witness to the incident. Her evidence was that, after the appellant helped her to load the water jerrycans on the donkey, he got her to take a different route to go home. Along the way, he dragged her into a bush where he defiled her. PW4 was led by the child to the scene. It was near a riverbed. PW2 or PW3 did not go to the scene. We find that the complaint is without merit.

17. The prosecution may not have called the owner of the watering point. However, it was not the prosecution's case that he had witnessed the appellant defiling PW1. The appellant's defence was that he was not at all at the scene at the time, and could not have been at the watering point. His defence was that of an alibi, and he was not under duty to prove it. It was for the prosecution to call evidence to place him at the scene at the material time and to show beyond doubt that he was the one who had committed the offence (See *Kiarie -vs- Republic* [1984]eKLR). In fact, it was the appellant's complaint that his defence had not been considered. Further, that he had been framed, as it were, by PW3 with whom he had a boundary dispute. We have anxiously considered all these. The record shows that the appellant cross- examined PW3. The question whether or not they had a boundary dispute was not put to her, for her to deny or admit. We consider the claim to have been an afterthought. It follows that there was no grudge. It was not disputed that PW1 knew the appellant well. The incident was during the day. The trial court found the girl to have been vivid in her account of the incident. She was intelligent. The court was alive to the provisions of section 124 of the *Criminal Procedure Code*, and its proviso. It accepted her evidence. The learned Judge accepted that finding. Consequently, we find no merit in the claim that the defence was not considered or that the non-calling of the owner of the watering point in any way disadvantaged or prejudiced the appellant. We are of the firm view that he was convicted on cogent and irrefutable evidence.

18. Lastly, we note that no issue, either in the grounds of appeal or in the submissions, was raised concerning the sentence.

19. In conclusion, therefore, we find no merit in the appeal, which we dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR