KGK v Republic (Criminal Appeal 20 of 2020)
[2023] KECA 14 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KECA 14 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 20 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JANUARY 20, 2023

BETWEEN

KGK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (Korir J.) dated 10th April 2019 and delivered on 30th May 2019 in High Court Criminal Appeal No 16 of 2017arising from the original trial in Kilifi SPM Criminal Case 465 of 2013)

JUDGMENT

1. This judgment is on a second appeal by KGK ("the Appellant"), challenging the dismissal by the High Court of his first appeal against his conviction for the offence of defilement and sentence of 20 years' imprisonment that had been imposed by the Senior Principal Magistrate's Court at Kilifi (hereinafter 'the trial Court'). The particulars of the offence were that on diverse dates between September 1, 2013 and October 22, 2013 in Chasimba sub-location, Chasimba Location within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of LG, a juvenile aged 12 years old. The Appellant entered a plea of not guilty in the trial Court, whereupon the prosecution called five (5) witnesses to testify in support of its case, while the Appellant gave sworn testimony and did not call any witnesses. The trial Court thereupon convicted the Appellant, having found that the prosecution had proved its case beyond reasonable doubt.

2. The Appellant was aggrieved by the findings by the trial Court and proferred an appeal to the High Court, being Malindi Criminal Appeal No 16 of 2017. He faulted the trial Magistrate for admitting the testimony of the minor complainant when it was not corroborated, for admitting the medical evidence when it did not establish the truth; and for failing to consider that the legal burden of proof in criminal cases was not met as the case was not proved beyond reasonable doubt. The High Court in its judgment dated and signed on April 10, 2019 (W Korir J), and delivered on May 30, 2019 (R Nyakundi J), held

that the complainant (PW1) testified that she was lured from her house by the Appellant with the promise of food who defiled the complainant several times thereafter, and that after the complainant's father (PW2) and area Assistant Chief (PW3) were alerted about the issue, PW3 confirmed with the complainant what had happened. Further, that the complainant was examined by a medical officer and it emerged that her hymen was broken, which confirmed that the complainant had been penetrated. Lastly, that the complainant clearly identified the Appellant as the man who defiled her, and picked him out of three watchmen.

3. The learned Judge also found that the Appellant's testimony was not truthful, and that his defence was contradictory. After correcting the error that the Appellant was convicted under section 8(2) of *Sexual Offences Act* to section 8(3) of the Act, as the complainant was between the age of twelve and fifteen years, and also noting that the Appellant did not suffer any prejudice as a result of the error, the learned Judge upheld the sentence of 20 years' imprisonment imposed by the trial court, being the minimum sentence for a person convicted pursuant to Section 8(3).

4. The Appellant is dissatisfied with the decision made by the High Court and has proffered the instant Appeal by way of a memorandum and grounds of appeal in which he contends that the age of the complainant was not proved given the fact that the documentary evidence produced was contradictory; that section 36 of the *Sexual Offences Act* was not complied with as a DNA test was vital and that the provisions of section 8 (3) of the *Sexual Offences Act* contravene Article 50 (2)(p) of the *Constitution* and the imposition of 25 years' imprisonment upon the Appellant was violation of his right to a fair trial under Article 25 (c) of the *Constitution*.

5. We heard the appeal virtually on September 26, 2022, and the Appellant, who was unrepresented, was present in person appearing from Malindi Prison, while the Respondent was represented by learned Senior Principal Prosecution Counsel, Ms Mutua. Both the Appellant and Ms Mutua relied on their respective written submissions that they filed in Court. In commencing our determination, it is necessary to restate the role of this Court as a second appellate Court as set out in *Karani v R* [2010] 1 KLR 73 as follows:

> " .... By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact 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 matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

6. A perusal of the Appellant's grounds of appeal and submissions reveals two issues for determination. The first is whether the elements of the offence of defilement were proved beyond reasonable doubt. The Appellant, after highlighting the principles of law that apply to the burden and standard of proof in criminal trials, and while relying on section 107 and 109 of the *Evidence Act* , faulted the evaluation by the High Court of the evidence adduced during the trial, and submitted that the complainant's evidence raised a number of doubts as to its credibility since the complainant testified that she was sleeping in one of the houses with her siblings as well as her father and that the Appellant knocked the door and they left the house together and came back without anyone noticing; that she was defiled by the Appellant several times yet she did not tell anybody nor was her father aware until he was informed by her teacher from the school; that she was defiled in the school toilets and in the bush yet the police were never taken to the site to confirm the existence of such toilet, bush and the status of the house the complainant was picked from.

7. Further, that PW 2, complainant's father testified that the complainant was born on June 5, 2005 but did not produce the birth certificate or any related document, and that the complainant's age was thereby not proved. Therefore, that all the contradictions and failures by the prosecution to gather material evidence and present it should have been resolved to the benefit of the Appellant.

8. The prosecution counsel on her part submitted that the three key elements requisite to prove the offence of defilement were conclusively proved by the evidence adduced, and reliance was placed on the decision of this Court (Makhandia, Ouko & M'Inoti JJA) in *Maripett Loonkomok vs Republic* [2016] eKLR where the Court held that the question of age is a question of law under the *Sexual Offence Act* to prove that the victim was a child at the time of defilement and for purposes of sentence. The counsel submitted that the age of the complainant on the charge sheet was stated as 12 years, and that while PW1 testified that she was 12 years old but could not remember when she was born, her evidence was corroborated by the conclusive evidence in the form of age assessment report produced by PW5. Therefore, that the age of the victim was proved conclusively and the sentence meted out was lawful.

9. It was further submitted by the counsel that there was no circumstance that the Court would have deemed necessary to make an order for DNA testing for the purpose of gathering evidence to determine whether or not the appellant committed the offence, and reference was made to the decision of this Court (Makhandia, Ouko & M'Inoti JJ. A) in *Williamson Sowa Mbwanga v Republic* [2016] eKLR that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court to determine whether it is necessary for purposes of gathering evidence to order that samples be taken from an accused person for forensic, scientific, or DNA testing.

10. This Court (Makhandia, Ouko & Murgor, JJA) reiterated in *John Mutua Munyoki vs Republic*, [2017] eKLR, that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:

> "i. The victim must be a minor, and
>
> ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.
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> The Appellant has disputed that the age of the complainant was proved beyond reasonable doubt. We will briefly dispose of this argument by noting that the charge sheet indicated that the complainant was twelve years, the complainant (PW1) testified that she was eleven years old, while the complainant's father (PW2) testified that the complainant was born on June 5, 2005, which would have made complainant eight years old on the date the offence was first committed on September 1, 2013. PW2 however did not produce the birth certificate and testified that it had been destroyed in a house fire. Corporal Clara Bingo who took over the investigation of the offence and testified as PW5, stated that the complainant's age was assessed and she produced an exhibit 3, which was the age assessment report dated December 27, 2013, that assessed the complainant's age as approximately eleven years old."

11. In this regard, the question whether the complainant was 8, 11 or 12 years of age at the time of the offence is a question of fact, with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were tenacious in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or be based only on conjectures and surmises as noted in *Maripett Loonkomok vs Republic* [*supra*]. The learned Judge of the High Court found as follows in this respect: "Looking at the evidence

that was adduced at the trial, I come to the same conclusion with the trial magistrate that the Appellant defiled the complainant who was 12 years old at the time of the incident". We are of the view that given the documents and evidence of different ages of the complainant, the High Court did not err in resolving the doubt in the Appellant's favour, and as it was also not in dispute that the complainant was a child under the age of eighteen years.

12. It is also notable that PW1 testified as to having been defiled on four occasions by the Appellant on the promise of being availed food. The complainant's sole evidence as regards the defilement was in this regard sufficient under section 124 of the *Evidence Act*, and it was not necessary in this regard for her father (PW2) or siblings to confirm that she did leave the house with the Appellant. The fact of penetration was corroborated by the evidence of PW4, a doctor at Kilifi District Hospital, who produced a P3 form he filled after examining the complainant as the prosecution's Exhibit "1", and which showed that the complainant's hymen was not intact, and that the complainant was infected with sexually transmitted diseases including HIV. The Appellant has alleged that there was lack of evidence as regards the place where the penetration occurred, and in our view this evidence was not only immaterial, and the failure to adduce it did not in any manner affect the fact of penetration. Likewise, it was not necessary to undertake any medical or DNA tests on the Appellant to determine the fact of penetration, given the corroboration of penetration by the PW4 and the Appellant's positive identification as the perpetrator by the complainant.

13. The complainant was defiled by the Appellant several times and therefore saw him more than once. PW3, who was the area assistant chief, in this respect testified that the complainant picked out and positively identified the Appellant as the person who defiled her in his presence and the presence of the police, from amongst the watchmen in the school where the Appellant worked. PW2 did also corroborate the fact that the Appellant was previously known to him and the complainant, and that he was a watchman in a neighbouring school and a distant relative. The High Court therefore did not err in finding that the offence of defilement was proved beyond reasonable doubt.

14. The second issue for determination is whether the sentence meted on the Appellant was illegal and unconstitutional. The Appellant made reference to Article 50 (2) (p) of the *Constitution*, which provides for the right to the benefit of the least severe prescribed punishment for an offence, to submit that the trial Magistrate meted out a sentence contrary to that prescribed by law. The prosecution counsel on the other hand submitted that the Appellant took advantage of the victim by luring her with food, which qualified as an aggravating factor in sentencing and that the sentence was legal. The counsel placed reliance on the decisions in *Shadrack Kipkoech Kogo v R* Criminal Appeal No 253 of 2003 and *Bernard Kimani Gacheru v Republic* [2002] eKLR that sentence is a matter that rests in the discretion of the trial court, and an appellate court will not interfere with it unless the sentence is manifestly excessive in the circumstances of the case, or the trial court overlooked some material factor, or acted on a wrong principle.

15. It is notable that the minimum sentence provided for defilement of a child aged between twelve and fifteen years under section 8(3) of the *Sexual Offences Act*, is the 20-year imprisonment sentence that was meted on the Appellant. The said sentence was therefore not an illegal or unconstitutional sentence as alleged by the Appellant. In addition, under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact outside the scope of a second appeal. Lastly, the Supreme Court of Kenya clarified in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR that its previous decision in the same matter declaring the mandatory death sentence in murder as being unconstitutional did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute; and was not

an authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*.

16. We accordingly find no merit in this appeal, which is hereby dismissed in its entirety.

17. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR