Ndung'u v Republic (Criminal Appeal 3 of 2015)
[2023] KECA 991 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 991 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 3 OF 2015

F SICHALE, FA OCHIENG & WK KORIR, JJA

JULY 28, 2023

BETWEEN

JACOB KAHIGA NDUNG'U ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (J. N. Mulwa, J.) dated 22nd October, 2014 in HC.CR.A. No. 162 of 2013)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Nakuru (J N Mulwa, J). The appellant was charged with the offence of defilement on four counts contrary to section 8(1) as read with section 8(2) & (3) of the Sexual Offences Act No 3 of 2006. The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11(1) of the *Act*, on four counts. At the conclusion of the trial, the appellant was convicted in all the four counts. The appellant was sentenced to life imprisonment on counts 1 and 4 and to 20 years' imprisonment on counts 2 and 3. The sentences were to run concurrently.

2. The particulars of the offences were; in count 1, on unknown dates between May 2011 and June 2011 at an unknown time, within Nyandarua county, the appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate the female organ (vagina), of FWN (name withheld), a child aged 9 years old. The alternative charge was the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. In count 2, on unknown date in May 2011 at around 1:00 pm and on June 4, 2011 at around 10:00 am, within Nyandarua county, the appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely anus, of EMM (name withheld), a child aged 12 years old. The alternative charge was the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. In count 3, on unknown dates in April 2011 at an unknown time, within Nyandarua county, the appellant intentionally and unlawfully

caused his genital organ, namely penis, to penetrate the genital organ, namely anus, of HGK (name withheld), a child aged 12 years. The alternative charge was the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. In count 4, on unknown dates in April 2011 at an unknown time, within Nyandarua county, the appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely anus, of PK (name withheld), a child aged 11 years. The alternative charge was the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The prosecution's case was that; PW1 (complainant in count 1), PW4 (complainant in count 2), PW5 (complainant in count 4), and PW8 (complainant in count 3), were school going children aged 9, 12, 10 and 12 years respectively. They were pupils at [Particulars Withheld] Primary School.

4. PW1 stated how on June 30, 2011 at around 4:00 pm the appellant, who lived near their home sent her to fetch water for him at the water point. She obliged. When she brought the water, she entered the appellant's house. She told the court that the appellant did bad manners to her on his bed. She felt bad, she also bled from her private parts. She went home and told her mother. Her mother took her to hospital. PW1 told the court that she would fetch water for the complainant, and he would pay her Kshs 10/-. She also mentioned the other three children who would come to the appellant's house and they were also defiled.

5. PW1 disclosed to her guiding and counselling teachers, who had met her on the road twice while she was going to the hospital, that the appellant, whom she knew had been defiling her and the three boys, and four other pupils who were not parties to this case. The complainants' parents were informed of the incident and the matter was later reported to the police. On examination, the PW1's hymen was found to be broken.

6. PW4 stated that the appellant asked him to fetch water. The appellant then gave him food and took him to his house, where he forcefully removed PW4's trousers and did "bad manners" to him. This happened on three occasions. On the last occasion, the appellant defiled PW4 and his companions; J and N. The appellant threatened to kill him if he told anyone.

7. PW5 stated that he knew the appellant prior to the incident. He informed the court that he had gone to take the donkeys to feed near the appellant's home when the appellant called him to his house. The appellant removed his clothes and did "bad manners" to him using his penis, which he inserted in PW5's anus. He felt pain and screamed. The appellant threatened to kill him if he told anyone.

8. PW8 stated that he had been sent to collect milk from the appellant's place by his neighbor by the name, L. He was with M, L's son. The appellant offered them tea, he then carried PW8 to the bed, removed his trousers and inner wear did "bad manners" to him through his anus. The appellant threatened to kill him if he told anyone.

9. The appellant in his unsworn statement of defence denied having committed the offence. He blamed his three sons; Joseph Mungai Kahiga, Chege Kahiga and Macharia for framing him, so they could sell his land and cows. He stated that his sons had beaten him in 2007 and demanded for a land title. In 2008 Joseph claimed that he had seduced his daughter and Mungai claimed that he defiled his son. However, the appellant did not answer to the individual charges against him. He did not establish the link between his sons and the complainants. Indeed, the appellant did not cross- examine any of the complainants concerning the alleged connection with his sons.

10. The learned Judge held that the appellant was well known to the complainants, they used to fetch water for him for pay. Given that the complainants were young children; they would not ordinarily have issues or grudges against the appellant. The learned Judge also held that the teachers and the parents

of the complainants had no reason to frame the appellant. The learned Judge held that the appellant was not telling the truth in his defence. He did not rebut the complainants' testimonies, but he instead blamed his sons for framing him. There was no evidence that the complainants had been beaten and coerced to tell lies against the appellant by their teachers.

11. The learned Judge noted that there was no proof of the ages of the complainants. There were no birth certificates, ante-natal or hospital cards, and no age assessment was done. The trial court had relied on the complainants' testimonies on their respective ages and the fact that they were in class three, and concluded that they must have been ages 9 to 12 years. The learned Judge held that since the sentence meted against the appellant corresponded with the court's assessment and finding on the age of up to 15 years, and that the trial court had had the occasion to see the complainants and assess their ages based on their evidence; there was no reason to interfere with the trial court's finding on the complainant's ages. The learned Judge also held that the medical evidence pointed to the defilement of the complainants by the appellant.

12. The learned Judge held that the appellant had not demonstrated to the court how, and in what manner the charge sheet was defective. The particulars thereof were clear and the appellant had no difficulty during the trial. The learned Judge further held that after re-evaluation of the evidence, there was no shred of contradiction or inconsistency; all the witnesses corroborated each other's evidence. The appellant's claim that his defence was not considered was neither here nor there.

13. The learned Judge faulted the trial court for failing to interrogate further the ages of the complainants. She however noted that from the testimonies, the ages of the complainants were between 9 to 12 years. Therefore, the learned Judge found no reason to interfere with the finding of the trial court on sentencing. Consequently, the appeal was dismissed.

14. Dissatisfied, the appellant lodged the appeal before this court, and he relied on his amended supplementary grounds of appeal. The grounds were to wit that: the conviction was unsafe in light of Section 198(1) of the *Criminal Procedure Code*; the appellant's fundamental rights under Article 25(c) and 50(4) of the *Constitution* were violated; the plea and judgment were contrary to Section 169(1) of the *Criminal Procedure Code*; the prosecution did not prove penetration beyond reasonable doubt as provided for under Section 2(1)(6) of the Sexual Offences Act; the age of the complainants was not conclusively proved; the learned Judge was in breach of Section 6 of the *Evidence Act* on circumstantial evidence; and the life sentence meted on the appellant was contrary to Articles 27 and 50 of the *constitution*.

15. At the hearing of the appeal, the appellant was in person while the state was represented by Ms. Korosi. The parties relied on their respective written submissions.

16. The appellant was of the view that the use of the words "ENG/KISW" at the time when he took the plea was ambiguous. He stated that the rest of the proceedings were in English, a language which he did not understand and he was therefore unable to fully participate in the proceedings. His language of choice was Kikuyu. He contended that he was not accorded an interpreter. The appellant submitted that as a result, he was prejudiced. The appellant also submitted that the *ratio decidendi* and the judgment were not binding, and this perverted the course of justice. However, he did not elaborate or clarify on what he meant by that.

17. The appellant pointed out the inconsistencies in the dates when he was arrested and when PW1 was taken to hospital. He wondered why PW1's mother threw the blood stained clothes in a pit latrine, and even after examining PW1, she did not take her to hospital immediately and waited for the following day. He urged the court to disregard the evidence of PW1 and her mother as the said evidence was not

credible. He acknowledged that PW1's hymen was broken but contended that the age of the injury was not indicated.

18. The appellant further pointed out that the ages of the complainants were not proved conclusively. He faulted the learned Judge for so finding and also proceeding to uphold the conviction and sentence. He submitted that his evidence of an existing grudge could not be overlooked.

19. On whether the offence of defilement had been proved against the appellant beyond reasonable doubt, the learned senior prosecution counsel relied on the case of *Simon Ngole Katunga v Republic* [2020] eKLR in which penetration was defined as the partial or complete insertion of the genital organ of a person into the genital organ another person. The case also stated that; to prove defilement, the prosecution must lead evidence to establish the identity of the perpetrator, age of the complainant and penetration.

20. Counsel submitted that the PW1 stated that she was 9 years old and in standard 3; PW4 stated that he was 12 years old; the PW8 stated that he was 12 years old; and the PW5 stated that he was 10 years old. This evidence was corroborated by the evidence of their parents as well as the clinical cards which were produced as exhibits. The age of PW1 was indicated as 9 years in exhibit 5.

21. Counsel further relied on the testimony of PW12 who testified with respect to the P3 form and confirmed that indeed the PW1 had been defiled. She had a broken hymen, while the other three complainants had already healed at the time of examination. Counsel maintained that the evidence of the complainants and that of PW12 was sufficient proof of penetration. In support of the submissions counsel relied on the decisions in *Mark Oiruri Mose v Republic* [2013] eKLR and *Dennis Osoro Obiri v Republic* [2014] eKLR.

22. Counsel pointed out that the appellant was well known to the complainants. They all came from the same area [Particulars Withheld] village. The appellant was a neighbor to PW5 and his father. Their lands bordered each other. The appellant was also a neighbor to PW1 and her mother.

23. It was the respondent's case that this was not a case where the court relied on the evidence of a single witness. The evidence of the complainants was corroborated by the evidence of PW6, PW7, PW9, PW10, PW11 and PW12. It is the respondent's further contention that the appellant did not raise any complaint during trial or the first appeal, that he was not able to understand the proceedings or the charges against him. The appellant cross-examined the prosecution witnesses and gave an unsworn testimony.

24. Relying on the decision in the case of *Abdalla v Republic*, Criminal Appeal No 44 of 2018, the respondent submitted that the sentence meted on the appellant was legal. None of the appellant's rights were violated, the judgement was written in the language of the court, and the appellant has failed to demonstrate how the principles in Section 6 of the *Evidence Act* were breached.

25. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In doing so we are alive to our duty as a second appellate court. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

> " 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."

26. We have carefully considered the record of appeal, the written submissions by both parties, authorities cited and the law. The issue for determination is whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.

27. The following issues have been raised before this Court, but they were not raised before the first appellate court; the issue of interpretation of the language used by the court, violation of the appellant's rights, and the interpretation during plea and judgment. We hold that an issue cannot be raised before us, unless the appellant can demonstrate that he had raised the said issue but the court had failed to make a determination on it or it is a matter of law. Be that as it may, the record is consistent that the language used was English and the same was translated to Kiswahili. The appellant also testified in Kiswahili and cross-examined in Kiswahili. He cannot now turn and state that he did not understand the proceedings or the judgment. The appellant has also not demonstrated how his rights were violated.

28. The *Sexual Offences Act* sets out the elements of the offence of defilement as follows: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients.

29. A perusal of the record shows that the trial court conducted voire dire on the complainants. PW1 stated that she was 9 years old, born on August 7, 2002; that was corroborated by the Immunization Card. PW4 stated that he 12 years old, born on August 10, 1999; that was corroborated by the Immunization Card. PW8 stated that he was 12 years old, born on October 25, 1999; that was corroborated by the Immunization Card. PW5 stated that he was 10 years old, born on August 15, 2001; that was corroborated by the Immunization Card. The clinical Immunization Cards were produced in evidence. PW6, PW9 and PW10 corroborated the evidence of their respective children, concerning their dates of birth. Therefore, the learned Judge erred in holding that there was no documentary evidence for guidance on the ages of the complainants. We find that the ages of the complainants were sufficiently proved.

30. The evidence of PW1 concerning the incident, was also corroborated with the evidence of her mother, who saw her bleeding and even threw the bloodstained clothes in a pit latrine and PW12 who confirmed that PW1 had a torn hymen. We find this evidence to be sufficient proof of penetration. It is on the strength of the complainants' evidence who each described their respective encounters with the appellant, and the trial court found them to be truthful; as corroborated by the medical evidence of PW12, that we find that penetration was proved.

31. As regards the identity of the appellant, we note that he was well known to the complainants. He was their neighbour and they would occasionally assist him in fetching water for pay. The complainants recognized him.

32. In the result, we find that all the ingredients of the offences of defilement were proved beyond reasonable doubt. Each of the complainants was a child; and they were defiled by the appellant.

33. From the foregoing, we have absolutely no doubt that the appellant's conviction was safe.

34. The appellant contended that the life sentence meted upon him was unconstitutional. On the other hand, the respondent maintained that the sentence was legal. Section 8(2) of the *Sexual Offences Act* provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

35. While Section 8(3) of the *Sexual Offences Act* provides:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

36. This Court in the case of *Christopher Ochieng v Republic* [2018] eKLR stated thus:

> " In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ..... Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic* (*supra*), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

37. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

38. In the instant appeal, we have given due consideration to the evidence on record and the circumstances of this case. The appellant is a serial paedophile. He preyed on young children, who were his neighbours. We hold the considered view that the children and the society is safer, when the appellant is kept behind bars. Therefore, there is no basis upon which we could intervene on the sentences, in order to uphold justice. If anything justice is best served by sustaining the respective sentences, as we now hereby do.

39. The upshot is that the appeal against conviction and sentence is without merit and is hereby dismissed.

Orders accordingly.

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

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR