Kasiani v Republic (Criminal Appeal 9 of 2022)
[2023] KECA 1006 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1006 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 9 OF 2022

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

HENRY KASIANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (G. Ngenye, J.) dated 7th June, 2017 in HC. CR. A No. 112 of 2016)

JUDGMENT

1. The appellant, Henry Kasiani was charged before Limuru Law Courts, Nairobi, with the offence of defilement of a child, contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that, on June 12, 2012 at [Particulars Withheld] within Nairobi County, the appellant intentionally caused his penis to penetrate the vagina of MN, a child aged 15 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006.

2. Before we consider the appellant's grounds of appeal, we note that by dint of the provisions of section 361 of the *Criminal Procedure Code*, the Court must be confined to issues of law only as set out in *Karani vs R [2010] 1 KLR 73*, where the role of the second appellate court was succinctly set out and the this Court expressed itself as follows:

> ' 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.'

3. To put the appeal in context, we shall give the background in a summary form, the prosecution case before the trial court as well as the appellant's defense. According to the complainant (PW1), she had gone to school on the morning of June 12, 2012 and arrived at 7.00 am but was sent home for being late, as the reporting time was 6.00 am. On her way home she met the appellant, whom she knew, and he greeted her. As she continued walking, the appellant pulled her by her sweater which got torn, and grabbed her hand. She tried to scream but he gagged her mouth and carried her on his shoulder into a nearby forest, removed her under-pants and put his penis into her vagina. She testified that the appellant pleaded with her not to report the matter, threatened to kill her if she did, and gave her transport money. She did not immediately report to her aunt for fear of being beaten.

4. PW2, DA, had taken her child to the hospital on June 12, 2012 and was heading back home at about 10 am, when she met PW1 with the appellant. She knew the appellant to be a watchman and lived in the same settlement with him. According to her, she did not ask PW1 why she was crying as she looked anxious and confused but saw the appellant giving PW1 something from his pockets and suspected that he was trying to placate her after committing some act to her. She then informed Wesonga, a neighbor whom she met along the way, to follow up with PW1 and the appellant.

5. PW3, ENN a sister to PW1's mother, stated that she left the house at 6.00 am and took PW1 to school. According to her, at about 4.00 pm on the same day, she met W a neighbour who came to the farm where she worked and informed her that PW1 had not gone to school on that day and that she should take her to the hospital. It was her testimony that she left for home and on reaching home, she asked PW1 what happened. PW1 began crying as she narrated how the appellant had taken her to the forest and raped her. She then took her to the police station and reported the matter.

6. PW 4, PWO, testified that he met DA (PW2) at Mabrouki tea estate who told him that PW1 had been seen with the appellant and she was crying. He knew PW1 and went looking for her but did not find her. He also knew the appellant well. He then went to PW3's workplace and told her, that he had heard that PW1 had been raped by the appellant.

7. PW5 Sgt Solomon Ng'ang'a, an AP officer got a call from a Tigoni police officer on June 13, 2012 informing him of a report of a defilement case and that the appellant was within his area of jurisdiction. On June 14, 2012 in the company of the assistant chief, went to the factory manager's office at Mabroukie factory where the appellant had been summoned. He then handcuffed him and took him to Tigoni police station.

8. PW6 Corporal Janet Odhiambo was the investigation officer. It was her testimony that on June 13, 2012 at about 9.00 pm, while she was in the office, she got a report from PW1 and her mother. She then took them to Tigoni District hospital on the same night where PW1 was treated. She recorded their statements on the next day and returned with PW1 to the hospital where the P3 form was filled. She also did a sketch plan of the layout of the crime scene after being taken to a bush where the offence was committed.

9. PW8, Dr Susan Kerubo Omundi, testified that she examined PW1 on June 13, 2012 and found her to be in a fair general condition, had whitish fluid on the external genitalia, her hymen was broken, had inflammation at the introitus and the injuries were one (1) day old.

10. PW9 Dr Wilson Ndahera Ngobe did an age assessment on PW1 on August 29, 2013 and using the standard reference number to be 24, her skeletal age was 15 years.

11. When put to his defence, DW1, the appellant herein denied committing the offence and testified that he lived with PW1 in the same estate; that he had gone out on his bicycle to buy milk. On his way home, he met a girl in school uniform who was crying. He stopped and asked her why she was crying and she responded by saying that her 2 brothers and herself were orphans and a certain lady was mistreating them. According to him, PW1 complained of lack of fees and other school amenities and that they had been sleeping hungry, and that the appellant's colleague, one 'Thomas' who was helping PW1 had become reluctant to assist as people were making insinuations about their relationship. The appellant stated that PW1 was desperate and that was why he gave her Kshs 20/=

12. He further testified that D (PW2) was malicious and had framed him because, at one instance, D was violent with her child and had once picked a panga and threatened the appellant. He stated that he did not relate well with PW3. He also stated that he had erectile dysfunction and was sexually incompetent, and hence could not have raped PW1 as he was incapable of having carnal knowledge with a woman and that his wife was aware of this condition. He also added that he did not relate well with PW 4 as he used to play music at a loud volume and the appellant would warn him hence hated him as a result of that disagreement.

13. He called two witnesses to corroborate his evidence. DW2 was doctor James Nyabanda who stated that he knew the appellant and that he had been admitted at Nazareth hospital in November 2010 with difficulty in passing urine. He was diagnosed with benign prostatic hyperplasia and underwent surgery for the prostate using minimal invasive surgery. The doctor stated that prostatism is a condition of blockage of urine caused by the prostate being enlarged and blocking the passage of urine and it had no effect on the libido and did not cause incompetence.

14. The doctor testified that the appellant did not tell him of a condition that had affected his libido or ability to perform sexual activity neither did he bring it up during his post-surgery reviews and added that erectile dysfunction could be occasioned by castration, reduction of testosterone surgically or using medicine. He confirmed that the condition the appellant had, would not cause a reduction of testosterone levels. He stated that the surgery done on the appellant was not a castration surgery as that is undertaken on patients with prostate cancer and such surgery occasions 100% castration, of which they would inform the patient.

15. DW3 was the appellant's wife who stated that they had been married since 2001. She testified that she had known PW1 for the past 4 years. On June 12, 2012 at 9.00 am she was in the house, when she heard a knock on her door. The appellant was asleep in the house and her children had gone to school. She opened the door and she saw, the complainant, PW1 herein, who was familiar to her. She was in school uniform which was torn and her shoes were in her hands. Her bag was torn and her books were spilling out. She stated that PW1 asked for something to drink, she then sent her to the shop to buy mandazi as she prepared her black tea. Later, PW1 came back and told her that she was in a hurry as madam Veronica, the nursery teacher had called her for some task. PW1 told her that she had something to tell her but eventually ended up not telling her.

16. She stated that on June 14, 2012 while at her door, she saw PW1 opening a common toilet about 10 metres away and PW1 signaled her to go to her. According to her testimony, PW1 told her that madam Veronicah had convinced her to frame the appellant on rape charges since they had been chased by the company. She added that she knew PW1's guardian as she used to buy milk from her. When the guardian was asked to move out from the camp, she had DW3's debt which she refused to pay saying that DW3 was conceited. She added that the guardian had a grudge against her and PW1 told her that Veronica was jealous of the appellant's good life.

17. The trial magistrate found the ingredients of the offence of defilement to have been established and found the charge to have been proved beyond reasonable doubt and convicted the appellant, as charged. He was sentenced to 20 years' imprisonment.

18. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by G Ngenye, J. In the judgment dated June 7, 2017, the Judge upheld both the conviction and sentence, thus precipitating this second appeal.

19. The appellant lodged a notice of appeal on July 11, 2017 and has proffered the instant appeal by filing an undated ground of appeal containing 3 grounds. The grounds are that the Judge erred in law: by upholding the decision of the trial court yet the ingredients of the offence were not proved beyond a reasonable doubt; in failing to consider that the medical examination done to the appellant was not evaluated with the medical examination findings from the complainant and in failing to consider that the documents the trial court relied on, were not genuine and went against the provisions of section 66(1)(a)(b) and (c) of the *Evidence Act*.

20. The appellant has filed submissions that are undated but which have the thumbprint as the signature and which can be summarized as follows: that PW1's age was not proved as PW3, guardian to the complainant stated that PW1 was 16 years, and produced a birth certificate which was not served upon the appellant prior; and that the age assessment report produced by Dr Ndahera went against section 69 of the *Evidence Act* on notice to produce a document. He further submitted that he was not medically examined hence it was impossible to ascertain whether he committed the offence; that STI's did not feature in the P3 form and this raised doubts as to the veracity of the report; and that the doctor's evidence excluded important and crucial evidence. According to the appellant, the P3 document relied on as evidence was defective and did not have merit as it lacked medical officer's reference number and was produced with 3 copies instead of 4; that the two courts below disregarded his evidence about his condition of erectile dysfunction and that the courts did not consider his defence.

21. Mr Okachi, state counsel for filed submissions dated February 17, 2023. He submitted that the concurrent findings of fact by both the trial court and the High Court sufficiently supported the conviction of the appellant; that the grounds put forward in this appeal are largely factual and fall outside the realm of the 2nd appellate court and no good reason has been brought, to warrant the Court to disturb the facts as concurrently settled by both the trial court and High Court.

22. We have revisited the record on our own and considered it in light of the rival arguments set out in the submissions by the appellant and the response by the state. In our opinion, three issues arise for our consideration:

> 'Whether the first appellate court discharged its mandate properly, whether the ingredients of the offence had been proved beyond reasonable doubt, and whether the appellant's defense was disregarded.'

23. With regard to proof of defilement, the Judge concurred with the findings of the trial magistrate that the prosecution had indeed established to the required standard of proof, beyond any reasonable doubt that the complainant was penetrated. The trial magistrate held that:

> ' On penetration and the identity of the assailant, the critical testimonies were those of PW1 and PW2. In her testimony, PW1 said that she got to school at 7.00 am on June 12, 2012. She was thus late.

The record however indicates that PW1 under cross examination stated:-

> '1 felt pain. I saw some discharge. I bled a little.' Overall, PW1 was consistent even as her sworn testimony was subjected to intense cross examination by counsel for the accused person. She described the act and its aftermath in detail.'

24. The Judge, on the element of penetration held as follows:

> ' With regard to penetration, PW1 gave a candid account of how the appellant pulled her into the bush and defiled her. In an attempt to entice her not to disclose what had happened, he gave her Kshs 20/=. When the incident was known PW1 was taken to Tigoni Hospital where she was examined and it was confirmed that she had been defiled. Dr Susan Kerubo Omundi then working at Tigoni District Hospital examined her on June 13, 2012. She confirmed that her hymen was broken and that the injury was one-day old. This was consistent with the fact that she had been defiled on June 12, 2012. Her evidence thus proved penetration.'

25. The PW1 gave a detailed account of how the incident took place and squarely put the appellant at the scene of the crime. Additionally, the appellant was well known to PW1 and hence had no reason to fumble on his identity. Under section 124 of the *Evidence Act*, PW1's evidence on its own is enough to prove penetration and no corroboration was required.

26. The proviso to section 124 allows a court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. In this case, the evidence of the prosecution witnesses, together with the medical evidence, proved that PW 1 had been defiled and it was the appellant who had defiled her. Contrary to the appellant's assertions, penetration was thus proved.

27. The appellant's position is that the prosecution failed to prove the elements of the offence of defilement against the appellant. With regard to the age of the complainant, the Judge had this to say:

> ' Therefore, the evidence that the court needs to interrogate is whether the age assessment was properly done. The same was done by PW9, a consultant radiologist at Kenyatta National Hospital. The witness interpreted the X-ray images presented to him. He was therefore not required to physically see the patient. Moreover, he adequately expressed the methodology he used in arriving at PW1's age. He stated that the same was premised on the study of the skeletal structure of the patient on viewing the x- ray images. He was also candid that it was best that he did not see the patient because in his assessment, the images did not hinder his ability to act objectively. I accordingly hold and find that the age of PW1 was properly established.'

28. The trial magistrate, on this issue, held:

> ' Dr Wilson Ndaihera Ngobe (PW9) assessed the age of the alleged victim MN (PW1) as 15 years based on his assessment of the X-rays on August 29, 2013 PW1 gave her age as such. However, her guardian (PW3) gave the child's age as 16 years. Dr Susan Kerubo who examined PW1 on June 13, 2012 assessed her age at 15 years.
>
> Dr Ndaihera (PW9) based his assessment on the 'Radiographic Atlas of skeletal development of the hand second edition by Professor Willian Walter Greulich'.
>
> I am satisfied that PW9's assessment was that of an expert. His testimony was not shaken even under cross-examination. Based on the same, I find that there is no reasonable probability that the medical records (X-rays) which PW1 relied on were in any way tampered with.

I am thus satisfied that even as of June 12, 2012, PW1 was 15 years old as she stated.'

29. The appellant submits that the prosecution was keen on substituting the charge to have him convicted of 20 years instead of 15 years and posed the question, who ordered for the age assessment report yet the court did not? This assertion lacks basis as it is the appellant's counsel who objected to the production of the birth certificate by PW6. The trial magistrate in this regard held:

> ' According to PW3, PW1 was aged 16 years, whereas PVW1 (sic) had testified that she was 15 years. In my view, this minor contradiction was ousted by the candid medical age assessment adduced by PW9.'

30. It is not true, as asserted by the appellant, that the prosecutor's aim was to substitute the charge from Section 8(1) as read with 8(4) to section 8(1) as read with section 8(3) so that the appellant could serve 20 years instead of 15 years. It was the appellant's counsel, Mr Amendi that objected to the production of the birth certificate and not the prosecution as alleged by the appellant. An expert witness, PW9 came and gave the age assessment to be 15 years and both the trial court and High Court correctly relied on that age in their holdings. We are satisfied that the age of the complainant was proved by an expert who explained how he did the age assessment. We find no reason to disturb that finding.

31. The other ground raised in the appeal concerns the alleged failure by both courts below to consider the appellant's defence of erectile dysfunction adequately. The Judge in rejecting the appellant's defence considered the evidence given by the doctor DW2, who had been called by the appellant as a witness, and observed that as held by the trial magistrate, the appellant could still have sexual intercourse. She reviewed the evidence and found as a fact that the appellant's defence was not plausible. The Judge then concluded that:

> ' The defence further submitted that the appellant's defence was not considered. Counsel pointed to the appellant's defence that he was not capable of defiling PW1 on account of his erectile dysfunction which the learned magistrate dismissed. The appellant chose to call DW2, Dr James Nyabanda, a consultant surgeon at Nazareth Hospital. This is the hospital where he was admitted for a surgery on presenting himself with difficulties passing urine. The surgery was successfully done and the blockage removed.
>
> In the witnesses' opinion, he was candid that the appellant made full recovery and that his condition did not occasion loss of libido or erectile dysfunction.
>
> He also testified that the condition did not cause a decrease in testosterone which would otherwise cause erectile dysfunction. The learned trial magistrate therefore properly arrived at a finding that the appellant's defence was contradictory and did not absolve him from the offence. More specifically that he was in a position to have sexual intercourse.'

32. From the holding, it is evident that, that ground was canvassed before the Judge. The Judge considered his defense in great detail and found that it did not absolve him from culpability and just because the holding did not go his way, did not mean that his defence was disregarded. This ground thereby fails.

33. It was the appellant's contention that he was not subjected to any medical examination and thus asserted that there was no link between him and PW1. The trial magistrate on this argument found:

> ' Further, that the accused was not medically examined or such examination results produced in court is not fatal. The same results probably were of no probative value.'

34. We agree with the trial court that this was neither a pre-requisite to the offence being proved nor was it an ingredient of the offence that was required to be discharged by the prosecution. This Court in *Fappyton Mutuku Ngui vs Republic [2014] eKLR* held:

> ' 27. The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.

35. In *Aml v Republic [2012] eKLR* (Mombasa), this Court upheld the view that:

> ' The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.
>
> This was further affirmed in the case of *Kassim Ali v Republic Cr App No 84 of 2005* (Mombasa) where the court stated:
>
> > '[The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.'
>
> The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.'

36. It is instructive to note that the law on Sexual Offences is also proved by the evidence tendered by the prosecution and is not only dependent on the examination of the perpetrator. So that if the trial magistrate believed the testimony of the victim on the identity of the perpetrator, the evidence is sufficient to support the conviction. Defilement can be proved by the oral evidence of the victim or by circumstantial evidence. We note that the complainant explained how she was grabbed and dragged by the appellant and how the sexual assault took place. Immediately after the incident, PW2 saw the appellant with the complainant, the events leading to his arrest were well explained and the medical evidence was clear. The appellant's attempt to depict himself as a sympathetic Good Samaritan who also purported to be sexually immobile collapses in the face of the evidence that was adduced by the prosecution.

37. We note that the Judge considered in great detail every complaint the appellant raised on appeal before her. She gave sound reasoning for her holding and the reasoning was well balanced and we find no fault in the approach taken by the Judge. We agree that both courts below arrived at the correct conclusion as to the appellant's culpability.

38. Having dealt with the above issues, the upshot of the foregoing is that the appeal fails on each and every ground.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR