Kituyi v Republic (Criminal Appeal E116 of 2023)
[2024] KECA 1568 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1568 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E116 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

SIMON PETER KITUYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Kiarie Waweru Kiarie, J.) delivered on 24th October 2023 in HCCRA No. E051 of 2022)

JUDGMENT

1. The appellant, Simon Peter Kituyi, was charged with the offence of defilement 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 being that, on diverse dates between 6th November 2021 and 31st December 2021 in Kilifi County within the Coast region, he intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely the vagina of ENK, a child aged 15 years. He faced an alternative charge of indecent act with the said child contrary to section 11(1) of the *Sexual Offences Act*.

2. The Appellant was tried before the Principal Magistrates Court (Hon. R. Amwayi, SRM) at Kaloleni in Sexual Offences Cause No. E003 of 2022 and found guilty of the offence of defilement and convicted on 29th August 2022. According to the learned Magistrate, the prosecution proved the age of the complainant, penetration of the complainant's genitalia, and the appellant was positively identified by the complainant as the perpetrator of the offence. The learned Magistrate found that the appellant was at the scene on the alleged dates and time and, therefore, his defence did not shake the evidence adduced by the prosecution's witnesses. After considering the appellant's mitigation, the learned magistrate sentenced the appellant on 8th September 2022 to serve 20 years imprisonment.

3. Aggrieved, the appellant lodged Malindi High Court Criminal Appeal No. E051 of 2022 and, in a judgment delivered on 24th October 2023, the learned Judge (Kiarie Waweru Kiarie, J.) upheld the appellant's conviction and sentence. Before the High Court, the appellant complained that the learned Magistrate: erred both in law and facts by convicting him on evidence that was contradictory and uncorroborated; failed to consider that the prosecution had not discharged their burden beyond reasonable doubt; failed to appreciate that the matter was inadequately, poorly and shoddily investigated; convicted the appellant on unreliable and questionable documentary and medical exhibits; and failed to appreciate that there was miscarriage of justice.

4. Aggrieved by the decision dismissing his appeal, the appellant has approached this Court in this second appeal in which he contends: that the learned Judge erred in both law and fact by failing to appreciate that sections 107, 108, 109 and 110 of the *Evidence Act* were violated; that the learned Judge failed to appreciate sections 70, 77, 163 and 164 of the *Evidence Act*; that the learned Judge failed to consider the fact that Article 50(2) (c) and (j) of *the Constitution* was violated; and that the learned Judge violated sections 25, 26 and 124 of the *Evidence Act*.

5. We heard the appeal on the Court's GoTo virtual platform on 10th June 2024 when the appellant appeared in person from Malindi Prison while learned Prosecution Counsel, Ms. Valarie Ongeti, appeared for the respondent. Both the appellant and Ms Ongeti relied on their written submissions, which they briefly highlighted

6. In his submissions, the appellant cited the Canadian case of R v P.C, M.B [1994] I SCR 555 for the proposition that it is the prosecution's duty to prove its case beyond reasonable doubt; and Daniel Maina Wambugu v Republic [2018] eKLR, highlighting the ingredients of the offence of defilement. On the other hand, the respondent cited the case of Anjononi and Others v Republic [1980] KLR, stressing the compelling nature of the evidence of recognition; Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995, highlighting that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence; Evans Wanjala Wanyonyi v Republic [2019] eKLR, submitting that, in a charge of defilement, DNA examination is not mandatory; and Bernard Kimani Gacheru v Republic (2002) eKLR, stressing that sentencing is a discretion of the trial court.

7. The appellant submitted that the prosecution did not prove beyond reasonable doubt that he committed the offence; that the ingredients of the offence of defilement were not proved beyond reasonable doubt; that, while he was not disputing the age of the Complainant, the other two ingredients of the offence were not proved; that the period from October to 7th January could not have been four weeks, and that from 31st October 2021 to 7th January, 2022 could similarly not have been four weeks, thereby creating a huge doubt on the prosecution's case as regards the act of defilement which, had the trial court keenly evaluated, would have arrived at a conclusion favourable to the appellant; that the learned Magistrate failed to appreciate sections 70, 77, 163 and 164 of the *Evidence Act* in that, while the signatures in the P3 form and the treatment notes are of the same specimen, the signature in the PRC form is totally different to that appearing in the P3 form, implying that the two documents were signed by different individuals and not by the same person as was claimed; that this brought into question the authenticity of the documents that were produced in evidence; that Article 50(2) (c) and (j) of *the Constitution* was not considered since section 211 of the Criminal Procedure Code was invoked after the ruling on a case to answer was delivered on 14th July 2022 by a different trial magistrate; that, being a first offender and not very conversant with the law, the appellant never knew nor was he informed of his right to have enough time to look for the resources he needed to mount his defence; that he was only given 14 days despite being out on cash bail; that his alibi defence which cast doubt on the respondent's case was never considered sufficiently and adequately by both the trial

court and the High Court, taking into consideration the age of the pregnancy and the facts given by the respondent; that sections 25, 26 and 124 of the *Evidence Act* were violated since the Investigation Officer never bothered to sufficiently and thoroughly investigate the case as he merely relied on the confession made by the appellant that he had committed the offence; and that this Court should re-evaluate the evidence since this was never done by the High Court and allow his appeal.

8. It was submitted on behalf of the respondent that the prosecution proved all the ingredients of the offence; that the appellant was a person who was well known to the complainant as her teacher; that the Complainant's age was proved by way of a birth certificate, which indicated that she was born on 13th September 2006 and was therefore 15 years old as at the time of the incident; that the key evidence relied upon by the courts in defilement cases in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by a medical officer; that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence; that, though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration; that penetration was proved since the Complainant clearly understood what sex was and was able to describe what transpired since she testified that she had sex with the Appellant in the month of October 2021 and on 31st December 2021 in the appellant's house; that the court was satisfied that the Complainant was speaking the truth in accord with section 124 of the *Evidence Act*; that the clinical officer confirmed that she had been defiled; that DNA examination could not have been done as the Complainant was still pregnant; that sentencing is a discretion of the trial court and that, in this case, the traumatic effect of the incident on the complainant was far reaching as she was made a mother at a very early age and that, therefore, the sentence should be upheld.

9. This being a second appeal, this Court's mandate is limited by section 361(1) (a) of the Criminal Procedure Code to consider issues of law only, unless it is demonstrated that the two courts below 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 or that their finding was perverse. As to what constitutes a perverse finding, Justice Kurian of the Supreme Court of India stated in Damodar Lal v Sohan Devi and others, Civil Appeal No. 231 of 2015 that:

> "The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

10. The consideration of matters that ought not to have been considered or failure to consider matters that should have been considered are matters of law that entitle this Court to interfere with the decision as was appreciated in Karani v R [2010] 1 KLR 73 where it was held that:

> "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."

11. It is appreciated that, at times when the question involved is that of mixed fact and law, it is not easy to distinguish the two. The Supreme Court therefore clarified what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, in Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others [2014] eKLR where the three elements of the phrase "matters of law" were identified thus:

> "(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."

12. The appellant complains that the prosecution failed to prove its case beyond reasonable doubt, and that the first appellate court failed in its duty to re-evaluate the evidence. His case falls within the category (c) of cases referred to by the Supreme Court in the afore-cited decision. Clearly, the failure by the first appellate court to undertake its duty of re-evaluating the evidence afresh, a duty imposed by law, elevates the otherwise factual matters to a matter of law. In this regard, this Court held in Jonas Akuno O'kubasu v Republic [2000] eKLR that:

> "It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

13. Our determination of this appeal must therefore be based on the foregoing principles. Accordingly, we shall briefly revisit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their legal mandate as is required of them.

14. The prosecution's case was that the appellant was the Complainant's teacher; that the Complainant was born on 13th September 2006 and was therefore 15 years old at the time of the incident; that, in October 2021, the appellant invited the Complainant to his house where she had sex with him, that being the Complainant's first experience in sexual intercourse; that, on 31st December 2021, the same scenario was repeated when the Complainant went to visit the appellant in his house; that, as fate would have it, some boda boda riders saw the Complainant entering the appellant's house and reported the matter to the area chief; that, as the Complainant was leaving the appellant's house, she met her sister who informed her that she was required at the Chief's Office; that, upon her arrival at the Chief's office, she was confronted with the information and disclosed what had transpired between her and the appellant; that she was sent to the Kaloleni police station where she recorded her statement before being referred to Mariakani Sub County Hospital where, on 10th January 2022, PW1 examined her and found that she was less than 4 weeks pregnant. PW3, the Complainant's mother, confirmed that she received information from the Complainant's father that the Complainant had been seen entering the appellant's house and was asked to go to the Chief's office; and that, upon receipt of the information,

she went to the Chief's office from where she accompanied the Complainant to the police station and to the hospital where the Complainant was found to be pregnant. Upon concluding the investigations, PW4 preferred the case against the appellant.

15. When the appellant was placed on his defence, he denied the charge and testified that, although he knew the Complainant, the charges against him were untrue; that he had only worked at [Particulars Withheld] Primary School for one week and that, on 8th October 2021, they closed school; that he then travelled to his home in Bungoma County before returning on 16th October 2021 for resumption of the new term; that he was arrested on 10th January 2022 at 11.57 PM by four police officers, who took him to Kizurini Police station where he was interrogated about the offence of defiling the Complainant; that it was thereafter that he was charged with the offence; and that he had only stayed in the area for three weeks when the allegations were made.

16. The ingredients of the offence of defilement were set out in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was held that:

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

17. In this case, the age of the Complainant was not disputed, and the appellant has not taken issue with that ingredient. From the Complainant's evidence and the medical evidence adduced by PW1, there can be no doubt that there was penetration of the Complainant's genital organs with a male genital organ. Otherwise, the pregnancy would not have resulted. The only issue in contention was whether it was the appellant who was responsible for that penetration. The evidence on record is that the first sexual intercourse between the Complainant and the appellant took place in October 2021 while the second one took place on 31st December 2021. At the time of the Complainant's examination on 10th January 2022, the Complainant was found to have been less than 4 weeks pregnant. From the Complainant's evidence, the sexual intercourse that resulted in her pregnancy could only have been that which occurred on 10th December 2021 since the period between October 2021 and 31st January 2022 was more than 4 weeks.

18. In his evidence and submissions, the appellant contended that he could not have been responsible since he was away at the time it was alleged that he engaged in sexual intercourse with the Complainant. However, from his evidence, he was only away from school between 8th October 2021 when the school was closed and 16th October 2021 during which period he went to Bungoma. He did not say that he was not in school after 16th October 2021. His evidence did not disclose that he was outside the school during the period after 16th October 2021 and, to be precise, on 31st December 2021 when the second act of defilement was alleged to have taken place. In those circumstances, the appellant's so called alibi defence could not displace the prosecution evidence.

19. The appellant admitted that the Complainant knew him very well and he did not allude to any reason why the Complainant would frame him with such a charge. From the Complainant's evidence, it would appear that the Complainant had no grudge against him and might not have disclosed their escapades had she not been seen by the bodaboda ridersentering the appellant's house, following which a report was lodged at the Chief's office. The Complainant's sister in law saw her leaving the appellant's house thereafter. We find no reason on the record as to why the Complainant would have made the

allegations of defilement against the appellant. In Ayub Muchele v Republic [1980] KLR 44, Trevelyan and Sachdeva, JJ opined that:

> "Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask 'What reason had the witness to lie?'"

20. The Complainant gave evidence that it was the appellant who made her pregnant, which evidence was believed by the two courts below. That was a finding of fact. As held in Mwashanga Mwadingo v Republic [2018] eKLR:

> "...this Court cannot interfere in the findings of fact by the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009 unreported). We remind ourselves further, as expressed in a litany of our decisions that we must as much as possible defer to the concurrent findings of fact by the two courts below."

21. On the evidence presented before the trial court and affirmed by the first appellate court, we cannot say that no reasonable tribunal addressing itself to the facts and the law could not have reached the conclusion they did, or that their findings were perverse. There was evidence on record on the basis of which such findings could be returned and, consequently, we are not to interfere with such findings even if we were to be of the view that, had we been sitting as the trial court, we would have arrived at a different conclusion.

22. The test to be applied by this Court sitting as a second appellate Court was set in Koingo v Republic [1982) KLR 213 where it was held that:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)"

23. The two courts believed the evidence of the Complainant and, as was held in Keter v Republic [2007] 1EA135:

> "Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not."

24. Based on the evidence adduced by the prosecution, we have no basis for interfering with the finding that the appellant was the one whose act caused the penetration of the Complainant's genital organ. After analysing the evidence, the first appellate court concluded that the ingredients of the offence of defilement were proved and, therefore, we find no reason to differ with that finding.

25. The appellant took issue with the authenticity of the documentary evidence produced by the prosecution. The documents in issue were produced with a view to proving penetration. However, as was held by the Supreme Court of Uganda in Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

26. While we do not downplay the role played by medical evidence in proof of sexual offences, we hasten to emphasise that proof of penetration is not only by way of medical evidence, and that lack of medical evidence is not necessarily fatal to a charge of defilement.

27. The appellant also took issue with the conduct of the investigations which, in his submissions, was not sufficient, and that the investigations officer only relied on his confession. The investigations officer testifying as PW4 stated that:

> "I started my investigations and I accompanied the child and her mother to Mariakani Subcounty hospital. The child was examined by the medical officer and she was indeed pregnant. After hospital we went to the police station, and recorded the statement of the compliant, her mother and other witnesses. The complainant in her statement stated that the accused herein one Simon Peter Kituyi, who was her teacher in the said school employed by Parents Teachers Association was the one responsible for her pregnancy. She stated that the teacher used to call some of the students including the complainant and after other pupils leave, he used to tell the complainant to remain behind and engage in sexual intercourse with her. She stated that the incident had taken place more than once. The incident went on for some time and the residents of where the teacher had rented (sic) noticed that the incident was too much and persistent. They used to see the complainant go into the house of the accused person. They then informed the family of the complainant and the accused was arrested by assistant chief and they were then directed to [the] police station to make a formal complaint. After investigations, I looked for the accused person and with the assistance of the complainant who showed us the house of the accused person we established that the accused had vacated the house about three days earlier. I was then showed the house to which he had moved into and when we proceeded there we managed to get the accused person and arrested him. After arrest, we went to the police station and recorded his statement in which he admitted that he was a teacher at Kidzini primary school and also admitted that he used to have sexual intercourse with the complainant and blamed the devil for the act and stated that he did not know that it was an offence."

28. From that evidence, it is clear that thorough investigations were conducted before the appellant was charged with the offence. Although PW4 disclosed that the appellant admitted the offence, the conviction was not based on that admission, but on the other independent evidence by which the ingredients of defilement were proved beyond reasonable doubt. Accordingly, we find this ground unmerited.

29. The appellant further submitted that Article 50(2) (c) and (j) of *the Constitution* was not considered since section 211 of the Criminal Procedure Code was invoked after the ruling on a case to answer

was delivered on 14th July, 2022 by a different trial magistrate. From the record, the prosecution's case was closed on 30th June 2022 and the learned trial magistrate fixed 14th July 2022 as the date for the delivery of the ruling on no case to answer. That ruling was indeed delivered on the said date by the same magistrate who, according to the record, complied with section 211 of the Criminal Procedure Code, which requires the trial court to explain to the accused the options available to him after being found with a case to answer. After that, the defence case proceeded before the same magistrate. From the record, and this Court being a court of record, we find no substance in the appellant's complaint.

30. In conclusion, we find that the evidence adduced by the prosecution was sufficient to sustain the charge against the appellant. In the circumstances, we find no merit in this appeal which we hereby dismiss and uphold the decision of the High Court.

31. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR