Koi v Republic (Criminal Appeal 14 of 2020)
[2023] KECA 81 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 81 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 14 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

FEBRUARY 3, 2023

BETWEEN

MATANO CHARO KOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (Nyakundi J.) dated and delivered on 10th February 2020 in High Court Criminal Appeal No 38 of 2018 arising from the original trial in Kilifi Criminal Case 315 of 2014)

JUDGMENT

1. Matano Charo Koi, the Appellant herein, has lodged this second appeal after the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement and the sentence of 15 years imprisonment that had been imposed by the Senior Principal Magistrate at Kilifi (hereinafter 'the trial Court'). The particulars of the offence were that on diverse dates between the month of May and June in Ganze District within Kilifi County he intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of KCK, a child aged 16 years. A trial was conducted after the Appellant pleaded not guilty, and the prosecution called five (5) witnesses to testify in support of their case in the trial Court, while the Appellant gave unsworn testimony and did not call any witnesses.

2. The evidence that had been adduced in the trial Court in this respect was that the complainant KCK, who testified as PW1, was in a sexual relationship with the Appellant which started in 2013, and in 2014, she became pregnant, whereupon the Appellant took her to a hospital in Bamba where an abortion was procured. After a week her brother noticed that she had a problem, and took her back to the hospital for examination, and she was taken to Bamba police station where they were issued with a P3 form, and returned to Bamba hospital for treatment. PW1 informed her brother that the Appellant had impregnated her, and the Appellant was arrested and taken to Bamba police station.

PW1 also informed the Court that she was assessed to be 15 years old on 28th July 2014, though she did not have a birth certificate.

3. The complainant's cousin, HKK, testified as PW2 and confirmed taking PW1 to hospital in July 2014 together with the village chairman, after the complainant's mother told him she seemed unwell, and they were informed that the complainant had aborted and were referred to the police. Further, that the complainant informed them that the Appellant had impregnated her and took her to abort. CC, the complainant's mother, who testified as PW3, and confirmed that on 13th July 2014 she had noticed that the complainant looked unwell, and requested PW2, who was PW3's nephew, to take her to hospital. That she was informed that the complainant had aborted and that her womb had to be cleaned, and the complainant told her that the Appellant was responsible for the pregnancy. PW 3 also testified that she received two herds of cattle as compensation for the abortion and cleaning of the complainant.

4. PC Peter Odhiambo, the investigating officer and PW4, received the report of the pregnancy and abortion on 20th July 2014 at Bamba Police Station, and issued the P3 form to the complainant, and also arranged for an age assessment of the complainant. He testified that the complainant was found to be 16 years on 24th July 2014, and he produced the age assessment form as an exhibit. He also testified that on 29th July 2014, he and another police officer went to the Appellant's home, where the complainant's brother pointed him out, and they then arrested him. The P3 form issued to the complainant was produced by Dr. Hassan Bachu (PW5), a medical officer at Kilifi Hospital, who testified that it was filled by a Dr. Kalu on 24th July 2014, and indicated that the patient had been pregnant and was cleaned and antibiotics and analgesics were administered to her, and that the hymen was broken and there was discharge and blood in the birth canal.

5. The Appellant gave an unsworn statement in which he denied knowing the complainant. The trial Court found that the ingredients of penetration and age of the victim had been proved beyond reasonable doubt and convicted the Appellant and after considering his mitigation, sentenced him to fifteen years' imprisonment. The Appellant was aggrieved by the findings of the trial Court and appealed to the High Court. He faulted the learned trial Magistrate for relying on the evidence of a single witness which was insufficient to sustain as safe conviction; failing to consider that the prosecution failed to prove its case beyond reasonable doubt as required by the law; failing to consider sharp contradictions from the prosecution witnesses thereby creating doubt on the prosecution case contrary section 163 (1) (e) of the *Evidence Act*; and failing to consider his defence which was unrebutted creating doubt on the prosecution side.

6. The High Court (R. Nyakundi J.), in a judgment dated and delivered on 10th February 2020, found that the testimony by PW1 of sexual intercourse with the Appellant and of her pregnancy and abortion were corroborated by medical evidence by PW5, and her age was proved beyond reasonable doubt. In addition, that while the identification of the Appellant as perpetrator was solely by the complainant, there was no danger in the trial court convicting on the basis of a single identifying witness, as this was a case of recognition by the complainant. On the sentence imposed by the trial Court, the High Court found that there was no evidence that the court overlooked some material factor, or took into account some wrong material, or acted on wrong principles.

7. The Appellant is dissatisfied with the decision by the High Court and has proffered the instant appeal. In the Appellant's supplementary Grounds of Appeal, they contended that the learned High Court Judge erred in convicting and sentencing the Appellant based on the evidence of the victim without proof that the victim was telling the truth, given that no DNA or medical evidence was produced to connect the Appellant to the victim's pregnancy, the victim did not report the incident immediately

and only confessed when she was suspected to be having a problem, and as it was quite probable that any other person could be responsible for the pregnancy. The Appellant also faulted the High Court for failing to consider that the prosecution did not adduce evidence on the crucial element of the age of the victim, and that the Appellant was forced to pay cows to compensate the alleged abortion of a pregnancy which was never proved to have been caused by the Appellant, which was enough punishment.

8. We heard the appeal on 27th September 2022 on the Court's virtual platform, and the Appellant was present in person appearing from Kilifi Prison, while the Respondent was represented by learned Prosecution Counsel, Mr. Kennedy Kirui. Both the Appellant and Mr. Kirui relied on their respective written submissions which they filed in this 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 vs 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."

9. A perusal of the Appellant's grounds of appeal and submissions reveals two issues for determination. The first is whether the evaluation of the evidence adduced at trial disclosed the offence of defilement, and the second is whether the sentence imposed on the Appellant was legal. On the first issue the Appellant submitted that it was crucial for three elements of defilement be established, and that in as much as penetration was proved, the prosecution was still required to demonstrate who was responsible. That the victim did not report the incident immediately and only confessed when she discovered she was pregnant and had engaged in sexual intercourse more than once possibly with another person apart from the Appellant who was responsible for the pregnancy. Therefore, that it was necessary for DNA or medical evidence to be produced to connect the Appellant to the victim's pregnancy pursuant to section 36(1)of the *Sexual Offences Act* and that since this was not done, the prosecution had not proved its case beyond reasonable doubt. Reliance was in this regard placed on the decision on the prosecution's burden of proof in *Woolmington vs DPP* (1935) UKHL 1.

10. Further, that the prosecution failed to adduce evidence on the crucial element of the charge with regards to age, and no birth certificate, baptismal card or school records were availed to show the complainant's age. That the age assessment form and the P3 forms gave the age of the complainant as 16 years and 15 years respectively, and did not indicate the method used, nor did the doctor who testified offer an explanation for the different ages in the medical documents produced. The Appellant in this respect cited the decision on the case of *Francis Omuroni vs Uganda* Cr. Appeal No 2 of 2000 that in determining the age of the victim, the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.

11. The prosecution counsel on his part submitted that the elements requisite to prove the offence of defilement were proved. With regards to positive identification and penetration, that this was a case of recognition since the Appellant was well known to the complainant, and the medical evidence produced by PW5 stated that the victim's hymen was broken. In addition, that the victim's age was proved by way of an age assessment dated 24th July 2014.

12. This Court (Makhandia, Ouko & Murgor, JJ.A) 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.

The Appellant's arguments that it was possible that there were other persons who had sexual intercourse with the complainant and who could have been responsible for her pregnancy are in our view immaterial and irrelevant. The material legal question which required to be addressed was whether there was sufficient evidence adduced that the complainant was a minor and was penetrated by the Appellant. We find that the High Court did not err in finding that these facts were proved beyond reasonable doubt, as the complainant testified that the Appellant who was previously known to her as he was a neighbour and in-law, had sexual intercourse with her several times and took her to hospital to procure an abortion when she became pregnant; PW3 testified in this regard that she received compensation from the Appellant for the abortion; and PW5 corroborated the complainant's evidence on penetration and testified that on examination, the complainant's hymen was broken. There was thus sufficient proof of penetration and positive identification of the Appellant as the perpetrator by the complainant by way of recognition.

13. In the circumstances, it was not necessary to undertake any further medical or DNA tests on the Appellant to prove penetration, and we are in this regard persuaded by the decision of this Court (Makhandia, Ouko & M'Inoti JJ. A) in *Williamson Sowa Mbwanga vs Republic* [2016] eKLR, that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, and allows the court to determine whether from the circumstances of a case, it is necessary for purposes of gathering evidence to order that samples be taken from an accused person for forensic, scientific, or DNA testing. We need to emphasize in this regard that the element that requires to be proved in defilement is penetration, and not paternity in the eventuality of a pregnancy.

14. On the sufficiency of evidence on the complainant's age and that she was a minor, the charge sheet indicated that the complainant was sixteen years, the complainant (PW1) testified that she was sixteen years old at the time of her testimony and fifteen years at the time of age assessment, and PW4 produced the age assessment report dated 24th July 2014 as exhibit 3, that assessed the complainant's age as sixteen years old. The manner of proof of age was the subject of this Court's decision (Visram, Koome & Otieno- Odek JJ.A) in *Richard Wahome Chege vs Republic* [2014] eKLR, where it was held that:

> " 12. On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

15. In this regard, the question whether the complainant was 15 or 16 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 as noted by this Court (Makhandia, Ouko & M'Inoti JJ.A) in *Maripett Loonkomok vs Republic* [2016] eKLR . We cannot therefore in this respect fault the finding by the learned Judge of the High Court that the age of the complainant was proved beyond reasonable doubt by Exhibit 3, which was the age assessment report, and which is one of the ways of proving age as held in Francis Omuroni vs Uganda [supra] and Richard Wahome Chege vs Republic [supra]. We are also of the view that given the documents and

evidence on different ages of the complainant, the High Court did not err in resolving the doubt in the Appellant's favour, and it was also not in dispute that the complainant was a child under the age of eighteen years.

16. The second issue for determination is whether the sentence meted on the Appellant was illegal. The Appellant submitted that he was forced to give cows to the family of the victim in the name of compensation for the alleged abortion, and the trial Court should have considered that the Appellant was already punished before the Court pronounced conviction on the Appellant, and hence the Court should exercise mercy and be lenient.

17. The prosecution counsel on the other hand submitted that the sentence meted out was legal, and that trial Court took into account all the relevant factors including the mitigation and the nature of the offence. The counsel cited the decision in *Kenneth Randu Nzau vs Republic* (Criminal Appeal No 11 of 2020) [KECA] 502 KLR that this Court can only address the legality of the sentence and not its severity, and urged us to affirm the sentence of 15 years imprisonment provided by section 8 (4) of the *Sexual Offences Act*.

18. It is notable that the minimum sentence provided for defilement of a child aged between sixteen and eighteen years under section 8(4) of the *Sexual Offences Act*, is the 15-year imprisonment sentence that was meted on the Appellant. The said sentence was therefore not illegal and the Supreme Court of Kenya clarified in *Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR that it did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute, and that its decision was not an authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. 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.

19. In conclusion, we need to clarify on the role and relevance if any, of traditional remedies, such as the compensation of cows paid to PW3, the complainant's mother, for the complainant's abortion. It is notable in this regard that Article 159(2)(c) and (3) of *the Constitution* provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, but shall not be used in a way that—

    a. contravenes the Bill of Rights;

    b. is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

    c. is inconsistent with this Constitution or any written law.

20. Indeed, the opening statement of the Kenya Judiciary's Alternative Justice Systems Framework Policy emphasizes that: "The Alternative Justice Systems (AJS) is both a philosophical concept as well as a practice for accessing justice. As a philosophical concept, and consistent with the human rights school of thought, it is based on the following fundamental ideas: freedom, equality, non-discrimination, dignity, and equity. All these are contained in *the Constitution* of Kenya. As a practice for access to justice, AJS refers to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity."

21. It is our view in this regard that cultural and traditional practices and remedies that condone and thereby promote harmful practices such as defilement and child marriages do not pass the muster of the rights-based approach envisaged by the Article 159(3) and the AJS, and the compensation paid to the complainant's mother cannot for these reasons be relied upon by the Appellant as a mitigating or exclusionary circumstance.

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

23. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS DAY 3RD OF FEBRUARY, 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