Gitonga v Republic (Criminal Appeal 96 of 2017)
[2024] KECA 1278 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1278 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 96 OF 2017

M NGUGI, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

HARRISON GITONGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (S. M. Githinji, J.) dated 13th October 2017 in HC.CR.A. No. 207 of 2014)

JUDGMENT

1. The appellant herein 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 diverse dates between 8th and 12th June 2013, at [Particulars Withheld] village of the then [Particulars Withheld] District, within Nakuru County, the appellant intentionally caused his genital organ (penis), to penetrate the genital organ (vagina), of TW a girl, aged 11 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 found guilty, he 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, leading to the present appeal.

5. The prosecution's case was that the complainant, who testified as PW1, was born in 2005. She started school late and in 2013 she was in class 1 at [Particulars Withheld] Primary School. She informed the

court that one day, while she was going home from school, she met the appellant, whom she referred to as 'H'. She told the court that the appellant was well known to her because he also lived in [Particulars Withheld]. The appellant asked her to follow him to his house, which she did. When they got there, the appellant led her behind his house, made her lie on the ground, removed her pants, and did to her what she referred to as 'tabia mbaya'. When she started crying, he left her. He allowed her to go but warned her not to tell anyone.

6. PW2 was the complainant's mother. When she received information from PW3, she questioned the complainant about the matter. The complainant narrated to her how Haddy had been defiling her. When PW2 examined the complainant's private parts, it was dirty and bloody. The pants were also blood-stained. She reported the matter at Molo Police Station on 13th June 2013. She informed the court that the complainant was born in the year 2003.

7. PW3 was the complainant's teacher. After being informed about the person lingering on the school fence by PW4, she asked the complainant who the appellant was, and the complainant disclosed that his name was Haddy and that he had been defiling her, but warned her not to tell anyone. At around 4:00 pm that day, she informed PW2 about the matter.

8. According to PW4, on 11th June 2013 she was teaching at [Particulars Withheld] Nursery School when she saw the appellant call out to a group of girls who were sitting near the school fence. The appellant walked away when she asked the girls whether they knew him. The following day, she informed PW3.

9. PW6 was the investigating officer. When she recorded the complainant's statement, the complainant stated that it was Haddy who had been defiling her.

10. PW7 examined the complainant. He noted that the complainant's hymen was broken, and the vaginal area was hyperaemic, a sign of friction. He concluded that there was evidence of penetration.

11. When put to his defence, the appellant chose to remain silent.

12. The learned Judge held that the complainant firmly disclosed her defiler when she mentioned to PW2, PW3, PW4, and PW6 that it was Haddy who used to defile her.

13. The learned Judge also held that even though the complainant did not disclose her age because she was not sure about it, PW2 confirmed that she was born in the year 2003. The learned Judge held that since the P3 form estimated the age of the complainant to be between 10 -12 years, it was certain that at the time of the incident, the complainant was 11 years old. The learned Judge concluded that in the instant case, the best person to have known the age of the complainant was her mother.

14. The learned Judge held that all the ingredients of the offence of defilement were established beyond reasonable doubt and that the actual date when the offence was committed was immaterial.

15. The learned Judge affirmed the sentence of life imprisonment against the appellant.

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

    a. The learned Judge erred in failing to fully evaluate the evidence as required by law as a first appellate court.

    b. The learned Judge erred in failing to find that the evidence tendered was not cogent enough to sustain a conviction and was also below the admissibility test.

c. The learned Judge erred in finding that the prosecution case was proved beyond reasonable doubt.

17. The appellant also raised the following supplementary grounds of appeal:

    a. The learned Judge erred in failing to find that the appellant was charged on a defective charge sheet.

    b. The learned Judge erred in upholding the conviction and sentence when there was no eyewitness.

    c. The learned Judge erred in failing to find that the appellant's rights under Article 49(g) & (h) of *the Constitution* were violated.

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

19. The appellant submitted that he was convicted on a defective charge sheet which did not indicate the specific date of the alleged defilement. The charge sheet did not also include the word 'unlawfully'.

20. The appellant submitted further that he spent one week in custody before he was arraigned in court, and this was a violation of his rights under Article 49(g) & (h) of *the Constitution* and Section 77(i) of the *Evidence Act*. He relied on the case of Jackson Akumu Yongo v Republic [1983] eKLR to buttress this submission.

21. The appellant faulted the learned Judge for upholding his sentence based on the evidence of a single eyewitness and failing to re-evaluate the evidence tendered before the trial court.

22. The appellant was of the view that since the laboratory results came back negative, there was no evidence of penetration.

23. The appellant contended that he was arrested on mistaken identity as Haddy is not the short for his name, his name is Harrison and not Hudson.

24. The appellant further submitted that since no birth certificate, clinic card, or baptismal card was produced in court, there was no evidence of the age of the complainant to be relied upon by the court. The appellant was of the view that the broken hymen could have happened at any time as it was not specific as to when it happened.

25. The appellant submitted that the investigations in this case were shoddy and could not sustain a safe conviction as the dates were not corroborated, and they had discrepancies.

26. The appellant submitted that the sentence meted out against him was harsh. He urged us to quash his conviction and set aside the sentence.

27. Opposing the appeal, the respondent submitted that penetration was proved by the evidence of the complainant who stated that the appellant did 'tabia mbaya' to her. The respondent was of the view that this evidence was corroborated by the evidence of PW7 who examined the complainant and concluded that the complainant's hymen was broken and it was an indication of penetration.

28. The respondent submitted that the complainant knew the appellant very well as he was a resident of Mona and the complainant also mentioned his name to her teachers and mother when they asked her about him. She led them to his house and also mentioned that the appellant had defiled her several times, hence there was no room for mistaken identity.

29. The respondent submitted that the age of the complainant was proved to be 10 years at the time of the incident as PW2 informed the court that the complainant was born in the year 2003.

30. The respondent submitted that the concurrent findings of fact by the two courts below were based on evidence and proper principles, and therefore, the conviction was sound.

31. The respondent was of the view that given the circumstances of this case, the trial court having considered the appellant's mitigation, the sentence of life imprisonment meted out against the appellant was appropriate save that this Court should give guidance on the duration of the said 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:

> "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."

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 its case against the appellant beyond any reasonable doubt, and whether or not the sentence meted out 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. Under 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 includes 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 told the court that she was not sure how old she was. However, PW2, the complainant's mother, informed the court that the complainant was born in 2003. The P3 form

adduced in evidence indicated that the complainant was between the ages of 10 and 12 years. The learned Judge concluded that the complainant was 11 years old at the time of the incident as the evidence of her mother was more conclusive in the circumstances. 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 circumstances, we concur with the finding that the complainant's age was proved beyond reasonable doubt to be 11 years at the time of the incident.

40. As regards penetration, the complainant narrated to the court how the appellant took her behind his house, undressed her, and did 'tabia mbaya' to her. The appellant thereafter warned her not to tell anyone. The complainant told her teachers and her mother that the appellant had defiled her several times. This evidence was corroborated by the evidence of PW7, who examined the complainant and noted that her hymen was broken and there was friction in her vaginal area. He concluded that there was penetration.

41. On the strength of the complainant's evidence narrating the incident, and on the strength of her testimony being found to be truthful in the mind of the two courts below, and as corroborated by the medical evidence of PW7, we find this evidence to be sufficient proof of penetration.

42. As regards the identity of the appellant, the complainant stated that he was from their village, [Particulars Withheld]. Further, when the complainant told her teachers and mother about the incident, she mentioned the appellant as Haddy. She told them that the appellant had defiled her on several different occasions. Besides, the appellant had even come to the school fence to talk to the complainant. Though the appellant contends that his name is not Hudson but Harrison, this was not an issue in contention.

43. We find that the evidence of the complainant was sufficient proof that the appellant was well-known to her. 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."

44. In the circumstances, we find that the appellant was positively identified through recognition and that there was no room for mistaken identity.

45. 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.

46. As regards the sentence meted 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."

47. As the appellant did not raise the issue of his sentence before the High Court, which was the first appellate court, he cannot be seen to raise the issue before us on a second appeal. This is so because an appeal cannot arise before us on a matter which was not determined by the court from whose decision the current appeal arises. (See: *Republic v Joshua Gichuki Mwangi*, Petition No. E018 of 2023).

48. Be that as it may, it is trite that a sentence is meted out at the discretion of the court. The trial court sentenced the appellant to life imprisonment. This sentence was upheld by the High Court.

    As no cogent reason has been placed before us to warrant our interference with the sentence meted out against the appellant, we decline the appellant's invitation to make a determination on the issue of the sentence.

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

    We consequently dismiss the appeal in its entirety. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

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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.