Micheck v Republic (Criminal Appeal 61 of 2018)
[2024] KECA 1707 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KECA 1707 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 61 OF 2018

W KARANJA, LK KIMARU & J MOHAMMED, JJA

NOVEMBER 28, 2024

BETWEEN

DUNCAN IRUNGU MICHECK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Muranga (A. Mshila, J.) dated 13th October, 2016 and delivered on 4th November 2016 by H.Waweru, J. in HCCRA No. 36 of 2014))

JUDGMENT

1. Duncan Irungu Meshack, the appellant herein, was tried and convicted by the Principal Magistrate's Court at Kangema for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge are that on diverse dates between 21st December 2013 and 24th December 2013 at xxxx Village within Muranga' County, the appellant intentionally caused an act of penetration to S.W.M. a girl aged eleven (11) years.

2. The appellant pleaded not guilty to the charge and the matter proceeded to full hearing with the prosecution calling five witnesses in support of its case. The appellant on his part gave an unsworn statement of defence and called no witnesses. The trial magistrate found the appellant guilty, convicted him of the offence and sentenced him to life imprisonment.

3. Being aggrieved by both conviction and sentence, the appellant lodged an appeal in the High Court, and the High Court, (A. Mshila, J), having heard the appeal, found that the charge of defilement was proved against the appellant. The learned Judge, therefore, dismissed the appeal and affirmed the conviction and sentence.

4. The appellant is now before us on a second appeal in which he has appealed against both conviction and sentence on grounds, inter alia, that the first appellate court erred in law; by upholding the conviction and sentence without considering that there was a disagreement between him and PW1; in failing to appreciate that he was not accorded a fair trial as the case proceeded without him being supplied with witness statements, occasioning a miscarriage of justice and contravened Article 50(2) of *the Constitution*; in failing to appreciate that the critical element of proof of defilement was not proved to the required standard; and by failing to consider his sworn evidence and by failing to re- evaluate the matter afresh.

5. A brief recapitulation of the evidence before the trial court will help place this appeal in proper context. The child, S.W.M., a standard 6 pupil at xxxxx Primary School, born on 22nd November, 2003 testified that on 21st December, 2013, the appellant invited her to his place, promising to give her Kshs.20 and sugar cane. When she returned at 2:00 pm, he led her to his bedroom, removed their clothes, and sexually assaulted her. She bled, and he gave her a shirt to wipe the blood and Kshs.20, asking her not to tell anyone and promising Kshs.200 later. The appellant asked her to go back to his house on 24th December 2013.

6. On the early morning of, 24th December, 2013, S.W.M. went back to the appellant's place, unaware that her aunt G.N. who, had become suspicious of her behaviour, was following her. After she entered the appellant's house and locked the door, her aunt locked the door from outside and screamed, gathering people. Members of public came and forced the appellant to open the door. On entering the house, they found the child inside crying after the appellant struck her accusing her of setting him up. They rescued her and G.N., took her to the hospital, where a doctor examined her and took blood samples. They then went to the police station where they reported the matter. A baptismal certificate from the Redeemed Gospel Church, indicating S.W.M.'s birth date as 22nd January 2003 was produced in evidence. She stated that the appellant had defiled her four times.

7. According to the witnesses, the appellant lived four houses away from S.W.M.'s auntie's home where she used to live with her grandmother. S.W.M. used to stay with G.N. when her grandmother was away.

8. The appellant was arrested on the spot by members of public who included the area chief and taken to the police station where he was later charged with the offence mentioned earlier.

9. After the child was taken to hospital for examination, PW 4, Amos Mbogo, a clinical officer at Kangema Sub-district Hospital examined her and found that she had no injury to her external genitalia and that her hymen was broken. There was no blood or discharge and that there was evidence that she had been penetrated severally. He testified that other tests were negative and that there was no evidence of spermatozoa. The witnesses produced the duly completed P3 Form in that regard, as exhibit before the trial court.

10. When put on his defence, the appellant gave an unsworn statement and called no witnesses. He stated that on 24th December, 2013 he woke up at 7.00am and went for a long call outside his house. He did not lock the door. That when he got back into the house, he saw a crowd approach his house and were armed and that at the time he did not know the complainant was in the house. He stated that he quickly got in the bedroom and locked the door but the front door was open with the mob locked from the outside.

11. He testified that he then heard a child crying from inside his house and he opened the bedroom window and spoke to the crowd telling them that he had nothing to do with the child in his house and he did not see her and he did not know how she got in. He stated that he saw the police come and the door

was opened and he was arrested. He said he knew the child and the mother and stated they were not neighbours and denied committing the offence.

12. He stated that he was a distant relative of the complainant's mother and that the child was brought there by the crowd to set him up. It was on the basis of that evidence that the appellant was convicted and his first appeal dismissed.

13. When the appeal came up for hearing on 20th December 2023, the appellant was present in person, whereas Lubanga Varoline, Principal Prosecution Counsel, was present for the respondent. The parties relied on their respective written submissions.

14. The appellant submitted that he was not accorded a fair trial as he was not supplied with the witness statements, charge sheet, P3 Form and investigation diary which violated his rights under Article 50(2) of *the Constitution*. He submitted that this failure was fatal to the prosecution case.

15. He further submitted that the critical elements of defilement were not proved and it is trite that the age, penile penetration and identity must be proved. He went on to say that from the record the child's age was not proved, but stated that the age of the alleged victim was about 11 years; that no birth certificate was produced to establish the age of the victim as the victim's mother had passed away and the same was critical in determining the class of section 8 of the *Sexual Offences Act* under which he was charged. He relied on Phillip Mueke Mwangi -vs- R. [2015] eKLR.

    According to the appellant, since the age and penetration were not proved then the identity of the perpetrator was a non-issue.

16. The appellant submitted that his defence was not considered by the trial magistrate as no one saw him committing the offence and that on the day of the alleged incident it was the child that came to his house without his knowledge very early in the morning. He submitted that he is an old man and was 66 years old at the time of the arrest.

17. Finally, he submitted that his sentence was harsh, excessive and also unconstitutional as held in the case of Julius Kitsao Manyeso -vs- *Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) which declared life imprisonment as unconstitutional. He submitted that his mitigation factors were not considered by the two courts below and urged the Court to consider that he is 77 years old and reformed and to set aside the sentence.

18. In opposition, counsel for the respondent submitted that from the record there is nowhere indicated that the appellant was supplied with witness statements and/or documents the prosecution intended to rely on during the hearing. Further, that Article 50(2)(j) of *the Constitution* provides for the right to fair trial by supplying prosecution witness statements to an accused person in advance. It was submitted that while the respondent associates with Article 50(2)(j) of *the Constitution*, it must be noted that rights go hand in hand with responsibilities and that nowhere in the court record does it show that the appellant asked for the provision of the documents and was denied. That it is unclear why the appellant did not raise the issue at the earliest instance and has decided to raise it on appeal.

19. Learned counsel also submitted that despite it not being clear as to whether the appellant was supplied with statements or not, it is noted that the appellant fully participated in the trial process. And that he cross-examined witnesses and also had the opportunity to tender his defence. It was submitted that no prejudice was visited on the appellant because the record shows that he ably cross-examined all the prosecution witnesses. The respondent urged us to find that no rights were violated as alleged by the appellant and to dismiss this ground of appeal and the appeal in its entirety.

20. We have carefully considered the record of appeal, the rival submissions by both parties and the law. This being a second appeal, the jurisdiction of this Court is restricted under section 361(1) of the Criminal Procedure Code to matters of law only. As stated in Karingo -vs- 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. See Reuben Karari s/o Karanja v R. [1950] 17EACA 146."

21. Regarding the argument that the trial court violated his constitutional rights to a fair trial, the appellant complained to the High Court that he had not been given witness statements and that this violated his right to have facilities to prepare for his defence under Article 50(2)(j) of *the Constitution*. Our case law has now established without a doubt that it is the prosecution's duty to provide the witness statements to an accused person and the trial court's duty to ensure compliance with this constitutional requirement.

22. In the present case, the learned Judge scoured through the record, as we have done, and concluded that at every occasion when the trial proceeded, the appellant informed the court that he was ready to proceed. At no instance did he indicate to the court that he did not have the witness statements; and he raised the issue for the first time on appeal giving the impression that this was an afterthought. By indicating to the trial court that he was ready for the hearing without requesting for the witness statements, the appellant was implicitly confirming to the court that he either had the witness statements or he did not need them. The Supreme Court has explained an accused person's minimal obligations to ask for the witness statements in Hussein Khalid & 16 others -vs- Attorney General & 2 others [2019]eKLR in the following words:

> " ... Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

23. This puts to rest the appellant's first complaint.

24. 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. See Charles Karani -vs- Republic, Criminal Appeal No. 72 of 2013, where this 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."

25. The appellant was tried and convicted of the offence of defilement of an eleven-year-old child. The issue for determination before us is whether the appellant was properly convicted of this offence. Penetration is a critical ingredient of the offence of defilement. The two lower courts made concurrent findings that there was penetration of the child's sexual organs. This was because the clinical officer

who examined her noted the hymen was not intact and that she had a history of having had sexual intercourse previously and severally.

26. 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 whom she knew, not once but severally. The trial court was satisfied that the child knew the appellant and identified him by recognition as a neighbour who had once sent her to buy sugar- cane for him before and this was corroborated by the child's aunt, who testified that the appellant lived four houses from hers. The trial court was satisfied that the child was speaking the truth.

27. Under the proviso to section 124 of the *Evidence Act*, a trial court can convict for a sexual offence under the *Sexual Offences Act* on the evidence of a complainant alone without corroboration. In William Sowa Mbwanga -vs- Republic [2016]eKLR, this Court stated as follows:

> " The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in George Kioji v Republic, CR. APP. NO. 270 of 2012 (Nyeri):
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> "Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

28. The learned Judge of the 1st appellate 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 stated that he had once sent her to buy sugar-cane for him and that he had asked her to sleep with him and had promised to give her Kshs.20. The child also gave a descriptive account of exactly how the appellant defiled her.

29. 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.

30. As regards proof of the child's age, as was stated by this Court in Richard Wahome Chege -vs- Republic, Criminal Appeal No. 61 of 2014 (UR), age is not necessarily proved by production of a birth certificate, the evidence of the mother of a child may be sufficient.

31. In this case apart from the child herself giving her age as eleven years, a copy of the dedication certificate from the Redeemed Gospel Church was also produced to confirm the child's age where it was clearly indicated that the child was born on 22nd November, 2003. In the circumstances, we are satisfied that there was sufficient evidence that the child was eleven years old. Thus, all the ingredients of the offence were established and the appellant was properly convicted of the offence of defilement.

32. 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 magistrate 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.

33. The appellant has argued before us that the mandatory sentence imposed upon him was severe and excessive, and that it violated his constitutional rights and was unconstitutional. We note however, that in his appeal before the High Court, much as the appellant stated that his appeal was against conviction and sentence, the appellant did not raise any grounds against the sentence. The issue of the sentence although raised before the High Court was not canvassed. In the result, that court did not render any determination on the issue of the sentence. It therefore follows that an appeal cannot lie before us on a matter which was not determined by the court from whose decision the current appeal arises. Our said decision is informed by the decision of the Supreme Court in the case of Republic -vs Joshua Gichuki Mwangi, Petition No. E018 of 2023. We decline the appellant's invitation to make a determination on the issue of the constitutionality of the sentence.

34. In the instant appeal, we have given due consideration to the evidence on record and the circumstances of this case. The appellant submits that the trial magistrate did not consider his mitigation which is contrary to what the record shows because when the trial court before sentence asked the appellant to mitigate his response was;

> " I am a widower. I plead leniency".

35. The trial court after taking note of the appellant's mitigation proceeded to sentence the appellant and noted that:

> " The offence is serious. At his age of 66 years as he told the court. I believe the accused person has grand and great grandchildren."

36. It is our view that the trial court considered the appellant's mitigation in its sentence.

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

We consequently dismiss his appeal in its entirety.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

…….

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR