Muhendu v Republic (Criminal Appeal 60 of 2018)
[2024] KECA 322 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 322 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 60 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

MARCH 22, 2024

BETWEEN

JOHN KATHURI MUHENDU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Murang'a (Mbogholi, J.) dated 18th November, 2016 in Criminal Appeal No. 126 of 2015)

JUDGMENT

1. The appellant, John Kathuri Muhendu, was arraigned before the Principal Magistrate's Court at Kangema, on 26th January 2015, and charged with the offence of defilement contrary to Section 8(1) as read with subsection (2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 19th January 2015, at [particulars withheld] Kiriaini Sub-Location, within Murang'a County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of G.N.N. (the complainant), a child aged 6 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge alleged that on the same date and place, the appellant intentionally touched the vagina of G.N.N., a child aged 6 years, with his penis.

2. The appellant denied the charge prompting the trial in which the prosecution called a total of six (6) witnesses. It was the complainant's testimony (unsworn) that she was on her way from the toilet, when the appellant restrained her and took her to his house, and placed her on his bed. She stated that the appellant removed her trouser and underwear, and inserted his thing for urinating in hers. She testified that the appellant asked her not to tell anyone about the incident, with the promise of buying her 'mutura'. She told the court that she cried during the act as she felt pain. She informed her sister C.W.N., of what the appellant had done to her. C.W.N., aged eight years old, testified as PW5. She told the court

that on 19th January, 2015, she was at home with the complainant. That the complainant had gone to use the latrine when the appellant took her to his house. PW5 stated that she followed them to the appellant's house and found the appellant, who was naked, lying on top of the complainant, doing 'tabia mbaya' to her. She told the Court that the appellant promised to buy them 'mutura'. She stated that she informed her aunt of the incident.

3. The said aunt, RMM, testified as PW3. It was her testimony that on 23rd January, 2015, she went to visit her sister's children, when she noticed that C.W.N. was not walking properly. On prodding her, C.W.N. told her that the appellant had done 'tabia mbaya' to her and the complainant.

   PW3 reported the incident at Kiriaini Police Station, and took the children to Kangema Sub-County Hospital for medical examination and treatment. PW1, INM, the complainant's mother, testified that she was informed by her sister that her two daughters, including the complainant, had been defiled by the appellant. She told the Court that the complainant was born on 22nd June, 2008, and was six (6) years old when the incident occurred. She produced the complainant's birth certificate into evidence.

4. PW4, Robert Mwangi, a clinical officer at Kangema Sub-County Hospital, told the Court that he examined the complainant on 26th January, 2015. She was alleged to have been defiled on 19th January, 2015, and had been treated at the same hospital on 23rd January, 2015. PW4 stated that the complainant's hymen was broken, and that there was presence of pus cells in her vagina. He formed the opinion that the complainant had been sexually assaulted. He produced the complainant's P3 Form and treatment booklet into evidence.

5. The investigating officer, P.C. David Chepkwony, testified as PW6. It was his testimony that PW3 came to Kiriaini Police Station on 23rd January, 2015, and reported that two of her nieces, including the complainant, had been defiled by the appellant. He stated that they arrested the appellant the following day, and after conducting his investigations, preferred the charges against the appellant.

6. On his part, the appellant gave an unsworn statement. He asserted that on the material day of 19th January, 2015, he opened his bar at 8.00 am, and thereafter left, accompanied by his wife, to go see his mother-in-law, who was unwell at Kagumoini. He stated that he was there until 4.00 p.m., after which he went back to his bar and worked till 9.00 p.m. He denied committing the offence. The appellant availed his wife, Martha Muthoni Maina, who gave evidence as DW2. DW2 reiterated the alibi defence as was presented to court by the appellant.

7. The learned trial magistrate upon assessing and analyzing the evidence tendered before the court found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. The appellant, aggrieved by this decision, filed an appeal before the High Court at Murang'a.

8. In his petition of appeal, the appellant complained that the sentence meted by the trial court was harsh in the circumstances. He urged that PW2's evidence in court contradicted what was contained in her statement to the police. He contended that the medical evidence failed to link him to the offence. He asserted that PW3 testified that the complainant had difficulty walking, yet her school teachers were not called as witnesses, to speak on this fact. Lastly, the appellant was aggrieved that his defence was rejected by the trial court without any explanation. He urged the first appellate court to allow his appeal on both conviction and sentence.

9. In a judgment dated 18th November, 2016, the learned Judge (Mbogholi, J., (as he then was), after re-evaluating the record of the trial court and the submissions made before him, saw no reason to disturb the conviction and sentence of the appellant by the trial court.

10. The appellant is now before this Court, seeking to overturn the decision of the first appellate court, and has proffered eight (8) grounds of appeal. In summary, the appellant states that: the learned Judge failed to address the grounds of appeal raised by the appellant before the first appellate court; the learned Judge failed to consider the witnesses' statements which he annexed in his submissions, which revealed discrepancies between what the witnesses told the police and their testimonies in court; PW5, who was the complainant in Criminal Case No. 38 of 2015, gave contradicting evidence in that case, as compared to what she told the trial court in this case; the complainant testified that 'Uncle John' lived in the same plot as theirs, while her sister claimed that the said 'Uncle John' lived in a plot next to theirs; and that the appellant was never taken to a doctor for examination for possible infections linking him to the offence. The appellant invited us to re-evaluate the matter afresh, and set aside the judgment of the first appellate court.

11. The appeal was canvassed by way of written submissions of both the appellant and the respondent. The appellant appeared in person. It was the appellant's submission that the trial court failed to grant him a fair trial, by denying him the opportunity to consolidate this case with Criminal Case No. 38 of 2015, as the complainants in the two cases are sisters, and the witnesses in both cases were the same. He asserted the evidence adduced by the witnesses in the two trials was inconsistent. He reiterated that the trial court failed to inform him of his right to have legal counsel, and that he was not made aware of the evidence the prosecution intended to rely on. The appellant contended that he was a caretaker at the plot where they resided, and that there existed a grudge between him and a lady who incited PW3 to frame him. The appellant submitted that the prosecution failed to prove elements of the offence of defilement, and that the medical evidence adduced by PW4, failed to establish the element of penetration as narrated by the complainant. The appellant faulted the first appellate court for failing to re- evaluate the case afresh, contrary to its mandate. He submitted that his alibi defence was cogent, as it was corroborated by his wife. With regard to sentence, the appellant submitted that the sentence of life imprisonment imposed on him was harsh, excessive and unconstitutional, as the trial court failed to consider his mitigation. In the end, the appellant invited us to quash his conviction and sentence.

12. In rebuttal, learned State Counsel, Ms. Lubanga, pointed out that the grounds of appeal advanced by the appellant raised matters of fact, which should not be entertained by this Court. She made submissions to the effect that the prosecution proved its case against the appellant, to the required standard of proof beyond any reasonable doubt. She urged that the complainant's age was established by the evidence of her mother, PW2, as well as the copy of her birth certificate produced in court. It was her submission that the element of penetration was established by the evidence of the complainant, which was corroborated by PW5's testimony, as well as the medical evidence. Ms. Lubanga submitted that the appellant was properly identified as the perpetrator by the complainant and PW5, because he was their neighbour, and therefore was well known to them. On the issue of whether the trial court considered the witnesses' written statements vis a vis their oral testimony, learned State Counsel reiterated that this was new evidence submitted during his first appeal, and that the appellant failed to cross-examine the said witnesses on the alleged discrepancies. She invited us to uphold the appellant's conviction, and affirm his sentence.

13. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or

failed to consider matters they should have considered, or looking at the entire decision, it is perverse. In the case of Kaingo vs Republic [1982] KLR 213 at page 219 this Court stated thus:

> " A second appeal must be confirmed to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146]."

14. We have carefully considered the record, the grounds of appeal, and the rival submissions set out above, in light of this Court's mandate. In our opinion, the following issues of law arise for our determination:

    i. Whether the prosecution established the elements of the offence of defilement, to the required standard of proof beyond any reasonable doubt;

    ii. whether the first appellate court addressed itself to the grounds of appeal advanced by the appellant; and

    iii. whether the life sentence imposed on the appellant was harsh and excessive.

15. With respect to the first issue, the prosecution was required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator. The complainant's mother, PW1, testified that the complainant was on born 22nd June, 2008, and was six (6) years of age, at the time of the alleged sexual assault. This was confirmed by the complainant's birth certificate produced by the prosecution before the trial court. The appellant did not challenge the evidence adduced with regards to the complainant's age. It is, therefore, our finding that her age was established to the required standard of proof beyond any reasonable doubt.

16. The second element is penetration. The appellant submitted that the cause of penetration was not indicated in the complainant's P3 Form; that PW4 testified that he could not tell when the complainant's hymen was broken; and that he was not taken to hospital to undergo any medical examination. We agree with the observations made by the Supreme Court of Uganda in the case of Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995 with regard to proof of penetration:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

17. In the instant case, evidence of penetration emanated from the complainant's unsworn evidence, and was corroborated by the evidence of PW5, as well as medical evidence. This was properly re-evaluated by the learned Judge. The complainant was categorical that the appellant inserted his penis in her vagina. She told the court that the appellant took her to his house, placed her on his bed, undressed her, and inserted his thing for urinating into hers. She stated that she felt pain and cried when the appellant inserted his thing for urinating in between her legs. The complainant's sister, PW5, witnessed the appellant leading the complainant to his house. She stated that she followed them into the house, and saw the appellant, who was naked, on top of the complainant. PW5 stated that she saw the appellant doing 'tabia mbaya' to the complainant. This Court, in the case of Muganga Chilejo Saha vs Republic

[2017] eKLR observed that courts in this country have generally accepted the use of euphemism, "alinifanyia tabia mbaya" as an apt description of acts of defilement.

18. The complainant was examined three days after the incident occurred. PW4 told the court that the complainant's hymen was broken, and that there was presence of pus cells in her vagina. After examining the complainant, PW4 concluded that the complainant had been penetrated. The complainant's treatment booklet from Kangema Sub-District Hospital (P. Exhibit No.3), made similar observations to the P3 Form produced by PW4. We find no cause to fault the learned Judge's finding that the medical evidence, analyzed together with the evidence of the complainant, and the eye witness account of PW5, established beyond any reasonable doubt that the complainant had been defiled.

19. The appellant was properly identified as the perpetrator by the complainant and PW5. The sexual assault occurred in broad daylight. Further, the appellant was well known to complainant and PW5, as he was their neighbour. The appellant contended that he was not taken for any medical examination with respect to this case. Medical examination of a perpetrator is not a requirement to prove defilement, and is only necessary depending on the circumstances of a particular case, say, when for instance, upon the medical examination of the victim it is established that she was infected with a sexually transmitted disease. Such medical examination of the perpetrator may either prove or disprove whether the perpetrator infected the victim with the disease. In this case, the two courts below relied on the testimony of the complainant, coupled with that of PW4 and PW5, to prove that the appellant defiled the complainant. Contrary to the appellant's submission, the first appellate court did re-appraise the evidence adduced before the trial court, and came to the same conclusion as the trial court, that the appellant was guilty as charged.

20. The appellant complained that the first appellate court failed to addressed itself on grounds of appeal advanced by himself before that court. One of the grounds that was not addressed by the learned Judge was the appellant's contention that witnesses' written statements, compared to their oral testimony before the trial court, were inconsistent. We note that the appellant did not bring this issue up before the trial court, whether in his defence, or during cross-examination. Further, the said witnesses' statements did not form part of the record of appeal before us, and we are, therefore, not privy to their contents. Another ground was that the complainant's teacher was not called as a witness to confirm whether indeed the complainant had trouble walking, as was alleged by PW3. We note from the record that the evidence of PW3 was that she noticed that PW5 had trouble walking, and not the complainant. Further, it is trite law that the prosecution has the discretion to call witnesses it deems necessary to establish its case. Lastly, the appellant contended in his grounds before the first appellate court that PW1 testified that she was tipped off by a neighbour, as to the character of the appellant, prior to the defilement incident. From the record, PW1 made no mention of a neighbour who spoke to her regarding the appellant's character. In the circumstances, nothing turns on this ground.

21. We are, therefore, unable to disagree with the concurrent finding of fact of the two courts below as a consequence of which we dismiss the appeal against conviction.

22. The last issue relates to the life sentence imposed upon the appellant by the trial court, and affirmed by the first appellate court. The appellant urged that the same was harsh and excessive, and that his mitigation before the trial court was not considered. The appellant was sentenced to life imprisonment, which is the minimum mandatory sentence prescribed for the offence of defilement of a minor aged eleven (11) years or less, under Section 8(2) of the *Sexual Offences Act*.

23. It has recently been held by this Court that the mandatory nature of the minimum sentences prescribed by the *Sexual Offences Act* interferes with judicial discretion, when it comes to sentencing. This was

the holding of this Court in Criminal Appeal No. 84 of 2015 Joshua Gichuki Mwangi vs Republic. The Court stated as follows with respect to imposition of mandatory sentences:

> "This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2)(a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of *the Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited."

24. In his mitigation before the trial court, the appellant prayed for leniency, asserting that he was married with one child, and had a sickly leg. It is our considered view that, the appellant's mitigation notwithstanding, his conduct of taking advantage of the complainant, who was only six years old at the time, by luring her into his house and defiling her, was reprehensible. Further, we note from the record that the appellant is not a first offender, as he is serving a life sentence for the same offence of defilement, vide a judgment of the court in Kangema Principal Magistrate's Court Criminal Case No. 38 of 2015. It is our finding that the life sentence imposed by the trial court, and affirmed by the first appellate court, was commensurate with the offence committed, in the circumstances of this case.

25. From the foregoing, we are satisfied that the High Court addressed itself correctly on the law as regards the sentence of the appellant.

26. In the end, we find that this appeal has no merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR