Njuguna v Republic (Criminal Appeal 111 of 2015)
[2023] KECA 345 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 345 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 111 OF 2015

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

PETER KAMAU NJUGUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru, Mshila J), dated 10th February 2015) IN HC. CRA NO. 18 OF 2013)

JUDGMENT

1. Peter Kamau Njuguna (the appellant herein), has preferred this second appeal against the judgment of Mshila J dated February 10, 2015, in which he had initially been charged at the Senior Principal Magistrate's Court at Molo with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on diverse dates between June 1, 2011 to July 12, 2011, at (particulars withheld), he intentionally and unlawfully did cause the penetration with his genital organ (penis) into the genital organ namely, vagina of SM a girl aged 9 years in violation of the said Act.

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, he unlawfully and intentionally caused his genital organ namely penis, to come into contact with the genital organ namely, vagina of SM a girl aged 9 years in violation of the said Act.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on February 14, 2013, Hon H.M Nyaga (then Senior Principal Magistrate) 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 February 10, 2015, Mshila 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 *vide* a notice of appeal dated February 19, 2015, and a memorandum of appeal filed in court on February 20, 2015. Subsequent thereafter, the appellant filed undated supplementary grounds of appeal raising the following issues:

    1. That the learned appellate judge erred in law by upholding the sentence of the appellant of life imprisonment which was awarded in a mandatory form without considering the circumstances which prevailed during the commission of the offence and other constitutional provisions article 50 (2) (p).

    2. That the learned appellate judge erred in law and fact by holding that, the offence of defilement was proved but failed to note that the ingredients of the offence were not proved by the prosecution.

    3. That the learned appellate judge erred in law and fact by failing to note that the whole prosecution case was marred with inconsistencies and contradictions which if considered would have overturned the prosecution's case.

    4. That the learned appellate judge in law and fact when he failed to consider the defence evidence given by the appellant alongside other prosecution evidence."

7. A brief background of this appeal is as follows: PW1 was SM She testified that the appellant had found her grazing cows and "did bad manners" to her. It was her further evidence that the appellant did bad manners to her on three occasions, the second one being when she was grazing and the third one while she was going to fetch water. She testified that she did not tell her father as the appellant had threatened to kill her.

8. She later reported the incident to madam Michomo who then notified the head teacher who subsequently informed her father (PW2).

9. PW2 was JKM and PW1's father. It was his evidence that on July 14, 2011, he received a letter from the headmaster requiring him to attend school where his daughter attended. When he went there, he was informed that his daughter had been defiled severally by the appellant. The head teacher then called the chief and PW1 was questioned. The appellant was later arrested.

10. PW3 was Eunice Musika a teacher at [particulars withheld] primary school. She testified that on July 14, 2011, she was at school when she met a teacher by the name Abigail talking to PW1 who was in her class and PW1 told her that there was a man who had a habit of defiling her and had defiled her severally. She then called the head teacher who took up the issue.

11. PW4 was Ruth Sande a clinical officer at Molo District Hospital. She examined PW1 on July 16, 2011, who had been brought to hospital on allegations of having been defiled. On examination, PW1 had a torn hymen and she had blood stains on her clothes and there appeared to have been repeated defilement.

12. PW5 was PC Leah Chesang. She testified that on July 15, 2011, she was at Molo police station when a report of defilement was made. She later recorded witness statements and took both PW1 and the appellant to hospital.

13. Put to his defence, the appellant elected to give an unsworn statement and called no witness and denied having committed the offence and stated that at that time the offence was committed he was away.

14. The appeal was urged by way of written submissions with oral highlights by the parties on December 14, 2022. The appellant in his submissions denied having committed the offence and stated that he had been framed. Consequently, he urged the court to reduce the sentence of life imprisonment meted out on him to 20 years as it was too severe.

15. Mr Ondimu learned counsel for the respondent on the other hand while opposing the appeal submitted that the appellant had raised the question of existence of a grudge between him and the victim which issue he did not raise in the lower court. On sentencing, counsel urged that all the elements of the offence were proved and that the sentence was proper.

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

17. 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 ..."

18. 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)."

19. Turning to the first ground of appeal, we shall revert to the same at the tail end of this judgment as it has bearing on sentence. Regarding the second ground of appeal, the High Court was faulted for holding that the ingredients of the offence of defilement were proved. It is now trite law that for a charge of defilement to be proved, the prosecution must prove three elements namely, the age of the victim, penetration and identity of the perpetrator.

20. On age, it was submitted that the same was not conclusively proved as the charge sheet and the P3 Form showed that the complainant was 9 years old whereas PW1 in her evidence in chief stated that she was 11 years and further, that age assessment was not carried out.

21. We have carefully perused the record and it is indeed true that PW1 in her evidence stated that she was 11 years whereas both the charge sheet and the P3 Form indicated that she was 9 years. The appellant did not challenge PW1's evidence that she was 11 years and her evidence towards this respect remained unconverted. Proof of age is critically important in proving offence of defilement as it is the age of the victim that determines the length of sentence to be imposed on conviction.

22. In the instant case, the appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The said section provides that any person convicted for the offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment.

23. The High Court while addressing the issue of age stated as follows:

> "The critical evidence related to defilement and after finding this factor proven the trial magistrate addressed the issue of age when passing sentence and stated that the ages nine (9) years and eleven (11) years both fell under the same penalty section. This court concurs with the submissions of prosecuting counsel that the trial court noted the disparity and dealt with it appropriately."

24. We fully agree with the holding by the two courts below as regards the issue of age of PW1 as there was uncontroverted evidence that she was below 11 years when the offence was committed and the same fell within the age bracket of 11 years and below as provided for by section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006. Furthermore, this did not change the fact that PW1 was defiled and the same has only bearing on sentencing. Ultimately therefore, we are satisfied that PW1 was aged below 11 years and we are satisfied that the issue of age was conclusively proved. Had there been evidence to suggest or show that PW1 was above 12 years at the time of commission of the offence, the scenario would have been different.

25. Turning to penetration, the appellant submitted that the same was not proved to the required standards and further, that no one witnessed the incident and that he had denied committing the offence. PW1's evidence was that she had been defiled by the appellant on at least three occasions. Twice while she was grazing and once while she had gone to fetch water. Her evidence towards this respect remained unshaken even under cross examination when she stated thus; "it is you who did bad manners to me."

26. PW2 and PW3 confirmed that indeed PW1 had been defiled severally by the appellant as narrated to them by PW1. PW4 corroborated PW1's evidence that she had been defiled when she testified that on examination, PW1's hymen was torn and she had blood stains on her clothes and there appeared to have been repeated defilement. Again the evidence of this witness remained unchallenged even in cross examination.

27. From the circumstances of this case we are satisfied that penetration was proved to the required standard both by PW1's evidence and the medical evidence produced by PW4.

28. Lastly on identification, the appellant did not raise this issue when cross examining PW1 nor in his submissions before us. PW1's evidence which largely remained uncontroverted was that she had been defiled severally by Peter Kamau (the appellant) who used to graze Jane's cows. She gave a similar version to PW2 that she had been defiled severally by Kamau who used to work for Jane. The appellant in his defence confirmed as much that he was a herdsman. Regarding the issue of the alleged grudge, the appellant did not raise this issue either in cross examination or in his defence. the same was clearly an afterthought.

29. From the circumstances of this case we are satisfied the appellant's identity as the person who defiled PW1 was not in question and it is the appellant who defiled PW1 and no one else. PW1 knew the appellant by name and even the person he worked for. Consequently, therefore we are satisfied that all the elements for the offence of defilement were sufficiently proved to the required standard and this ground of appeal fails in its entirety.

30. The learned judge was further faulted for failing to note that the prosecution's case was marred with inconsistencies and contradictions. It was submitted by the appellant the actual dates of defilement were not mentioned by PW1 and that further the prosecutor stated that PW1 was examined on July

16, 2011, whereas the appellant was examined on July 18, 2011 and that this raised the credibility of PW4- the clinical officer.

31. We have carefully perused the record and the evidence of the prosecution witnesses remained largely uncontroverted. It is now trite law that inconstancies and contradictions of prosecution witnesses cannot vitiate a trial not unless they are contradictions in material particulars and go to the root of the matter.

32. In *Philip Nzaka Watu v Republic* [2016] eKLR, this court stated as follows:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self- contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question." (Emphasis ours)

33. Similarly, in *Erick Onyango Odeng' v Republic* [2014] eKLR this court citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v Uganda* criminal appeal No 139 of 2001, [2003] UGCA, 6 stated as follows:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

34. From the circumstances of this case and in light of the overwhelming evidence on record, we are of the considered opinion that even if there were minor contradictions in the evidence of the prosecution witnesses the same were not fatal to the prosecution's case and we are bound to overlook them. Consequently, nothing turns on this point.

35. Finally, the High Court was faulted for failing to consider the appellant's defence alongside prosecution's evidence. The appellant submitted that he was framed by PW2 due to an alleged grudge due to grazing of animals on a certain piece of land. Again, we have carefully perused the record and nowhere in his defence did the appellant allude to any grudge between him and PW2. He simply denied committing the offence and stated that he was arrested for no apparent reason. As a matter of fact, the

evidence on record shows that PW2 was unknown to the appellant prior to commission of this offence. The learned judge while addressing the issue of the appellant's defence stated as follows:

> " The issue of an existing grudge between the appellant and the complainant's family was raised by the appellant in his appeal. That the grudge was between the appellant and PW2 and arose from the grazing of animals on the same piece of land. Upon perusal of the appellant's defence testimony this court notes there was no mention of a grudge. It is noted that the appellant did not raise this issue when PW2 testified and that he only raised when cross examining the PW5 who was the police officer on duty when the report was made and she rightfully stated that she would not the best placed person to know about the existence of a grudge as between PW2 and the appellant (sic). This court is satisfied that the trial magistrate did not have to make any appraisal, evaluation or determination on the issue of an existing grudge as it was never raised in the appellant's statement in defence."

36. From the above passage and contrary to the appellant's submissions, it is evident that the High Court considered his defence and in our view, rightly dismissed the same. Consequently, nothing turns on this issue.

37. Accordingly, 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 there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement. We have no doubt that it was the appellant who defiled PW1.

38. We therefore 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.

39. Turning to sentencing, the appellant faulted the court for handing him a maximum mandatory sentence. The appellant submitted that recent developments showed that the courts can divert from the mandatory minimum sentences prescribed in the *Sexual Offences Act*.

40. We have considered the circumstances under which the offence was committed. The appellant defiled a 9-year-old girl severally and there were aggravating circumstances as the appellant had threatened PW1 with death should she tell anyone. Be that as it may, the appellant in his submissions before us on December 14, 2022, submitted that he has since reformed and had trained in carpentry and would teach others should he be released and that he was a young boy at the time of the commission of the offence.

41. There is no doubt that a life sentence is an indeterminate sentence which places a lot of anxiety on a convict for the rest of his/her life and recent jurisprudence shows that the courts have been frowning on the same as it denies the court the discretion to impose an appropriate sentence depending on the circumstances of each case.

42. Accordingly, from the circumstances of this case and in light of the appellant's submissions which we have duly considered, we are inclined to exercise our discretion in his favour and substitute the sentence of life imprisonment meted upon the appellant with a sentence of 35 years' imprisonment to run from the date of sentencing in the trial court. The appellant's appeal only succeeds to that extent.

43. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR