KENYA LAW
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Gachanja v Republic (Criminal Appeal 58 of 2019) [2024] KECA 1384 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1384 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 58 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 11, 2024

BETWEEN

JEREMIAH GICHUKI GACHANJA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kerugoya (R.K. Limo, J.) delivered on 22nd March 2016 in HC)

JUDGMENT

1. Jeremiah Gichuki Gachanja (Jeremiah), the appellant herein, was tried and convicted by the Principal Magistrate's Court at Gichugu of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. It was alleged that on 20th March 2013 in Kirinyaga East District of Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of EW a child aged 5 years.

2. Following the trial in which seven witnesses testified for the prosecution, including the child and her mother, and the appellant gave a sworn statement and called two witnesses, the trial magistrate found the appellant guilty, convicted him of the offence and sentenced him to life imprisonment.

3. The appellant lodged an appeal in the High Court at Kerugoya, and the High Court, (R.K. Limo, J), having heard the appeal, found the charge of defilement proved against the appellant, and that his alibi defence was properly rejected. The learned Judge, therefore, dismissed the appeal and affirmed the sentence that was imposed on the appellant.

4. The appellant is now before us on a second appeal in which he has appealed against both conviction and sentence. The grounds raised include the complaint that the High Court upheld the conviction without considering that the child could not clarify exactly who removed her trousers; failing in law by upholding the conviction without sufficient proof of his ? age; failing in law by dismissing the appeal

on scanty and contradictory evidence and misdirecting itself in failing to find that the minor could have been injured by some other object; failing to note that there were crucial witnesses who were not called to testify; that the prosecution failed to prove the case to the required standard and also failing to consider the appellant's defence.

5. The appellant also filed written submissions in which he buttressed the said grounds. He submitted that penetration was not proved and that the trial court erred in convicting him on the evidence of the child for the reason that a child's power of observation and memory is less reliable than that of adults. It was submitted further that lack, absence or a broken hymen per se cannot be proof of penile penetration as severally held by this Court.

6. Finally, he submitted that the sentence imposed upon him was harsh and excessive, and that the imposition of the mandatory minimum sentence denied him the right to a fair trial under Article 50 of the *Constitution*. He urged the Court to set aside the indefinite life imprisonment sentence that was imposed upon him, and instead substitute it with a term sentence that would give him the opportunity to reform and socially re-adapt after his prison term.

7. The respondent through Mr. Naulikha, learned counsel from the Office of the Director of Public Prosecution (ODPP) filed submissions in response to the appellant's submissions. He opposed the appeal urging that the appellant was properly convicted as the ingredients of defilement were established; that the child was 5½ years old as confirmed from the birth certificate. He submitted that the sentence was proper as the offence was serious and the appellant deserved a deterrent sentence.

8. We have carefully considered the record of appeal, the submissions and the law. This being a second appeal, the jurisdiction of this Court is limited under section 361(1) of the *Criminal Procedure Code* to matters of law only. As stated in *Karingo v R*. [1982] KLR 213 at page 219:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The text to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja v R*. [1956] 17EACA 146)."

9. In a nutshell, the evidence relied upon to convict the appellant was as follows, JMM (PW1) was the mother of EW, who was aged 5 years and 3 months at the material time. She stated that on 21st March 2013 she was at home when she was summoned to E.W.'s school. She went there and met EW's teacher who told her that E.W. had told her that the previous day when she was eating mangoes, Gichuki, the appellant had come to her and done bad things to her.

10. She stated that the teacher called E.W. and asked her to repeat what she had told her and that EW. told her the Gichuki had done bad things on her. The child told them that Gichuki had removed her panties, laid her on the ground and that he had lain on top of her and defiled her. According to PW1, the appellant was a distant relative who was well known to her and EW.

11. Before the trial court, the child testified that on 20th March 2013 in the evening she had gone to pick mangoes when Gichuki called her and he removed her trousers, folded her skirt and laid her on the ground and that he removed his trousers and he did bad manners to her. She stated that he penetrated her with his penis which is located between his legs and which he inserted into her vagina. She stated that when she went to school the following day, the teacher noticed her walking with difficulty and on being asked what the problem was, she had narrated her story and that led to the mother being summoned to school.

12. The child's mother was accompanied by the teacher and headteacher to Ndifathas hospital where EW was examined and referred to Kianyaga sub-district hospital for further examination and treatment. They thereafter reported the matter at Kianyaga police station.

13. According to Mercy Wamuyu (PW6), a clinical officer at Kianyaga sub-district hospital who produced the P3 form before the trial court, the child had bruises on the lower limbs; bruises on upper thigh bilaterally which is the hip area on upper third on both sides of both lower limbs and that she had dried bruises on both areas and bilateral redness on both regions which implies inflammation.

14. Other injuries included redness of external genitalia, Labia majora towards the perineum which was reddened and had dry bruises. The child's hymen was broken. She had redness in inner wall of labia minora and around the hymen opening and that she had tenderness and that the conclusion made was that there was penetration. In conclusion she stated that she was of the opinion that penetration had taken place on 20th March, 2013.

15. After the appellant was placed on his defence, he gave a sworn statement and called 2 witnesses. He denied that he had defiled EW as he had been in school the whole day. His 2 witnesses DW2 and DW 3 who were his classmates stated that they had been with the appellant in school on 20th March, 2013 and had parted ways at 5.00pm when they went home and that they could not tell what the appellant did thereafter.

16. The High Court after re-evaluating and analyzing the evidence on record, found the age of the complainant was duly established by the production of the birth certificate and that the minor was aged 5 years 5 months; the act of defilement was established and proved by evidence tendered by prosecution witnesses including the P3 Form and treatment chit produced as exhibits; the offence occurred during the day and more so the fact that the minor knew the appellant well as he was a neighbour and was known to her by name which she confirmed in court. The learned Judge found that the appellant was positively identified as the person who committed the act of defilement. The court found that all the ingredients of the offence were proved beyond reasonable doubt.

17. On sentence, the learned Judge addressed himself as follows:-

> " There is only one sentence prescribed by law and mitigating factors the appellant really should innocent young child aged 5 years 5 months. This court is unable to disturb the sentence meted out by the trial court because that is simply what the law prescribes. The upshot of this is that I find no merit in this appeal. The same is dismissed. The conviction and sentence is upheld. It is soordered."

18. The issue for determination before us is whether the appellant was properly convicted based on the evidence adduced before the trial court, and whether the conviction and sentence were properly upheld by the High Court. Penetration is a critical ingredient of the offence of defilement. The two courts below made concurrent findings that there was penetration of the child's sexual organs.

19. The appellant maintained that the evidence that was adduced did not necessarily implicate him with the offence, however the trial magistrate who assessed the demeanour of the child was of the view that she was speaking the truth that she was defiled by the appellant. The trial court was satisfied that the child knew the appellant and identified him by recognition as a neighbour.

20. The learned Judge of the High Court agreed with the findings of the trial court and found that the appellant was properly recognized by the child as the assailant, and that the child indeed knew his

name as Gichuki; there was penetration and that the child's age had been proved. All the ingredients of defilement had, therefore, been established to the satisfaction of both courts.

21. On our part, we are satisfied that there was sufficient evidence confirming penetration and implicating the appellant as the perpetrator of the offence. The evidence was not simply anchored on the absence of the hymen as the appellant would want us to believe. In the circumstances, the appellant's purported alibi defence could not stand.

22. We are satisfied that the High Court re-evaluated the evidence adduced before the trial court incisively and arrived at the correct conclusion. We have no basis for interfering with the concurrent findings of the two courts below as to how and by who the child was defiled. The child's age, was proved through her birth certificate; the act of defilement was proved through the child's evidence which was corroborated by the medical evidence adduced in court and the identification of the perpetrator was proved beyond doubt. Thus, all the ingredients of the offence were established and the appellant was properly convicted.

23. As regards the sentence, section 8(2) of the *Sexual Offences Act* which is the penal section under which the appellant was charged, provides for a mandatory sentence of imprisonment for life, where the child violated is aged eleven years or less. The trial Judge having considered the appellant's mitigation noted that the sentence provided was a mandatory sentence, and thereby sentenced the appellant to life imprisonment. The learned Judge of the first appellate court dismissed the appeal against both conviction and sentence.

24. The appellant has argued before us that the mandatory sentence imposed upon him was severe and excessive, and that it violated his constitutional rights. The issue of mandatory sentences for offences under the *Sexual Offences Act* was recently settled by the Supreme Court in Petition No. E018 of 2023*, Republic v Joshua Gichuki Mwangi and Others*, where the Apex Court affirmed the lawfulness of minimum/mandatory sentences and pronounced itself as follows:-

> " In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

25. From the foregoing, it is clear that the sentence meted out by the trial court and upheld by the High Court is perfectly lawful. However, in view of this Court's recent decision in *Manyeso vRepublic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) where the Court held that an indeterminate life sentence was inhumane treatment and violated the right to dignity under Article 28 of the Constitution, we are enjoined to interfere with the sentence. In the circumstances, and for the reasons

stated above, our conclusion is that the appeal against conviction is devoid of merit and is hereby dismissed. On the sentence, after considering the age of the child and the permanent trauma she has been subjected to, we set aside the life sentence and substitute therefor a sentence of 30 years imprisonment. The appeal only succeeds to that extent.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF OCTOBER 2024.

W. KARANJA

....

JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR