Kiritu v Republic (Criminal Appeal 93 of 2016)
[2024] KECA 1075 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KECA 1075 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 93 OF 2016

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JUNE 20, 2024

BETWEEN

EDWARD MURIGO KIRITU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (Mshila, J.) dated 27th October, 2016 in Criminal Appeal No. 83 of 2013)

JUDGMENT

1. The appellant, Edward Murigo Kiritu, was arraigned before the Principal Magistrate's Court at Karatina, on 8th October 2012, and charged with the offence of defilement contrary to Section 8(1) (3) as read together with Section 8 (2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 31st July 2012, at about 15.00 hours, in Nyeri County, the appellant intentionally caused his penis to penetrate the anus of RNM, a child aged 10 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 committed an indecent act with RNM, a child aged 10 years, by rubbing his penis between the buttocks of the said child.

2. The appellant pleaded not guilty to the charges. The prosecution called a total of six (6) witnesses. The complainant testified as PW3. She gave sworn testimony. It was her evidence that on 31st July 2012, she was at home with her siblings M, C and W. She was unwell. The appellant came to their house and sent C and W to the shop. She was left outside with M., their youngest sibling.

3. The appellant took her inside the house to the kitchen. He pulled down her underwear which got torn in the process. He then poured water on her anus. He placed her on the floor and inserted his penis

into her anus. After he was done, he warned not to cry or else he would kill her. He gave her Kshs. 20 to buy sweets. The complainant stated that she told F. and her mother what had happened.

4. The complainant's mother gave evidence as PW1. She stated that on the fateful day of 31st July 2012, she was at work at Iruri. She had left her four children at home; the complainant (10 years old), W (3 ½ years old), C (2½ years old) and M (2 years old). She came back to the house at about 6. 00 p.m. Her eldest daughter F. informed her that the appellant came to the house, took the complainant to the kitchen where he inserted his penis in her anus.

5. PW1 testified that she talked to the complainant who confirmed the information. The complainant told her that she was feeling pain in her anus. PW1 stated that she cleaned the complainant's anus using salty water. She recalled seeing the complainant's anus bruised and inflamed. There was traces of blood. The following morning, PW1 reported the matter to a village elder, who referred her to the assistant chief's office. The assistant chief referred her to Kiamariga Police Station. She advised to take the complainant to Karatina Hospital for medical treatment.

6. PW1 stated that when she reported the matter, the appellant went into hiding. Her son, PW2 SM, stated that he spotted the appellant outside a local bar on 7th October 2012. He was in the company of PW4. PW2 informed PW1 who called the police. They came and arrested the appellant.

7. PW5, Dr. Nyorita of Karatina Hospital, testified that she first examined the complainant on 1st August 2012. The complainant was alleged to have been sexually assaulted. PW5 stated that she observed a cut on the complainant's anus and referred her for surgery. The cut was 0.5 cm long. She also administered anti-retroviral drugs and antibiotics. She examined the complainant again on 6th August 2012, when she filled the P3 Form. PW5 made the conclusion that the minor had been defiled and that the penetration was into anal passage. PW5 produced into evidence the complainant's P3 form, Post Rape Care form and medical card.

8. PW6, Corporal Ahoe Gachula of Kiamariga Police Station, was the investigating officer. He interviewed the complainant, who narrated to him how on 31st July 2012, the appellant came to their home. He sent two of her siblings to the shop after which he took her to the kitchen and inserted his penis into her anus. The complainant informed her mother who reported the matter the following day to the police and then took the complainant to the hospital. PW6 stated that the appellant was arrested on 7th October 2012, and charges were preferred against him. He testified that the minor was born on 23rd January 2002, as per her birth notification. The prosecution case then closed its case.

9. The appellant was placed on his defence. He gave a sworn statement. It was his evidence that he worked as a plumber, and that on 7th October 2012, he was with a client when PW1's sons approached him. They asked him if he knew their mother. They called PW1 who came in the company of police officers. The officers arrested him and took him to Kiamariga Police Station. The appellant testified that PW1 was his secret lover, but that he ended the relationship because she was married. The appellant stated that PW1's husband, as well as her children, who were at home with the complainant when she was allegedly defiled, were not availed to testify in the case. He testified that while at the hospital, the complainant stated that she was defiled by her father, but later changed her story when she told the police that it was the appellant who defiled her. Upon cross-examination, the appellant stated that he could not recall his whereabouts on 31st July 2012, but that he must have been at work at Kagochi University, where he was employed as a plumber. He admitted that the complainant was known to him. It was his evidence that PW1 used the complainant to frame him of the charges which he was innocent of.

10. After full trial the appellant was found guilty as charged in the main charge of defilement. He was sentenced to serve life imprisonment.

11. The appellant was aggrieved by this decision. He lodged an appeal before the High Court at Nyeri. In his amended grounds of appeal, the appellant faulted the trial court for failing to find that crucial witnesses, to whom the incident was reported to, such as F, the village elder and the assistant chief, were not availed to testify before the trial court. He was of the view that the prosecution failed to prove its case against him to the required standard of proof beyond any reasonable doubt. Lastly, he was aggrieved that the trial court disregarded his defence which, in his view, had not challenged by the prosecution.

12. The learned Judge (Mshila, J.) after re-evaluating the record of the trial court and the evidence tendered before it, determined that the appellant's conviction was safe, and his sentence was lawful. The learned Judge dismissed the appellant's appeal in its entirety.

13. The appellant is now before us on second appeal. He has proffered four (4) grounds of appeal. The appellant faulted the learned Judge for upholding his conviction which was based on a defective charge sheet. He was of the view that the prosecution failed to prove the elements of penetration, and identification of the perpetrator, to the required standard of proof beyond any reasonable doubt. He was aggrieved that the learned Judge failed to acknowledge that crucial witnesses were not called by the prosecution to give evidence in the case. Lastly, the appellant urged that the sentence awarded by the trial court and affirmed by the High Court was excessive in the circumstances. He further asserted that life sentence was declared unconstitutional by the decision of the court in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR).

14. The appeal was canvassed by way of written submissions. The appellant appeared in person. It was his submission that the charge as drafted was duplex hence defective. He stated that the ingredients of penetration and identification were not established by the prosecution. He was of the view that the complainant's evidence was incoherent and seemed to have been coached. He asserted that the medical documents indicated that the complainant was defiled by her father. Further, the medical evidence failed to establish the age of the complainant's injury. It was his view that the medical evidence failed to establish that there was penetration as alleged by the complainant. He urged that the person that the complainant made the first report to was not availed to give evidence before the trial court. He submitted that the complainant only identified him at the dock, which identification was not sufficient to sustain a conviction. Regarding the sentence, the appellant urged us to set aside the life sentence affirmed by the learned Judge and mete upon him a lenient and definite sentence, in line with recent jurisprudence from this Court.

15. In rebuttal, Mr. Naulikha, learned counsel for the State, submitted that the evidence of the complainant, as well as that of PW1 and PW2 placed the appellant at the scene of crime on the material date and time. He explained that the appellant was well known to PW1, PW2, PW3 and PW4, and his identification was that of recognition. It was his submission that the charge sheet was not fatally defective, and urged us to cure the error by application of Section 382 of the Criminal Procedure Code, in respect of substantive justice, as the appellant did not suffer any prejudice. He urged that the appellant's defence was displaced by strong, reliable and consistent evidence by the prosecution witnesses. With respect to the sentence, Mr. Naulikha submitted that the same was not punitive or excessive, and that it was within the confines of the law.

16. The mandate of this Court on a second appeal is confined to matters of law only as stipulated in Section 361 (1) of the Criminal Procedure Code. This was affirmed by this Court in David Njoroge Macharia v. Republic [2011] eKLR as follows:

> " That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are 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 Chemagong v. R [1984] KLR 611."

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

    i. Whether the charge as drafted was fatally defective;

    ii. whether the prosecution proved the elements of penetration and identification to the required standard of proof beyond any reasonable doubt;

    iii. whether the prosecution failed to call essential witnesses; and

    iv. whether the sentence awarded by the trial court, and affirmed by the first appellate court, was sound in law.

18. Starting with the first issue, it was the appellant's contention that the charge as drafted was fatally defective for being duplex. Duplicity arises in instances where more than one offence is disclosed in the same charge. In this case, the appellant was charged with the offence defilement contrary to Section 8 (1) (3) as read together with Section 8 (2) of the Sexual Offences Act. Only one offence was disclosed, which is the offence of defilement.

19. Section 8 (1) of the Act provides what constitutes the offence of defilement. It provides that "A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement". Sub-sections (2) to (4) touch on the different applicable penalties, in the event one is found guilty of the offence of defilement, which is dependent on the age of the minor. It follows that the error in the charge relates to the sentencing section. The appellant was charged under Sub - sections (3) and (2).

20. The trial magistrate noted that since the complainant was under the age of eleven (11) years, Section 8(2) was the appropriate sentencing section. The first appellate court observed that the charge and particulars therein sufficiently disclosed the nature of the offence that the appellant was facing, and the appellant was well aware of the exact offence he was alleged to have committed.

21. We agree with the findings of the two courts below. The appellant was charged with one offence in the main charge,being the offence of defilement. The substance and particulars of the charge were read out to the appellant to which he pleaded not guilty. He therefore understood the nature of the charges against him. It is our considered view that error in the sentencing section is curable under Section 382 of the Criminal Procedure Code.

22. Turning to the second issue, the appellant contended that the elements of penetration and identification were not proved to the required standard of proof. With respect to penetration, it was his submission that the complainant's evidence was not credible, and that the medical evidence failed to corroborate her assertion that she was defiled.

23. The act of penetration, as was held by this Court in Kassim Ali v. Republic [2006] eKLR, can be proved by the oral evidence of a victim of rape or defilement, or by circumstantial evidence. In this case, the evidence of penetration emanated from the complainant's sworn evidence, and was corroborated by the medical evidence.

24. It was the complainant's evidence that the appellant came to their home while her mother (PW1) was at work. She was at their home with her three younger siblings. The appellant sent two of them to the shop. He then took her to the kitchen and left the youngest child outside the house. While inside the kitchen, the appellant undressed the complainant and poured water on her anus. He then lay her down and inserted his penis into her anus. The appellant gave the complainant Kshs.20 to buy sweets, and warned her not to tell anyone about the incident. The complainant stated that she told her older sister, F, and her mother (PW1).

25. PW1's evidence was consistent with that of the complainant. She stated that F. informed her that the appellant had defiled the complainant, after which she called the complainant and asked her about the incident. She further examined the complainant's anal region. She stated that the complainant complained of pain in her anus. She noted that the complainant's anus was bloody, bruised and inflamed. She cleaned the complainant's anus using salty water. The complainant maintained the same story when she spoke to PW6.

26. The complainant was examined by PW5 the day following the date of the alleged defilement. PW5 stated that she observed a cut on the complainant's anus and referred her for surgery. Both the Post Rape Care Form and the P3 Form noted that the complainant suffered a cut injury on her anus. The appellant submitted that the medical evidence failed to establish the age of the complainant's injuries. We find that the complainant's assertion that she was penetrated was corroborated by the medical evidence.

27. PW1 noted that the complainant was bleeding from her anus on the material day she was alleged to have been defiled. She was seen by the doctor the following day. The cut injury was fresh as the doctor deemed it necessary to refer her for surgery to treat the cut wound. PW5's opinion, after examining the complainant, was that she had been defiled. The medical evidence, analyzed together with the evidence of the complainant, and that of PW1, established beyond any reasonable doubt that the complainant was defiled.

28. The third issue relates to the appellant's identification. It was the appellant's contention that the complainant only identified him at the dock, and that in the history she gave at the hospital when she first sought treatment, the complainant stated that she was assaulted by her father. The appellant was well known to the complainant and her family. He admitted that the complainant and her family were well known to him.

29. The appellant was, therefore, not a stranger to the complainant. His identification by the complainant was that of recognition. The complainant told PW1 and PW6 that it was the appellant who defiled her. She identified him by name. The trial magistrate who had the benefit of seeing and hearing the complainant testify was satisfied that the complainant was a truthful witness. We see no error in law on the part of the learned appellate Judge in concurring with the trial court that the proviso to Section 124 of the *Evidence Act* was properly applied in this case.

30. We further agree with the finding of the learned appellate Judge that the appellant's defence that a grudge existed between him and PW1 was meant to exonerate himself, and that the same did not dent the otherwise strong in-culpatory evidence adduced by prosecution witnesses connecting him with the

sexual assault occasioned on the complainant. It was properly dismissed by the two courts below as being of no evidential or probative value.

31. The appellant contended that material witnesses, namely, F., the village elder and the assistant chief, to whom the incident was reported to, were not availed by the prosecution to adduce evidence before the trial court. We concur with the learned appellate Judge's observation that the witnesses availed by the prosecution were sufficient to establish the charge against the appellant.

32. Although the complainant informed her elder sister F that the appellant defiled her, she also told her mother, PW1, who gave evidence before the trial court. PW1 reported the incident to the village elder, who referred her to the assistant chief, and the assistant chief referred her to the police. The Investigating Officer gave evidence regarding the report made by the complainant. In Bukenya & others v. Uganda [1972] E.A.549, the court observed that the prosecution is not expected to call a superfluity of witnesses. An adverse inference will therefore only be made by the court if the evidence by the prosecution is not adequate or if the failure by the prosecution to call the mentioned witnesses will negatively impact on the appellant's defence. In this case, the evidence tendered by the prosecution was sufficient to sustain a conviction. The evidence that may have been tendered by the mentioned witnesses was adequately adduced by the witnesses who testified before the trial court.

33. For these reasons, the appeal against conviction is dismissed.

34. The appellant was sentenced to serve life imprisonment, which was the mandatory minimum sentence at the time the two courts below delivered their judgment. In line with the progressive jurisprudence on the constitutionality of indeterminate life sentences, the appellant is deserving of a review of his sentence to reflect a determinate sentence.

35. In the circumstances, we allow the appeal on sentence and set aside the sentence of life imprisonment. It is substituted thereto with a custodial sentence of thirty (30) years. The appellant was in remand custody during the pendency of his trial. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the appellant's sentence shall take effect from 8th October 2012, when he was first arraigned before the trial court.

36. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR