Cini v Republic (Criminal Appeal 63 of 2017)
[2024] KECA 254 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 254 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 63 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

MARCH 8, 2024

BETWEEN

JOHN WAKABUI CINI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decree and judgment of the High Court at Kerugoya (R.K. Limo, J.) dated 5th October 2016 in HCCRA No. 120 of 2013)

JUDGMENT

1. This is a second appeal by John Wakabui Cini (the appellant) who was charged before the Principal Magistrate's Court at Wang'uru vide Criminal Case No. 710 of 2012 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. It was alleged that on diverse dates between 6th and 14th October, 2012 in Tebere Location within Kirinyaga County, he defiled MNC a child aged 12 years.

2. In the alternative, the appellant was charged with an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars being that on the 4th October, 2012 in Tebere Location in Kirinyaga County, the appellant wilfully and unlawfully committed an act of indecency with MNC aged 12 years by removing her underpants and touching her private parts namely buttocks and vagina.

3. The appellant denied both the main and alternative charges, and in the trial, the prosecution called a total of seven witnesses in support of its case. It was the prosecution's case that LG the mother (PW3) sent the child MNC (PW1) to return the winnowing tray she had borrowed from the appellant, who was their landlord. The appellant is said to have asked the minor to remove her pants and he inserted his penis inside her. It was said that there was a lady who caught them in the act and she screamed causing the appellant to stop the act. He then ordered the child to put on her clothes and sent her on

her way. According to the child, the appellant had defiled her on three previous occasions and warned her of dire consequences should she report the incident to her mother, or anybody else.

4. The child did not report the incident to her mother and went to school the following day as usual. A teacher who had noticed the child behave in an unusual manner reported the matter to the female deputy school head. Following a bit of coaxing and reassurance, the child confided to the teacher what the appellant had done to her. The teacher summoned the child's parents to the school and after questioning them decided to take the child to hospital herself. It was the evidence of Ann Macharia, the Clinical Officer (PW4) who examined the child that she had been defiled.

5. At the close of the prosecution's case, the court found the prosecution had established a prima facie case against the appellant and consequently, placed him on his defence. The appellant decided to exercise his constitutional right to remain silent and opted not to adduce any evidence. The trial court considered the evidence and found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant, and sentenced him to 20 years imprisonment.

6. Aggrieved by the decision of the trial court, the appellant moved to the High Court on appeal raising grounds, inter alia, that the trial court erred: in law and fact by failing to hold that there was no prima facie case established by the prosecution; failing to find that none of the prosecution witnesses was an eye witness; failing to find that no sufficient evidence was adduced against him; that the evidence of PW1 was doubtful and that the trial magistrate relied on inconsistent prosecution witnesses.

7. The High Court (L.K. Limo J.) after re-analyzing and reconsidering the evidence adduced before the trial court concluded that the appellant's defence that he was framed was not raised before the trial court as he had opted to remain silent, and he could not raise it on appeal. The learned Judge found that PW1, PW2 and PW3 clearly identified the appellant as the person who had defiled the child. Further, that the sum total of the evidence tendered by the prosecution was sufficient to prove the charge of defilement against the appellant as charged and tried before the trial court. The appeal was found to be without merit and it was dismissed. The conviction and the sentence of 20 years meted by the trial magistrate was, therefore, upheld.

8. The appellant was aggrieved by the High Court's decision and he preferred this appeal in a last bid to secure his freedom. His grounds of appeal are, inter alia, that the learned Judge erred in law by convicting him on circumstantial evidence; shifting the burden of proof to him; introducing extraneous matters not canvassed during the trial; failing to appreciate that the evidence adduced did not support the charges; failing to appreciate that the prosecution had failed to prove its case to the standard required and that the sentence was harsh and excessive in the circumstances.

9. In support of his appeal, the appellant filed his written submissions. He submits that there was no sufficient evidence tendered by the prosecution in support of the offence, in addition to the medical examination which was conducted after 4 days of the date of the alleged defilement. He submits further that there were no eyewitnesses availed by the prosecution and the witnesses who testified gave hearsay evidence. On the sentence, the appellant contends that despite his mitigation, the trial magistrate meted out a harsh and excessive sentence. Urging for a reduction of the sentence, the appellant submits that he has reformed and has been rehabilitated and he ought to be released back to the society.

10. In opposing the appeal, the State filed its written submissions dated 20th February, 2023. It submitted that the learned Judge re-evaluated and re-analysed the evidence on record and agreed with the finding of the trial court both on conviction and sentence which they had proved beyond reasonable doubt, and that evidence from a single witness in cases of defilement did not need corroboration by dint of section 124 of the *Evidence Act*.

11. The High Court re-evaluated the evidence and found that the appellant had remained silent in his defence, that the evidence of the child and her mother (PW2) placed him at the crime scene which was behind his hotel and that he was well- known to her.

12. It is submitted further, that the prosecution proved its case beyond reasonable doubt contrary to the appellant's assertion and that the complainant's evidence that she was defiled was corroborated by the clinical officer's evidence which was consistent and reliable.

13. On the sentence, it is urged that the same was not harsh and neither was it excessive or unreasonable. Lastly, the Court was urged to dismiss the appeal on both the conviction and sentence.

14. At the plenary hearing of the appeal on 22nd February, 2023, the appellant was present though unrepresented. Mr. Naulikha was present, appearing for the State. The appellant informed the Court that he would rely on his written submissions. In reply, Mr. Naulikha urged us to also refer to his written submissions and further urged us to find that the prosecution proved its case beyond reasonable doubt through the evidence tendered which was re-analysed and re- evaluated by the learned Judge. On the sentence, counsel reiterated that the same is determined by the age of the victim and that the sentence meted on the appellant was lawful. He concluded by urging us to find the appeal without merit and dismiss it accordingly.

15. This being a second appeal, we are by dint of section 361(1) of the *Criminal Procedure Code* (CPC) constrained to considering points of law arising from the appeal. We are also enjoined to defer to concurrent findings of fact arrived at by the two courts below. This truism was emphasized by this Court in *Dzombo Mataza v Republic* [2014]eKLR where the Court stated:

> "As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court. See *Okello v Republic* [1972] EA 32. By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. See also *Karani v R*. [2010] 1 KLR 73."

16. We have considered the grounds of appeal, the record, submissions by counsel and the appellant as well as the relevant law. First and foremost, as stated earlier, the appellant did not adduce any evidence in his defence, and chose to remain silent, which is his right as provided under Article 50(2)(i) of the *Constitution*. Having so proceeded, he could not introduce any defences on appeal as he attempted to do. The learned Judge cannot be faulted for declining to consider any defence that was being raised before the High Court for the first time.

17. The issues that arise for our determination are whether the prosecution discharged its burden of proof in respect of the appellant as the person who defiled the child; whether the appellant was properly identified; whether the child was defiled and whether the High Court was correct in upholding the conviction and sentence passed by the trial court.

18. On whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution (See *Stephen Nguli Muli v R*. [2014]eKLR.) The standard of proof required is one that is proof beyond reasonable doubt and as rightfully held by the learned Judge, it is immaterial whether an accused person chooses to remain silent or not upon being called upon to defend himself pursuant to section 211 *CPC*. The burden never shifts from the prosecution's shoulders.

19. For the offence of defilement to be proved, the prosecution must prove three main ingredients: the age of the victim, penetration, and the proper identification of the perpetrator. On the age of the victim, the charge sheet indicated she was 12 years old. The birth certificate tendered in evidence showed the minor was born on 20th June, 1999, thus the child was 12 years 8 months as at the date of the alleged defilement.

20. The prosecution availed 7 witnesses in support of its case. As a general rule of evidence provided in section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the complainant alone unless such evidence is corroborated. However, in sexual offences, where the evidence is that of the complainant, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, for reasons to be recorded in the proceedings, if the court is satisfied the complainant is telling the truth. In this case, the appellant submitted that the evidence on record did not support the charge.

21. The record shows that a voire dire examination was conducted and the trial court observed that the minor possessed sufficient intelligence to understand the questions put to her. She was a class three pupil and on the material day it was her evidence that prior to the incident leading to the appellant being arrested, he had defiled her on four different occasions. The child later narrated to the head teacher, JWG (PW2) how the appellant had defiled her. The medical evidence produced in court by the clinical officer demonstrated beyond any shadow of doubt that the child had been defiled. There was also overwhelming evidence that the appellant was no stranger to the child. There was no chance of mistaken identity. Indeed, the question of identification was never raised before the trial court.

22. We do not fault the learned Judge for upholding the conviction of the trial magistrate. The child's testimony was found to be truthful and indeed there was no question of mistaken identity. We find that the child's evidence coupled with the medical report was sufficient documentary evidence to prove the element of defilement. The conviction was based on very solid evidence, and is, in our view unimpeachable. We uphold the same.

23. On the sentence the appellant challenged the 20 years imprisonment as harsh and excessive. Section 8(3) of the *Sexual Offences Act* provides that upon conviction, a minimum sentence should be 20 years. We remind ourselves that our remit on second appeal does not extend to interfering with lawful sentences, because severity of sentence is a question of fact. In any event, given the circumstances surrounding the matter, including the fact that the appellant had defiled the child three times before he was found out, the sentence imposed on him cannot be said to be excessive, and was in our considered view, justified. We find that the learned Judge did not err in upholding both conviction and the sentence.

24. Accordingly, we find this appeal devoid of merit and the same is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR