Kibuthi v Republic (Criminal Appeal 111 of 2017) [2024] KECA 1047 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1047 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 111 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JULY 26, 2024

BETWEEN

JASAN GERALD KIBUTHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (Ng'etich, J.) dated 24th July, 2017 In Criminal Appeal No. 53 of 2016)

JUDGMENT

1. The appellant, Jasan Gerald Kibuthi, was arraigned before the Senior Principal Magistrate's Court at Karatina, on 9th July 2014, and charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. The particulars of the charge alleged that on diverse dates between January 2013 and 30th June 2014, in Mathira East Sub-County within Nyeri County, the appellant intentionally caused his penis to penetrate the vagina of ANP, a child aged 9 years. In the alternative, he was charge 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 were that on the same dates and place, the appellant intentionally touched the vagina of ANP with his penis.

2. The appellant denied the charges. The prosecution called a total of ten (10) witnesses in a bid to establish its case. A brief summary of the facts according to the prosecution is as follows: The complainant, who testified as PW2, told the court that on several occasions, the appellant way laid her on her way back from school and take her to a house. At the house, the appellant would insert his penis into her vagina, then give her some money, with instructions that she should not tell anyone. The complainant testified that one day, on her way to school, the appellant started following her. They met an old man who warned the appellant against following a child. The old man told the complainant to report the incident to her teachers. The complainant stated that she told her head teacher that the appellant had been defiling her. She also reported to three other female teachers who were subsequently

sent to speak to her by the head teacher. The head teacher took her to the police station where they reported the incident. On the way to the police station, they met the complainant's mother, who accompanied them to the station.

3. The head teacher, JMM (PW4) told the court that on 2nd July 2014, at about 7.30 a.m., the complainant, who was a class two pupil, came to his office. She informed him that the appellant had repeatedly been defiling her. She told him that the last time the appellant defiled her was on 30th June 2014, at about 4.00p.m. PW4 recalled that he sent for the complainant's class teachers including PW6, RW. The complainant informed them that the defilement started when she first began class two, and that since she had repeated the class, they concluded that the appellant started defiling her in 2013. PW4 testified that they reported the incident at Karatina Police Station. PW4 stated that the appellant, who also went by the name "W" was employed at the school as a casual labourer.

4. The complainant's mother (PW1) testified that she was on her way home from the hospital when she met the complainant and PW4. PW4 informed her that the complainant had been defiled.

   They went to Karatina Police Station where she recorded a statement. When they got home, the complainant informed her that she was experiencing pain while passing urine and stool. PW1 called her sister, MWM (PW7), and together they took the complainant to a hospital in Nyeri where she was admitted. PW1 stated that the complainant informed her that the appellant used to defile her in an abandoned house, which had a tiny bed. PW1 stated that the appellant was well known to her as he was a neighbour and also a distant cousin.

5. AW, who testified as PW3, was a minor who attended the same school as the complainant. It was PW3's testimony that she was on her way home from school, accompanied by the complainant and one M. They met the appellant at the side of the road. The appellant gave PW3 and M Kshs.10. He then asked the complainant to meet him by the river. The following day, the complainant informed her that the appellant did 'bad manners' to her.

6. PW5, George Wanjau, was the area assistant chief. It was his evidence that he received a phone call from PW4, on 8th July 2014, informing him of a case of defilement, involving the appellant. PW5 accompanied P8, APC Patrick Sang, to the appellant's house where the appellant arrested.

7. PW9, Dr. Stanley Wahome, from Karatina Hospital, examined the complainant and filled out a Post Rape Care Form, and later a P3 form. Upon examination, he noted that her hymen was absent. PW10, Corporal Catherine Thiga, was the investigating officer in this case. It was her evidence that after the case was assigned to her, she took the complainant to Karatina Hospital where she was examined by PW9. The complainant informed her that the appellant would waylay her on her way home from school, at about 4.00 p.m. near a farm. He would then take her to an abandoned house on that farm, where he would defile her. She told the investigator that the defilement had been going on since January 2013, up until June 2014 when she reported the incident. The complainant further informed her that the appellant would give her Ksh. 70, and threaten to kill her if she reported the sexual encounter to anyone. The complainant narrated to her in detail how the appellant would sit on a bed inside the said house, put on something that looked like a balloon, place her on his lap, and defile her.

8. PW10 stated that on the day the complainant reported the incident to her teachers, she had seen the appellant on her way to school. She started running while screaming. The appellant chased after her. An old man saw the appellant chasing after the complainant. He decided to escort the complainant to school. He told the complainant to report the incident to her teachers. PW10 testified that when the appellant was arrested, she questioned him, and he admitted to being referred by the nick name "Wilo".

9. The appellant was placed on his defence. He gave a sworn statement. It was his testimony that on 8th July 2014, he was at home with his wife when the police and headman arrived. They arrested him and escorted him to the police station. At the station, he was informed that he was informed that he had defiled a girl. The appellant denied defiling the complainant, and contended that his cousin (PW1) had fabricated the charges against him. He stated that a grudge existed between them, due to a dispute that involved a parcel of land he inherited from his parents. He confirmed that he had been PW2's neighbour since childhood.

10. At the conclusion of the trial, the appellant was convicted of the main charge. The learned magistrate sentenced him to life imprisonment.

11. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nyeri. In his petition of appeal, the appellant faulted the trial court for failing to appreciate that the element of the complainant's age was not sufficiently proved by the prosecution. He stated that the learned magistrate fell into error by relying on the evidence a single identifying witness, and placing reliance on Section 124 of the *Evidence Act*. He was aggrieved by his conviction, stating that the Kshs. 70, that he allegedly gave to the complainant, was not produced in court as an exhibit. He faulted the trial magistrate for rejecting his defence, especially since the offence was alleged to have been committed on 30th June 2014, yet he was arrested on 8th July 2014.

12. The learned Judge (Ng'etich, J.) after re-evaluating the record of the trial court, and the evidence tendered before it, saw no reason to disturb the conviction and sentence of the appellant.

13. The appellant is now before us seeking to overturn the decision of the High Court, and has proffered four (4) amended grounds of appeal. The appellant urged that the learned appellate Judge erred in law by: failing to acknowledge the fact that a grudge existed between himself and the complainant's mother; failing to find that the ingredients of the offence were not sufficiently established by the prosecution; rejecting his defence; and, by failing to determine that the sentence meted by the trial court was harsh and excessive.

14. The appeal was canvassed by way of written submissions. The appellant appeared in person. It was his submission that the complainant's mother coached the complainant on what to say in court, and that she fabricated the charge against him, so that she could take over his parcel of land. He was of the view that the elements of penetration and identity of the perpetrator were not established by the prosecution. He submitted that the medical evidence failed to corroborate the complainant's claim that she had been penetrated, and that the absence of a hymen was not conclusive proof of defilement. The appellant submitted that his defence was not considered by the two courts below. He urged that failure by the prosecution to call the old man who was alleged to have seen the complainant with the appellant was detrimental to the prosecution's case. With regard to his sentence, the appellant urged that the same was harsh and excessive, in view of recent jurisprudence declaring that an indefinite life sentence is unconstitutional.

15. In rebuttal, Learned State Counsel, Mr. Naulikha, submitted that the medical evidence adduced corroborated the complainant's evidence of penetration. He stated that the appellant was well known to the complainant, and that there was no chance of mistaken identity. It was his further submission that the two courts below addressed themselves to the appellant's defence, and found that the evidence by the prosecution was overwhelming to warrant his conviction. He reiterated that the appellant's sentence was not harsh or excessive, considering the circumstances of the case, and the fact that the complainant was only nine years old at the time.

16. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of *Dzombo Mataza v Republic* [2014] eKLR, where this Court expressed itself in the following terms:

> " 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.... 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."

17. After carefully considering the record and the rival submissions set out above, we form the view that the issues that are arising for our determination are:

    i. Whether the prosecution established the elements of the offence of defilement beyond any reasonable doubt;

    ii. whether the appellant's defence was considered;

    iii. whether the appellant's defence that there existed a grudge between him and complainant's mother was viable; and,

    iv. whether the appellant's sentence was harsh and excessive.

18. On the first issue, it was the appellant's submission that the elements of the offence of defilement, were not proved by the prosecution, to the required standard proof beyond any reasonable doubt. The prosecution was required to establish three elements of the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator.

19. On the age of the complainant, PW1, who was the complainant's mother, testified that the complainant was born on 8th February 2005. She was therefore nine (9) years of age when the sexual assault was alleged to have repeatedly occurred. The complainant's immunization card produced in evidence confirmed that the complainant was indeed born in 2005. The appellant did not challenge the evidence adduced with regards to the complainant's age. We find that the prosecution did sufficiently establish that the complainant's age. This was the concurrent finding of the two courts below.

20. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " the partial or complete insertion of the genital organ of a person into the genital organs of another person."

21. The appellant contended that the medical evidence adduced failed to corroborate the complainant's assertion that there was penetration. He urged that the absence of a hymen was not conclusive proof of penetration. 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.

22. In this case, the complainant narrated to the court how the appellant repeatedly waylaid her on her way home from school. She stated that the appellant would take her to an abandoned house, undress her, wear something that looked like a balloon, and do 'bad manners' to her. She told the court that

the appellant gave her Kshs. 70 and threatened to kill her if she told anyone about what he was doing to her. This happened over the course of a year. The complainant reported the incident to her teachers, after she had been rescued by a good samaritan, who saw the appellant chasing after her, and offered to walk her to school. The good samaritan, who the complainant stated was an old man, advised her to tell her teachers about the incident.

23. PW4 and PW6 are the teachers she spoke to. It was their testimony that the complainant told them in great detail how the appellant had been defiling her since the year 2013, when she started class two. PW6 told the Court that the complainant explained that the appellant would remove his clothes, as well as hers, and put on something that looked like a balloon on his penis. He would then sit on the bed, put her on his lap, and do bad manners to her.

24. The complainant's mother (PW1), her aunt (PW7), and the investigating officer (PW10), all told the court that the complainant told them the same story. Other circumstantial evidence was adduced by one of the complainant's schoolmates, PW3. PW3 testified that one day she was walking home from school accompanied by the complainant and another minor. They met the appellant who gave her and the other minor Kshs.10 each. The appellant then asked the complainant to meet her by the river. The following day, the complainant informed her that the appellant had done 'bad manners' to her.

25. We agree with the appellant that the absence of a hymen, on its own, does not prove penetration. In this case however, the evidence of the complainant, taken together with that of PW3, and the medical evidence, conclusively established that the complainant was penetrated. We are alive to the fact that the complainant was defiled on multiple occasions over a period of approximately a year. As was observed by the doctor (PW9), there was a possibility that any signs of forceful penetration may not have been visible. The absence of a hymen, couple with the evidence of the complainant, and the prosecution witnesses, was consistent with a history of continuous sexual abuse.

    Again the two courts below found as a fact that there was penetration. We see no reason to depart from the concurrent finding of the two courts below.

26. The third ingredient is whether penetration was perpetrated by the appellant. The complainant was categorical that the appellant used to accost her on her way home from school. The sexual assault therefore occurred in broad daylight. Secondly, the appellant was known to the complainant. She identified him by his nickname "Wilo". PW1 stated that the appellant was a neighbour and a distant cousin. This fact was admitted to by the appellant in his defence. His identification by the complainant was by way of recognition. We further note that the defilement occurred continuously over a long period of approximately a year. The complainant had ample time to identify the appellant. It is our holding that the appellant was properly identified as the perpetrator of the sexual assault. The two court's below reached the same verdict. Again we see no reason to interfere with the concurrent finding of fact by the two courts below.

27. The appellant, in his submissions, faulted the prosecution for failing to call the good samaritan who rescued the complainant as a witness before the trial court. PW9, during re-examination, told the court that the complainant informed her that she did not know the said man's name or where he lived. PW9 was therefore not able to trace him as his identity was unknown.

28. The appellant in his defence denied that he defiled the complainant. He asserted that the case was a ploy by PW1 to frame him of the present charges, since a land dispute existed between them. We note that the appellant did not question PW1, during cross-examination, concerning this alleged grudge. Further, other than the evidence of the complainant, PW3's testimony that she witnessed the appellant luring the complainant to meet him, after which the complainant told her that the appellant defiled her, further implicated the appellant. In addition, PW1 was not aware that the appellant was defiling the

complainant. She only learnt of the same from her teachers, when she met PW4 taking the complainant to the police station to report the sexual assault. This was the concurrent finding of the two courts below which we cannot fault.

29. This Court therefore holds that the evidence of the prosecution witnesses, taken in totality was cogent, credible and corroborated in all material respects. The appellant was positively identified as the perpetrator of the sexual assault. We find that the appellant's defence was an afterthought meant to exonerate himself from the crime. It did not dent the otherwise overwhelming evidence adduced against him by prosecution witnesses. We find that the learned Judge did not err in upholding his conviction by the trial court.

30. As regards the sentence, the appellant was sentenced to serve life imprisonment, which is the prescribed penalty under Section 8(2) of the *Sexual Offences Act*. The appellant complained that this sentence is harsh and excessive. It is noteworthy that the appellant took advantage of the innocence of the complainant continuously for a period of over a year. Who knows for how long the appellant would have continued sexually abusing the complainant, had she not gained the courage to report the incident, after she was advised to do so by the good samaritan. We hold that this is a serious offence which greatly affected the victim both physically and psychologically. We therefore see no reason to disturb the appellant's sentence.

31. In the circumstances, we are satisfied that the superior court addressed itself correctly on the law. There are no grounds for interfering with the concurrent findings of fact by the two courts below. Accordingly, all the grounds raised and advanced before us by the appellant must fail.

32. We order the appeal dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 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