Makanga v Republic (Criminal Appeal E036 of 2023)
[2024] KECA 900 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 900 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E036 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

JULY 26, 2024

BETWEEN

SIMON KIBISU MAKANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (G. Nzioka, J.) delivered on 5th October, 2021 in HCCRA No. 85 of 2019)

JUDGMENT

1. The appellant, Simon Kibisu Makanga was charged before Kibera Law Courts, Nairobi, with the offence of defilement of a child, contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 17th December 2013, and 26th December 2013, within Nairobi County, he intentionally and unlawfully, committed an act that caused penetration by inserting his genital organ (namely penis) into the female genital organ (vagina) of SK, a child aged 15 years.

2. Upon hearing the case, the trial magistrate found the ingredients of the offence of defilement to have been established and found the charge to have been proved beyond a reasonable doubt, convicted the appellant as charged, and sentenced him to 25 years' imprisonment.

3. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court, in the judgment (Nzioka, J.) delivered on 5th October 2021, upheld both the conviction and sentence, thus precipitating this second appeal before us.

4. The prosecution case was laid down by 6 witnesses. (PW1), the complainant testified that at the time leading to the incident herein, she stayed with her mother's sister; Aunt R in (Particulars Withheld) and helped take care of her baby. On 17.12.13 a friend, Eva picked her and they went to Eva's sister's

house in (Particulars Withheld) where they found the appellant who is Eva's brother- in-law. Eva then left SK and the appellant in the house, when the appellant convinced SK to have sex with him. The appellant took her to bed as he fondled her breasts, pulled up her skirt towards her face, and removed her pants. He then lowered his trousers to the knees and had sex with her without using a condom. She went back home and did not tell anyone as she was embarrassed. On 18.12.13 at about 11.00 a.m., Eva called her again to the appellant's house; and left her with the appellant, who had sex with her again. On 20.12.13 Eva called her to the appellant's house again, when the appellant gave her a red skirt and she left for home.

5. On 24.12.13 the appellant went to the house of PW1's aunt at 11.00 a.m. but PW1 was busy. Later while on her way to buy groceries, she met the appellant who asked her to accompany him to his house, so that he could buy her a phone. She reluctantly followed him leaving her two nephews in the care of her neighbor whom the appellant promised to pay for babysitting as there was a possibility that they would take long to return. She accompanied the appellant to his house where she found the appellant's brother and cousin. She stayed there till 7 p.m. She was afraid to go home alone as the aunt was strict and the appellant had refused to take her. She ended up spending the night at the appellant's house and they engaged in sex many times.

6. The next day, the appellant left in the morning and returned in the evening drunk. He then asked her to leave his house as he was going to go to the village in Western Kenya and would return and get another house in Kawangware where they would reside as husband and wife. She declined to return home alone. He then locked her in the house until 1.00 a.m. when he returned with his brother and cousin all of them drunk. Again, the appellant had sex with her.

7. On 22nd December 2013, SK's aunt received information that she had been seen at the appellant's house and around 7 p.m. of the same day, SK's mother, the aunt, the father, and the uncle stormed the appellant's house. He was arrested and taken to Kabete Police Station. After investigations, he was charged with the offence of defilement. On the part of S.K., she was taken to hospital, treated, and discharged on medication. Later, she was examined by the Government doctor in the Nairobi Area, and on 26th December 2013, a P3 Form was filled.

8. PW2, PW1's mother, stated that PW1 was her first-born daughter and at the material time PW1 was staying with her sister R in December 2013, looking after her child; that she got a call from R 's husband informing her that PW1 was not in the house and had left food on the jiko with the child asleep; and had not returned for 2 days, this got her worried since this was the first time she had left home without permission; on 26th December 2013 at 5 p.m. she reported the incident to the area chief; later R called her and informed her that PW1 had been spotted near R 's house; she went to the AP Post but did not get assistance; she then got as many people as she could to help arrest the appellant; it was about 7 p.m. when she knocked on the appellant's door; he opened the door and she saw PW1; the appellant was arrested and PW1 rushed to hospital and on 27th December 2013 she went to the station to record a statement.

9. PW3, a businessman and pastor testified that on 26th December 2013, he saw a large crowd passing frog-marching the appellant to the police station; that as a volunteer Children Officer, he got concerned and joined the crowd; he learned about the incident and got to see PW1; he knew of MSF Hospital and requested them to rescue the victim; an ambulance came and PW1 was taken to hospital; he went with the crowd to the police station and he recorded his statement on 27th December, 2013.

10. PW4 is the biological father of PW1. He testified that on 24th December 2013 his daughter went missing and they thought she was at her friend's place; on 26th December 2013 he got worried and went to the AP Post nearby to make a report; R , his sister-in-law told him to go and arrest the man who had

taken his daughter; the police did not give them someone to arrest the appellant hence they organized a civilian arrest and went as a mob; they went and knocked on the door and he saw the appellant and his daughter in the house; the mob picked the appellant and he took his daughter to Kabete Police Station where they got an ambulance, which took PW1 to MSF Clinic and on 27th December 2013 he recorded his statement.

11. PW5, Dr. Kizzy Shako testified that she examined PW1 on 2nd March 2014, 3 months after the incident and formed the opinion that she was 15 years old; SK had normal external genitalia; the hymen was normal with old tears at certain areas. She filled and signed the P3 form on 2nd March 2014. She also examined the appellant and found he had normal genital organs with no abnormalities or injuries.

12. PW6 Pacific Awour, a nursing officer at MSF – Tumaini Rescue Centre, testified that PW1, who was brought in by her guardians was examined at the centre on 26th December 2013. PW1 complained of defilement and abduction. She was examined by her colleague. PW1 was by then 14 years 4 months; On examination S.K.'s physical body was normal, however, her vagina had bruises and she had a discharge that had a bad odor. Her hymen was broken and overstretched which was abnormal for her age. They took blood samples and found that SK was not HIV positive and had no STD. They gave her medication. They also took a vaginal swab in preparation for DNA analysis. In her opinion, PW1 went through a traumatic event as she was at puberty and too young for sexual encounters. On cross-examination, she stated that they had proof that sex had taken place as SK's hymen was overstretched, she had bruises, further that she did not have to bleed after the sexual encounter.

13. On his part when placed on his defence, the appellant elected to give a sworn statement. He stated that on 26th December 2013, he woke up at 10.00 a.m. and left for town at 11.00 to meet his friends, as it was a holiday. He then received a call from the guards at his residence that two women were waiting for him. He told the guard that he would return home at 4.30 p.m. At 5 p.m. he returned home, then went with a friend, Otieno to play pool and told the guard to call him once the two women returned. After a few minutes, the guard called him and he went back to meet the ladies who told him that they were looking for one Sammy who was required at Kabete Police Station; he told them his name was Simon and accompanied them to the police station, where he was arrested by a policewoman and kept in custody from 26th to 27th December 2013.

14. In his amended grounds of appeal dated 22nd December 2023 the appellant raised the following grounds;

    i. That the judge erred in convicting the appellant as the prosecution failed to establish a prima facie case contrary to Articles 25(c), 27(1), 47(1), 50(1), 157(11), and 159(2) (e) of the *Constitution* and section 107 of the *Evidence Act*.

    ii. That the judge erred as she did not evaluate the issue of consent properly.

    iii. That the judge erred in failing to find that the evidence against the appellant was insufficient.

    iv. That the trial judge erred in failure to consider the defence and mitigation contrary to Article 50 and Sections 216 and 329 of the *Criminal Procedure Code*.

    v. The sentence was contrary to Section 8(1) (3) of the *Sexual Offences Act*.

15. The appellant filed his submissions together with the amended grounds of appeal. On the prima facie case, the appellant submits that PW1 was not sincere when she testified that she stopped going to school as a result of illness caused by defilement; and that any medical record did not support the alleged spells of fainting.

16. On the issue of consent, the appellant contended that the PW1's age was not supported by any relevant legal or medical documents, yet age is a vital component when it comes to the offence he was convicted of and has a bearing on the sentence to be meted out, such that lack of such documents results in substantial injustice; further that age cannot be ascertained by mere physical appearance and physical characteristics. In this regard, he relied on the case of *Republic v the London Borough of Merton* [2003] EWHC.

    Further, the appellant submits that PW1 deceived him into believing that she was an adult and he reasonably believed her as she acted as one, pretended to be a lady and accepted gifts from male admirers.

17. The appellant argued further that the prosecution case was closed without the investigating officer appearing in court to testify and be cross examined hence a miscarriage of justice, yet he was a crucial witness. Further, he was prejudiced as his advocate abandoned him and the magistrate did not intervene to ascertain if the appellant was fairly prepared for trial; he was not informed of his right and there was a big possibility that substantial injustice would occur due to lack of representation.

18. Though this issue is not in the grounds of appeal the appellant submitted that age cannot be proved through oral testimony and doing so is a breach of Articles 25 (1), 47(1), 50 and 159(2)(e) of the *Constitution*; further a P3 form cannot be used to determine the age of a person and that no P3 form was produced in court; that no school records were produced to assist the prosecution in determining the age of the complainant; no birth notification was produced in court from the hospital where the complainant was born, thus the age of PW1 was not proved beyond a reasonable doubt; that the prosecution was required to prove all elements of the offence as well as disprove any defence raised by the appellant as held in the case of Viscount Sankey (Lord Chancellor) in *Woolmington v DPP* [1935] UK Supreme Court.

19. On whether his defence and mitigation were considered, the appellant submits that the judge did not assign weight to his defence and mitigation and relied on the case of *John Njue Nguta v Republic*, Criminal Appeal No. 55 of 2014 where this Court remitted the case back to the High Court for mitigation and resentencing as the appellant had not mitigated during the trial. Further, he urges that traditionally courts have regarded cooperation with the police and previous good character of the offender as excellent mitigation; that one did not resist arrest and answering frankly in police interviews suffices.

20. On the issue of the sentence, the appellant submits that the same was disproportionate; the court did not factor in the true circumstances of the case; there was no visible physical harm; there was no threat or force used or any damage caused; the case was well mitigated; that Section 8(1)(3) of the *Sexual Offenses Act* 2006 provides a minimum of 20 years sentence and that the sentence of 25 years was not justified. He relied on the case of *Joshua Gichuki v Republic* (Criminal Appeal No. 84 of 2015) where this Court reduced the appellant's sentence from 20 years to 15 years; *Francis Matonda v Republic* [2019] eKLR where the life sentence was reduced to 10 years: *Evans Wanjala Wanyonyi v Republic* [2019], Criminal Appeal No. 312 of 2018, where the court reduced the appellant's sentence from 20 years to 10 years, *Philip Mueke Maingi v Republic*, Criminal Appeal Number 46 of 2020 life sentence was reduced to 10 years. He also relies on the case of *Republic v Bibi* [1980] 1WLR 1193, where the court held that where loss of liberty is inevitable, the sentence should be kept to the minimum as far as possible.

21. The state filed submissions dated 15th March 2024. On the issue of insufficient evidence, the state submitted that the appellant was known to PW1, as he was related to PW1's friend, further, PW1 testified that they had sexual encounters several times, and further PW1 was found in his house before

his arrest. It was also asserted that the medical reports all corroborated the evidence of PW1 that there was penetration.

22. On the issue of consent, the state submits that there is no evidence that the victim carried herself as an adult or informed the appellant that she was an adult and that even if this was the case, the appellant being the adult had a duty to establish the age of the victim; that PW1 could not give consent to engage in sexual activity.

23. On whether the appellant's defence was not considered, the state submits that the defence was a mere denial; that both courts considered the defence in their respective judgments, and that the appellant's defence failed to dislodge the prosecution's case.

24. On sentencing, the state submits that the sentence imposed was legal and the learned judge had no reason to interfere with the same; that the period the appellant spent in custody was put into consideration; and that the sentence was a deterrent sentence.

25. By dint of Section 361 of the Criminal Procedure Code, this Court must confine itself to only issues of law as set out in the case of *Karani v R* [2010] 1 KLR 73, where this Court expressed the role of the second appellate court succinctly as follows:

> "This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

26. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] addressed matters of law as follows:

    a. the technical element: involving the interpretation of a constitutional or statutory provision;

    b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record; and

    c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

27. We have considered the record in light of the rival arguments set out in the submissions by the appellant and the response by the state. In our opinion, two issues arise for our consideration:

    i. Whether the offence of defilement was sufficiently proved.

    ii. Whether the sentence was disproportionate.

28. For the offence of defilement to be proved three ingredients are necessary. The age of the victim must be established, there has to be penetration and thirdly the perpetrator has to be positively identified. There was no dispute that PW1 was known to the appellant. PW1 was a friend of the appellant's sister-in-law. The girl, whose name was given as Eva was the go-between as she was the one who lured PW1 twice to the appellant's house where the sexual encounters took place. Apart from the evidence of PW1, the evidence of PW2 and PW5 was that PW1 was found in the company of the appellant on the day of his arrest. Further, the question of the appellant's identity did not arise at the two courts below.

29. On the issue of age, PW2 the mother of PW1 testified that she was 15 years old. PW2 had the birth certificate which, for unknown reasons was not produced in evidence. PW6 a nurse from MFS, where PW1 was initially examined gave her age as 14 years 4 months. The doctor who examined PW1 and filled out the report gave her age as 15 years. The victim herself gave her age as 15 years. Notable also is that age was never an issue both in the trial court and the High Court.

30. We are in total agreement with the holding of this Court in the case of *Mwalongo Gichoro Mwajembe v R* [2016] eKLR, where it was stated;

> "The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense."

31. On penetration, PW1 gave a vivid picture of the times that they had sexual intercourse. This evidence was corroborated by the nurse and the doctor who gave evidence. PW6, Pacific Awour informed the court that on examination, the PW1's vagina was bruised, had a smelly odour, the hymen broken and overstretched. The doctor, PW5, examined the victim after three months and confirmed an old tear on the hymen.

32. In his submissions the appellant attempted to raise a defence of consent and that PW1 had held herself out as a girl who was of age. None of the two issues were raised in the two courts below and we find it unnecessary to engage in the same at this stage.

33. In *Adan Muraguri Mungara v R*, CA Cr App No. 347 of 2007 it was held;-

> "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

34. Based on the evidence on record we are satisfied with the findings of both the trial court and the High Court that sufficient evidence was placed before the court to sustain a conviction of the offence of defilement.

35. On the sentence, the law is very clear, Section 8(3) of the *Sexual Offenses Act* provides as follows:

> "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

36. The appellant was sentenced to 25 years without the trial court alluding to any aggravating circumstances that may have militated towards the enhanced sentence. The High Court on its part agreed with the sentence. We fault the judge in this regard, as no justification was brought forth to exceed the sentence prescribed by the law.

37. The appeal therefore partially succeeds. We uphold the conviction and set aside the sentence of 25 years. Taking into account the circumstances of the case, we substitute the sentence meted out with a sentence of 18 years from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024

P.O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR