Kirima v Republic (Criminal Appeal 129 of 2018)
[2024] KECA 1059 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1059 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 129 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

APRIL 26, 2024

BETWEEN

RICHARD KIRIMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Meru (D.S. Majanja, J.) dated 15th October 2018 in HCCRA NO. 69 of 2018)

JUDGMENT

1. Richard Kirima, the appellant, was on 12th March 2018 convicted by the Resident Magistrate at Tigania of defilement of a girl A.K. (PW 1) aged 12 years under section 8(1) and 8 (3) of the *Sexual Offences Act*, No. 3 of 2006, and was sentenced to 20 years in jail. His appeal against the conviction and sentence before the High Court (D.S. Majanja, J.) was on 15th October 2018 dismissed. He has come before this Court on second appeal, on both conviction and sentence.

2. Our mandate on second appeal is limited under section 361(1)(a) of the Criminal Procedure Code to dealing with matters of law only. This is what this Court observed in Karingo -vs- R. [1982] KLR 213: -

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings 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 could find as it did (Reuben Karari s/o Karanja -vs- R. (1950) 17 EACA 146)"

3. Regarding sentence, it is trite that this is a matter that rests with the discretion of the trial court. (See Bernard Kimani Gacheru -vs- R. Criminal Appeal No. 188 of 2000). The appellate court will only interfere if the sentence is manifestly excessive, given the circumstances of the case, or where it is

demonstrated that the two courts below overlooked some material factor, or took into consideration some wrong factor, or acted on a wrong principle.

4. The record shows that the evidence on which the appellant was convicted was that, at 11.00 am on 7th January 2017, PW 1, a class 5 pupil then aged 12 years, was sweeping her mother's kitchen when the appellant, whom she knew, came and asked where her mother was. The mother R.K. (PW 3) was away to buy nduma (arrow roots). The appellant threw away the broom that PW 1 had. He held her by the neck and threw her on the bed, removed all her clothes and removed his. He then removed his penis which he used to do "bad manners to her." She felt pain. She could not scream as she was being held by the neck. PW 2 (N.K.), a girl aged 9 and PW 1's sister, returned home and started calling PW 1 whom she had left sweeping the compound but now she could not see her. When she opened the kitchen, she found the appellant holding PW 1 by the neck while lying on her. The appellant had removed his clothes and PW 1's clothes had been pulled up. The appellant and PW 1 were on the bed. The appellant was doing "bad manners to her." PW 2 screamed. The appellant ran away. PW 3 came and PW 2 reported the incident to her. PW 2 knew the appellant.

5. PW 3 took PW 1 to Police and to Mbeu Hospital. Clinical Officer Susan M. Muthika (PW 5) examined PW 1 and found her hymen was absent. She had a foul-smelling vaginal discharge, and had pus cells. There was, however, no bruise to her labia majora and minora.

6. The appellant gave a sworn defence on which he denied committing the offence. He testified that the prosecution case was a fabrication, there being a land dispute between him and the complainant (one Kalayu). Kalayu had complained to the Assistant Chief that he (the appellant) had poisoned his animals. He did not call witnesses. It is notable that when PW 1 was cross examined, she admitted that in November Kalayu's cows had died.

7. The trial Magistrate considered this evidence, and on it found that PW 1 was 12 years old at the time; knew the appellant; the appellant had penetrated her and therefore defiled her; found him guilty of the charge; and sentenced him to 20 years in jail. The High Court confirmed the conviction and the sentence.

8. In the amended grounds of appeal, the appellant complained as follows:-

> " 1. That the learned appellate Judge erred in matters of law by failing to consider that the legal provision for mandatory sentences under the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise discretion in sentence to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) and (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.
>
> 2. That the learned appellate Judge erred in matters of law by failing to note that penetration is not supported by medical evidence.
>
> 3. That the learned appellate Judge erred in matters of law by failing to consider the appellant's defense."

He asked that the conviction be quashed and the sentence set aside.

9. In his written submissions, the appellant urged the Court to find that there was no evidence to show defilement as PW 1's testimony did not find support in the medical evidence that showed that there was no injury to the genitalia. The fact that PW 1 had no hymen, the appellant submitted, was no

indication of penetration as some women do not have hymen. He submitted that all that the medical examination proved was that PW 1 had an infection. He relied on the decisions in *P.K.W. - vs- Republic [2012]*eKLR which had cited with approval the Canadian Case of The Queen -vs- Manuel Vincent Quinanilla (1999) abqb 769 in which it was observed that some girls are born without hymen, and therefore its absence does not necessarily mean that there was penetration that caused it to disappear.

10. Regarding sentence, the appellant, relying on Julius Kitsao *Manyeso -vs- R. Criminal Appeal No. 12 of 2021* ([2023]eKLR), *Evans Wanjala Wanyonyi -vs- R. [2019]*eKLR and Jared Koita Injiri -vs- R. Criminal Appeal 93 of 2014, submitted that the 20 years jail that was imposed, and which was the minimum penalty for the offence, was unconstitutional, harsh and excessive, in the circumstances.

11. Ms. Nandwa for the State opposed the appeal. In her submissions, the prosecution had called evidence to prove that PW 1 was 12 years old at the time; penetration had been proved by her evidence which had been supported by that of PW 2 and confirmed by the medical evidence; and that the sentence meted out was lawful.

12. We have considered the High Court's judgment, the grounds of appeal and the rival submissions.

13. We note that the prosecution had the duty to prove that PW 1 was a minor, in this case 12 years, and that she had been penetrated in her genital organ. (See *Mutua Munyoki -vs- Republic [2017]*eKLR. The two courts below found that PW 1 was 12 years old. There was her evidence, which the trial court believed, and the age assessment. We accept that her age was 12 years.

14. PW 1, while touching her crotch, stated that the appellant had removed his penis, put it there and done "bad manners" to her. PW 2 found the appellant on top of PW 1, and both had clothes off, and he was doing "bad manners" to the girl. Under section 124 of the *Evidence Act*, both courts found the girl's evidence to be believable. We are alive to the fact that penetration does not have to be complete or absolute; that partial penetration will suffice.

15. The medical evidence showed that PW 1 did not have hymen. PW 5 concluded that:

> " The hymen was absent so there was evidence of defilement."

It was not found that the hymen was broken. It was simply absent. Did she ever have the hymen? Was she born without the hymen? We find that the absence of the hymen did not conclusively indicate, in the circumstance, that PW 1 had been sexually penetrated. We bear in mind that PW 5 said that there was no injury to the majora and minora. PW 1 had no bruises to her female organ.

16. The girl had a virginal discharge that was smelly. She had pus cells in the discharge. Certainly, she had an infection. The infection was not, however, isolated. The appellant was not examined to find out if he was himself suffering from any infection. We cannot find that the infection was caused by the penetration, or that it was evidence of penetration.

17. If PW 1 said that she was penetrated and the medical evidence did not confirm this, if she said that she felt pain when penetrated, and the medical evidence did not reveal any bruise or injury to her genitalia; can it be said that the prosecution had established beyond doubt that the appellant had penetrated the girl? On the evidence, we find that the burden placed on the prosecution to prove penetration beyond reasonable doubt was not discharged.

18. The consequence is that the appeal against both conviction and sentence succeeds. We quash the conviction and set aside the sentence.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR