Kuvali v Republic (Criminal Appeal 122 of 2018)
[2023] KECA 128 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 128 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 122 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

PETER SHISIA KUVALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kapenguria, (Githinji J), dated 1st November 2017) IN HC. CRA NO. 23 of 2016)

JUDGMENT

1. Peter Shisia Kuvali (the appellant herein), has preferred this second appeal against the judgment of Githinji J dated 1st November 2017, in which he had initially been charged at the Principal Magistrate's Court in Kapenguria with the offence of defilement contrary to Section 8 (1) as read with Section 4 of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 6th day of October 2013, at (particulars withheld), he did cause his penis to penetrate the vagina of JJ a child aged 11 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, intentionally touched the buttocks and breasts of JJ, a child aged 11 years old.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on 8th July 2015, H. O Barasa (then Principal Magistrate Kapenguria law courts), convicted him of the main charge and sentenced him to life imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 1st November 2017, Githinji J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Undeterred, the appellant has now filed this appeal and probably the last appeal vide a memorandum of appeal filed in court on 17th November 2017. The appellant subsequently filed supplementary grounds of appeal on 26th March 2021, raising the following grounds of appeal:

    1. That the learned appellate judge erred in law in upholding my conviction and sentence on a fatally defective charge, the evidence adduced doesn't support the charge as drawn and presented thus I was prejudiced.

    2. That the learned appellate judge erred in law in upholding my conviction and sentence but failed to note that that the charge of defilement was not proved in evidence according to the set laws.

    3. That the learned appellate judge erred in law in upholding my conviction and sentence but failed to note that the sentence was couched in mandatory form thus not in line with the recent Supreme Court decision in Francis Karioko Muruatetu."

7. Briefly, the background to this appeal is that on 6th October 2013, at around 9;00am JJ, a child aged 11 years was coming from a shop when the appellant whom she knew as Barasa and who used to be his teacher followed her and grabbed her and took her to a nearby forest, took off her clothes and his clothes, pinned her to the ground and covered her mouth and then put the thing he uses to urinate in her thing.

8. That, she then proceeded home and informed her mother what had transpired. Her mother called the Kenya Police Reservist who came and arrested the appellant and the following day she was taken to Kapenguria district hospital where she was examined.

9. PW2 JL, is PW1's father. He accompanied PW1 to hospital for examination and treatment.

10. PW3 was Danson Litole a clinical officer working at Kapenguria District hospital. He produced a P3 form in respect of PW1 who had a history of having been defiled by someone known to her. Upon examination, he found that the hymen was perforated which was a sign of penile penetration and there was discharge on the labia. It was his further evidence that perforation was evidence of actual penetration. On age assessment he found PW1 to be 11 years old.

11. PW4 was PC Patricia Molo attached to Kapenguria police station. It was her evidence that on 7th October 2013, she was in the office when she received a complaint that PW1 had been defiled. She then issued her with a P3 form and accompanied her to hospital.

12. The appellant in his defence gave an unsworn statement of defence and called no witness. He denied having committed the offence and further stated that PW1 had been forced to implicate him by her mother.

13. When the matter came up before us for plenary hearing on 18th October 2022, the appellant who was in person sought to rely on his undated written submissions which he briefly orally highlighted in Court. Ms. Chege on the other hand holding brief for Ms. Anguria for the respondent sought to rely on her written submissions dated 22nd April 2022, which she also orally highlighted in Court.

14. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

15. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

16. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

17. With regard to the first ground of appeal, it was submitted by the appellant that the charge was defective for the reasons inter alia that the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* yet the complainant was 11 years old and that this went to the root of the prosecution's case.

18. On the other hand, it was submitted for the respondent that the error in the charge sheet was curable under Section 382 of the *Criminal Procedure Code* and that further not all defects in a charge sheet will render a conviction thereunder invalid and that in the instant case, the appellant understood the charges that were brought against him and even defended himself satisfactorily during the trial.

19. We have anxiously perused the record. It is indeed not in dispute that the appellant was charged under Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. It is also not in dispute that the victim (PW1) was 11 years as at the time of the commission of the offence. The appellant therefore ought to have been charged under Section 8 (1) as read with Section 8 (2) of the Act. It is apparent that both the courts below did not notice this omission.

20. Be that as it may, the appellant clearly understood the charges he was facing and ably cross examined the prosecution witnesses. No evidence whatsoever has been tendered by the appellant to show that he suffered prejudice or that he did not understand the nature of the charges he was facing. The mere fact that there was an error in the charge as regards Section 8 (4) of the Act did not change the fact that the appellant was charged with the offence of defilement pursuant to Section 8 (1) of the Act. The offence still remained defilement.

21. In *Isaac Nyoro Kimita & another v R* [2014] eKLR this Court (differently constituted) when dealing with an issue of a defective charge sheet stated thus;

> In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge"" [Emphasis added]

22. In the instant case and having come to the conclusion that the appellant fully appreciated the charge against him and that he suffered no prejudice, this ground of appeal is without merit and the same

must fail. We shall be reverting to this issue shortly before we conclude this judgment as it has a bearing on sentence.

23. The learned judge was further faulted for finding that the charge of defilement was proved as the age of PW1 was not conclusively proved, that there was no conclusive proof that the appellant penetrated PW1 and that the appellant having denied committing the offence, the two courts below did not call for an in-depth examination of the circumstances that led to identification of the appellant as the perpetrator.

24. On the other hand, it was submitted for the respondent that the ingredients of the offence of defilement were duly proved and that the evidence of PW1 that she was defiled by a person known to her was corroborated by PW3 who examined her and found that the hymen was perforated and that PW1 was defiled by a person well known to her who was her teacher. Further, the incident happened at 9 am and there was sufficient light to enable PW1 see the perpetrator.

25. On age, it was submitted that the age of the minor was assessed by a medical officer who found her to be 11 years old.

26. We have carefully re-evaluated the evidence on record. PW1 during the voir dire examination stated that she was 11 years old. In her evidence in chief she reiterated that she was 11 years old and a standard 3 pupil at [Particulars Withheld] primary school. Her evidence that she was 11 years remained uncontroverted as the appellant did not even attempt to cross examine her on the same and he never challenged her age. PW3 who was the doctor who carried out the age assessment corroborated PW1's evidence that she was 11 years. Again, his evidence towards this aspect remained unchallenged as he was not even cross examined on the same by the appellant. From the record, it is evident that there was no slightest suggestion that the age of PW1 was not 11 years.

27. Regarding the contention by the appellant that there was no conclusive proof of penetration, PW1 who was the victim in this case testified inter alia thus;

> .... He pinned me to the ground after removing my clothes. He then put the thing he uses to urinate into my thing. He removed his trouser and pant, he also removed my skirt, dress and pant, he raped me, I saw the thing he inserted into my thing. The thing is used to urinate.

28. He inserted it into my thing. My thing is also used to urinate...." (Emphasis supplied).

28. PW1's evidence towards this respect remained firm, consistent and unshaken even under intense cross examination from the appellant when she stated thus; "...you did bad manners to me. You inserted your thing into mine. It did not enter completely. The incident took quite a while."

29. PW1's evidence was further corroborated by the evidence PW3, the clinical officer who examined PW1 and whose findings were inter alia that PW1's hymen had been perforated which was a sign of penile penetration and that there was discharge on the labia.

30. Again, the evidence of this particular witness was never rebutted by the appellant even in cross examination. From the circumstances of this case and contrary to the appellant's contention, there was overwhelming evidence of penetration and the appellant's contention that there was no conclusive evidence of penetration is clearly without basis.

31. Turning to the issue of identification, PW1's evidence was that the appellant was her teacher. In cross examination PW1 stated that she knew the appellant as Barasa. The appellant stated as much in his defence. In addition, the incident happened in broad day light at 9:00 am and the conditions therefore were favourable for a positive identification free of any error. In any event, the appellant was well known

to PW1 prior to this incident as her teacher and therefore this was a case of recognition as opposed to identification of a stranger. Consequently, nothing turns on this point and this ground of appeal must fail in its entirety.

32. In light of the above, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

33. Accordingly, we find and hold that the appellants' conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

34. Finally, on sentencing, the learned judge was faulted for failing to note that the sentence was couched in mandatory terms thus not in line with the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. On the other hand, it was submitted for the respondent that the circumstances that led to defiling of an innocent 11-year-old girl were unwarranted and that further when the appellant committed the crime he was an adult who abused the trust bestowed upon him by the society as he was supposed to protect the complainant yet he turned out to be her tormentor.

35. Consequently, we were urged to uphold the conviction and sentence.

36. As we had alluded to earlier, the appellant was tried and convicted under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. However, he ought to have been charged under Section 8(1) as read with Section 8(2) of the Act since the complainant in this case was aged 11 years. The appellant was subsequently handed a mandatory life sentence as provided for under Section 8(2) of the Act. However, a person charged under Section 8(4) that the appellant was charged with is liable, upon conviction to imprisonment for a term of not less than 15 years.

37. From the circumstances of this case and in light of the error in the charge sheet which unfortunately the 2 courts below did not notice, we are inclined to exercise our discretion in favour of the appellant to reduce the sentence of life imprisonment meted against him.

38. Accordingly, we substitute the sentence of life imprisonment meted out on the appellant with a sentence of 25 years' imprisonment to run from the date of sentence in the trial court.

39. The appellant's appeal succeeds only to that extent. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR