Ruto v Republic (Criminal Appeal 100 of 2017)
[2024] KECA 899 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 899 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 100 OF 2017

M NGUGI, WK KORIR & FA OCHIENG, JJA

JULY 26, 2024

BETWEEN

GILBERT KIBET RUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru, (M. A. Odero, J.) dated 13th October 2017 in HC.CR.A. No. 137 of 2014)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on 17th July 2008, at Kamwaura location of the then Molo District within Nakuru County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of S.C. a girl, aged 7 years.

3. 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*.

4. The appellant pleaded 'not guilty' to the charges. To advance its case against the appellant, the prosecution called seven witnesses. At the end of the trial, the appellant was convicted and sentenced to life imprisonment. Being aggrieved, the appellant appealed to the High Court. His appeal was dismissed and his conviction and sentence were upheld.

5. The prosecution's case was that the complainant, who testified as PW1, was a class 5 pupil at [Particulars Withheld] Primary School at the time of her testimony. She informed the Court that she was 12 years old. On the material date, she left school at 1:00 pm together with her schoolmates and went home for lunch. On the way, they met the appellant who started chasing them. As a result, they

scattered in different directions. The complainant was not fast enough and the appellant caught and carried her into a nearby thicket where he undressed her and defiled her. Afterwards, the complainant ran home and informed her mother what had happened.

6. PW2 and PW3 were with the complainant when they met the appellant. They ran away from the appellant and hid in the nearby bushes. They informed the Court that when the appellant caught the complainant, he removed her sweater, put it in her mouth, and carried her in his arms. From their hideout, they watched as the appellant defiled the complainant.

7. PW4 was the complainant's father. He told the Court that the complainant came home while crying, with a swollen neck, and she had difficulties walking.

8. PW5 was the complainant's mother. She informed the Court that on the material day, when the complainant came home crying, she noticed that the complainant was walking with her legs apart. When the complainant told her that she had been defiled, she checked the complainant's private parts and noted that they were swollen and sore. She then took the complainant to the hospital and reported the incident to the police. She told the Court that she gave birth to the complainant in the year 2000.

9. PW6 examined the complainant. He noted that the complainant had bruises on her vagina and her hymen was broken. He concluded that there was penetration.

10. PW7 was the investigating officer. He produced an immunization card which showed that the complainant was born on 27th June 2000.

11. Put to his defence, the appellant, in his unsworn testimony denied the charges leveled against him. He testified that he had gone to visit his sick mother in Bomet on the material date when he was beaten, arrested, and tied up until the morning before he was taken to the GSU camp.

12. The learned Judge held that the complainant, born in June 2000, was 8 years old when the incident occurred. The immunization card being an official government-issued document, the learned Judge was satisfied that the age of the complainant had been proved beyond reasonable doubt.

13. The learned Judge found that the complainant gave a vivid narration of what happened to her. Being a young child who lacked sufficient vocabulary to describe the sexual act. The Court took judicial notice of the fact that children invariably refer to sexual intercourse as "tabia mbaya" or 'bad things'.

14. The learned Judge further held that this was an unusual case where defilement was witnessed by third parties. PW2 and PW3 hid in nearby bushes where they saw what the appellant was doing to the complainant. The learned Judge found their evidence to be consistent and truthful as they described the same thing. They remained unshaken during cross-examination and even after being recalled for further cross-examination.

15. The learned Judge also held that the evidence of PW4 and PW5 that the complainant was walking with her legs apart and that she had difficulties walking was a clear indication that there had been some interference with her private parts.

16. The learned Judge held that the evidence of PW6 that the complainant's hymen was broken, and she had bruises on her vagina were sufficient proof that the complainant had been defiled.

17. The learned Judge held that the appellant's contention that there was no spermatozoa did not negate the act of defilement, as it is not necessary for the sexual act to be completed, and according to PW6, there is a likelihood that someone can penetrate a woman without ejaculating.

18. The learned Judge held that the complainant identified the appellant as the person who defiled her. This evidence was corroborated by the evidence of PW2 and PW3 who were with the complainant on the material day. They identified the appellant as Gilbert. They knew the appellant as the son of Leah. The incident occurred in broad daylight as the children were going home for lunch. The complainant spent an ample amount of time in close proximity with the appellant hence she was able to see him well. PW4 and PW5 confirmed that the children mentioned the appellant by name as the person who had defiled the complainant. The learned Judge found this to be a case of recognition.

19. The learned Judge held that there was no pre-existing disagreement or grudge between any of the prosecution witnesses and the appellant for them to frame him. His defence was a blanket denial.

20. The learned Judge upheld the conviction. The sentence being the mandatory minimum sentence provided for by law at the time, was upheld.

21. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following grounds:

    a. The trial Court erred in convicting the appellant and sentencing him to serve a mandatory sentence of life imprisonment.

    b. The trial Court erred in holding that the offence of defilement was proved.

    c. The trial Court erred in failing to consider the appellant's defence.

22. When the appeal came up for hearing on 18th March 2024, the appellant was present in person whereas Mr. Omutelema, Assistant Deputy Director of Prosecution, was present for the respondent. The parties relied on their respective written submissions.

23. The appellant submitted that Section 8(2) of the *Sexual Offences Act* provides for a mandatory sentence, and therefore, it takes away the discretion of the Court in sentencing. He urged the Court to exercise its discretion and alter the sentence. He relied on the case of *Evans Nyamari Ayako v Republic*, Criminal Appeal No 22 of 2018 to submit that life imprisonment translates to 30 years' imprisonment.

24. The appellant was of the view that the evidence by the prosecution was marred with inconsistencies and that the ingredients of defilement were not proved. The case was all about suspicion. The age of the complainant was in doubt as none of the documents listed in Rule 4 of the *Sexual Offences Rules* was produced in evidence. Citing the case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, the appellant submitted that the age of the complainant was not proved.

25. The appellant argued that penetration had not been proved to the required standards.

26. The appellant pointed out that he had gone to visit his sick mother when he was arrested, and that the Court failed to consider his defence in the context of an alibi. He urged the Court to quash his conviction and set aside the sentence.

27. Opposing the appeal, the respondent submitted that all the ingredients of defilement had been proved. The age of the complainant was established by the oral evidence of the complainant who stated that she was 12 years old, and PW5 who stated that she gave birth to the complainant in the year 2000. There was also documentary evidence, the immunization card which showed that the complainant was born on 27th June 2000. The complainant was 8 years old at the time of the incident. The complainant's age was within the age bracket contemplated under Section 8(2) of the *Sexual Offences Act*.

28. The respondent submitted that penetration was proved through the testimony of the complainant who narrated how the appellant had done 'bad things' to her private parts. This was confirmed by

PW6 who examined the complainant and noted that her hymen was broken. He concluded that there was penetration.

29. The respondent pointed out that the appellant was positively identified by the complainant, PW2 and PW3 as the person who chased them and eventually caught the complainant. They identified him as Leah's son, and by the name 'Gilbert'. This was evidence of recognition, and it was free from error.

30. The respondent argued that the appellant had not accounted for his whereabouts at the time of the offence despite having stated that he left home at 4:20 a.m. to visit his ailing mother, and returned home at 6:30 p.m. The respondent was of the view that the alleged alibi defence did not displace the prosecution evidence.

31. The respondent was of the view that the appellant was deserving of the mandatory life sentence for chasing after young children, grabbing one of them, attempting to strangle her, and eventually defiling her in the presence of other minors. The appellant's conduct was aggravated, traumatizing to the minors, and deserving of the harshest sentence. The respondent urged us to uphold both the conviction and the sentence.

32. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

33. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issue for determination is whether or not the prosecution proved the offence of defilement against the appellant beyond any reasonable doubt, and whether or not the mandatory minimum sentence meted against the appellant was lawful.

34. Section 8(1) of the *Sexual Offences Act* provides that:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

35. Under the *Sexual Offences Act*, the elements of the offence of defilement are as follows: the victim must be a minor, there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice, and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above elements. In the case of *Charles Karani v Republic*, Criminal Appeal No 72 of 2013, the Court stated that:

> " The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant."

36. It is trite that the burden of proof regarding the age of the complainant lies with the prosecution. According to Section 8(1) of the *Sexual Offences Act*, a person is considered to have committed defilement if they engage in an act that involves penetration with a child. The definition of a child is as outlined in Section 2(1) of the *Children Act*, which means any person under the age of 18 years.

37. In the case of *Kaingu Elias Kasomo v Republic*, Criminal Appeal No 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depends on the victim's age.

38. In this case, the complainant testified that she was 12 years old.

This was about 4 years after the incident. This evidence was corroborated by the evidence of PW5, the complainant's mother, who testified that she gave birth to the complainant in the year 2000. PW7 also

produced an immunization card which showed that the complainant was born on 27th June 2000. All the evidence adduced pointed to the complainant having been 8 years old at the time when she was defiled. In the case of *Richard Wahome Chege v Republic*, Criminal Appeal No 61 of 2014, the court held that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by the production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."

39. In the case of *Francis Omuron v Uganda*, (*supra*), the Court of Appeal of Uganda held that:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense."

40. We find that the complainant's age was proved beyond reasonable doubt to be 8 years at the time of the incident.

41. The complainant narrated to the Court how, on the way home for lunch, they were chased by the appellant who grabbed her, held her sweater to her mouth, took her to the thicket, undressed her, and did 'bad things' to her private parts.

42. This evidence was corroborated by the evidence of PW2 and PW3 who managed to run away from the appellant and watched from their hideout as the appellant defiled the complainant.

43. This evidence was further corroborated by the evidence of PW4 and PW5 who saw the complainant walking with her legs apart, and she was crying. PW5 also noted that the complainant's vagina was swollen and sore.

44. PW6, the clinical officer who examined the complainant, noted that there were bruises on her vagina and that her hymen was broken. In his expert opinion, he concluded that there was penetration.

45. On the strength of the evidence tendered by the complainant, PW2, and PW3 as corroborated by the medical evidence of PW6, we find this evidence to be sufficient proof of penetration.

46. As regards the identity of the appellant, when the complainant, PW2 and PW3 reported the incident to PW4 and PW5, they referred to the appellant as 'Gilbert' and also the 'son of Leah'. This was not an issue in contention.

47. This is satisfactory proof that the appellant was well-known to the said witnesses. The risk of mistaken identity was non- existent. Therefore, this was a case based on recognition as opposed to identification by a stranger. In the case of *Anjononi & others v Republic* (1976-1980) KLR 1566, the court held that:

> " ...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

48. In the circumstances, we find that the appellant was positively identified through recognition by the prosecution witnesses.

49. The appellant contended that his defence that he was visiting his sick mother on the material day was not considered. This allegation was raised for the first time during the appellant's defence. In essence, the appellant raised an alibi defence. It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth. (See: *Ssentale v Uganda* [1968] EA 365).

50. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution. In the *Wang'ombe v Republic* [1976-80) 1 KLR 1683 case, the Court held that:

> "It is common ground that the appellant raised what he calls his alibi defence for the first time while giving his testimony on defence. Be as it may, the appellant merely stated that on the material day he was at home planting tea leaves. Given the implicit nature of an alibi defence, the appellant bore no burden to prove his alibi. He was entitled to the benefit of the doubt. We shall then take it that the appellant indeed raised an alibi defence."

51. In the case of *Ganzi & 2 others v Republic* [2005] 1 KLR 52 this Court stated that:

> " Where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence."

52. In the circumstances, we are satisfied that even though the two courts below failed to render a decision on the appellant's alibi, the said defence, when weighed against the evidence on the record, is completely displaced.

53. In the result, we find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. We find no reason to interfere with the findings of fact by the two courts below. The appellant's conviction was safe.

54. As regards the sentence meted out against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

55. As the issue of the sentence was not raised before the High Court as a first appellate Court, this Court has no jurisdiction to interfere with the same, as was held in the case of *Republic v Joshua Gichuki Mwangi*, Petition No E018 of 2023.

56. In the instant appeal, we have given due consideration to the evidence on record and the circumstances of this case. It is unfathomable that a man would defile a child of such tender years and blame it on a grudge.

57. Accordingly, we uphold the appellant's conviction and sentence.

Orders accordingly.

DELIVERED AND DATED AT NAKURU THIS 26TH DAY OF JULY, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR