Njuhigu v Republic (Criminal Appeal 52 of 2021)
[2023] KECA 814 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 814 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 52 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 7, 2023

BETWEEN

ISSAC NJUGUNA NJUHIGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Nairobi (Mbogholi-Msagha, J.) delivered on 17th July 2014 in Nairobi HCCA No. 22 of 2012)

JUDGMENT

1. This is a second appeal from the decision of the trial magistrates' court delivered on 5th August 2011, where the appellant, Issac Njuguna Njuhigu was charged with the offence of defilement of a child aged 13 years 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 4th June, 2010 at Banana, Kiambu District, in the former Central Province he unlawfully and intentionally committed an act that caused penetration with his genital organ (penis) into the genital organ (anus) of SK (PW 2) a boy aged 13 years old.

2. The appellant pleaded not guilty, and during the hearing, the prosecution called 4 witnesses. After a full trial, the court found the appellant guilty and convicted him of defilement, and sentenced him to 20 years' imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court, and upon considering the appeal, the learned judge upheld both the conviction and sentence.

4. Aggrieved by the decision, the appellant filed an appeal to this Court on grounds that the learned judge wrongly misconceived the import of section 124 of the *Evidence Act* yet the complainant was not the sole witness; that the learned judge failed to re-evaluate the committal bundle as required by Article 165(7) of *the Constitution*, and further misconstrued whether the sentence was with respect to the felony of sodomy or defilement; in failing to appreciate that the prosecution withheld crucial

information that would have aided the appellant prepare his defence; and in failing to appreciate that the charges were duplicitous.

5. The appellant filed written submissions and when the appeal came up for hearing he appeared in person from Kamiti Prison, and informed us that he would be relying on them in entirety. In the submissions, it was submitted that, the first appellate court misconstrued section 124 of the *Evidence Act* and further, wrongly held that calling Alice Wambui and Lelesaka Masai to testify would not have added value to the prosecution case or aided the appellant since the case related to a sexual offence where the evidence of the complainant was sufficient to prove the charge against the appellant. The appellant argued that section 124 of the *Evidence Act* can be relied upon only if the alleged victim of the sexual offence was the only witness capable of adducing evidence.

6. The appellant further submitted that his rights under Articles 35(2), 50 (2)(c) and (j) of *the Constitution* and section 147 of the *Evidence Act* were violated, because the integrity and credibility of PW1 was questionable, and furthermore, that he was not supplied with the statements and documentations to enable him to prepare his defence which was prejudicial to him.

7. Finally, it was submitted that the prosecution did not prove its case to the required standards and as a consequence, the conviction was not safe.

8. Learned State Counsel, Mr. O.J. Omondi opposed the appeal, simply submitting that, the prosecution proved its case to the required standard. The Court was urged to uphold the conviction and sentence.

9. The mandate of this Court on a second appeal is limited to matters of law only as specified by section 361 of the *Criminal Procedure Code*.

10. In the case of *Dzombo Mataza v Republic* [2014] eKLR this Court reiterated;

> " As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court....
>
> By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code*, our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

11. Guided by these dictates, we consider the following issues fall for determination;

    i. whether the appellant's rights to a fair trial under Articles 35 and 50 (2) (c) and (j) of *the Constitution* were not complied with;

    ii. whether the offence of defilement was proved to the required standards

    iii. whether the sentence was improper.

12. As to whether the prosecution failed to supply the appellant with the witness statements in time to enable him to prepare his defence in violation of Article 50 (2) (c)and (j) of *the Constitution*, we begin by observing that in his appeal to the High Court, the appellant did not raise this ground, and therefore there was no determination on the alleged violation.

13. In the case of *John Kariuki Gikonyo v Republic* [2019] eKLR, this Court stated thus;

> "(17) ....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR Criminal Appeal No 203 of 2009; held as follows:
>
> "…. the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."
>
> (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

The prosecution's duty of disclosure was addressed by this Court in the case of *Thomas Patrick Gilbert Cholmondeley v Republic*, [2008] eKLR, where it was held that the prosecution should provide an accused person, in advance of the trial, with all relevant material such as copies of statements of witnesses who will testify at the trial, and copies of documentary exhibits to be produced at the trial.

14. In the present case, the record shows that the trial magistrate ordered that the appellant be supplied with the witness statements. However, the record is silent on whether he obtained them before the hearing. However, on the hearing date, he indicated that he was ready to proceed and thereafter fully participated in the trial and cross examined all the witnesses.

15. This Court in the case of *Simiyu v Republic* (Criminal Appeal 49 of 2018) [2021] KECA 295 [KLR] while dealing with a similar argument stated;

> "On alleged infringement of the appellant's rights under Article 50(2)(j) of *the Constitution*, we agree with the State's observation that the record is silent as to whether the witness statements were ever requested for by the appellant. It is however evident from the record as also correctly observed by the State that no complaint was raised with regard to this issue by the appellant at the trial. It is also rejected for the same reason firstly as being belated as he fully participated in the proceedings up to its logical conclusion and secondly, it similarly amounts to an invitation for us to reappraise the facts which we are in law enjoined not to do in the absence of demonstration that these were either misapprehended or mis- appreciated by the two courts below and the law misapplied to them, a position not demonstrated herein."

16. As outlined above, the trial court ordered that the appellant be issued with the witness statement, and in the absence of any complaint from him at the time, and given the manner in which he conducted himself during the trial, we find that no violation was established as alleged. This issue therefore fails.

17. Turning to whether the offence of defilement was proved to the required standard, we will begin by briefly laying out the evidence that was before the trial court.

18. Richard Munene, (PW1), a clinical officer testified that he examined SK who claimed to have been defiled by a person known to him on 8th June 2010. The examination disclosed that he had multiple tears of the anal erifile and that the area was red and dilated. He concluded that the injuries were consistent with defilement, in other words, he was sexually assaulted. An age assessment of SK was also undertaken, and his age was assessed as 13 years old. The clinical officer completed a P3 form and produced it together with SK's age assessment report.

19. After the conduct of a *voir dire* examination, SK (PW2) gave sworn evidence that on 4th June 2010, he was sent by his mother to buy cooking oil from the shop at Banana. He returned about 7.00 pm and because he was afraid of being beaten by his mother for returning home late, he ran away to Banana, where he took up some manual jobs. He met one Alice Wambui who introduced him to one Maasai who offered him accommodation. He later met the appellant, a hand cart pusher whom he used to see at the bus park on the material day, the appellant offered him a job and they worked together the whole day until about 7.00 pm, whereafter, the appellant offered him accommodation for the night which he accepted. As they were walking to the appellant's home, the appellant directed him onto a path through some tall grass. There he showed him a knife and said,

> " Usitoroke. Ukuje hapa na utoe nguo zote na upige magoti nikiinua matako juu". (Don't run away. Come here and remove all your clothes and kneel down with your buttocks facing up".

20. SK did as he was ordered, whereupon, the appellant put saliva on his penis, and on SK's buttocks and inserted his penis inside his anus. When he finished defiling him, the appellant threatened to kill him if he reported the incident to anyone and then left. He was able to crawl back to Maasai's house, where he told Masaai what had happened to him. The next day he met his father and after narrating his ordeal, his father took him to the hospital for treatment and the matter was reported to the police.

21. In cross examination, SK confirmed that it was the appellant who defiled him; that he had helped him push the cart for the whole day and could recognize him.

22. PW3, SK's father stated that SK was aged 13 years; that he was called by one Alice Wambui who informed him that SK had been sodomized at Banana, and that he was staying with one Maasai. When he located him, SK confirmed that he had been sodomized by the appellant. Thereafter he reported the incident to the police and took SK to hospital for treatment.

23. PC Tom Odhiambo, (PW4), of Karuri police Station, crime office was the Investigating Officer to whom the incident was reported on 7th June 2010 by SK and his father. He took SK to Karuri Health centre where he was examined and issued with the P3 form. Later on, accompanied by PC Abisai, PC Muhinga, and SK, they proceeded to the scene in Ngeche area where SK said he had been defiled. The place was about 400 metres from the main road near a river in some napier grass, where the grass appeared to have been disturbed. He thereafter narrated the events leading to the appellant's arrest. He stated that he also recorded the statements of Alice Wambui and also Lelesaka (Maasai) but was unable to trace them at the time of the hearing, as they had moved away from the area.

24. In his defence, the appellant denied the allegations stating that he did not commit the offence and that the basis of the entire case was malice hatred of SK's family toward him.

25. So as to establish the offence of defilement the prosecution requires to prove three main ingredients, these being; the age of the victim (must be a minor), penetration, and the proper identification of the perpetrator.

26. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* which provides;

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

27. In the case of *John Mutua Munyoki v Republic* [2017] eKLR this Court held that;

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> I. The victim must be a minor
>
> II. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

28. On the element of age, in the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR this Court held that;

> " ...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

29. In the instant appeal PW1, the clinical officer testified that SK was 13 years old at the time of the alleged incident. His evidence was corroborated by SK's father who also produced an age assessment report evidencing his age. Consequently, SK's age was sufficiently proved.

30. Regarding the second ingredient of penetration, the appellant contended that SK was not a credible witness, and therefore the trial court ought not to have believed his evidence so as to rely on section 124 of the *Evidence Act* to convict him; that additionally, since crucial witnesses were not called to testify, the prosecution did not prove that penetration occurred.

31. In the case of *JMM v Republic* [2020] eKLR this Court held that;

> " On whether some witnesses were left out of the trial we note that the charge facing the appellant related to a sexual offence.
>
> The proviso to Section 124 of the *Evidence Act* permits a trial court to accept the testimony of a victim of sexual offence if the same is believable and such evidence may be accepted without corroboration. In the case before the trial court PW1 informed her mother PW2 as soon as she returned home that morning that she had been defiled by the appellant that night. Medical evidence confirmed that defilement had taken place. The case was proved by the prosecution to the required standard in law.

32. In this case, SK testified how he had worked with the appellant the whole day and thereafter was invited to the appellant's house. He graphically described how on the way there, the appellant led him into some napier grass and sexually assaulted him. Having seen and heard SK's testimony, the trial magistrate, had this to say;

> " The complainant appeared truthful and his demeanour was not that of a coach to witness (sic). The complainant appeared traumatised as he recalled the events surrounding the case".

33. It is evident from the above that the trial magistrate's assessment of SK was that he was a truthful and believable witness, and in so finding, the court did not have any hesitation in relying on his evidence to convict the appellant. As were the trial court and the High Court, we too are satisfied that SK's detailed and candid evidence was sufficient to prove that there was penetration.

34. Having so found, was penetration proved?

35. Under section 2 of the Act, "penetration" is defined as;

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

36. And related to this, "genital organs" are defined in section 2 to include the whole or part of male or female genital organs, including the anus.

37. When faced with similar circumstances this Court in the case of *Alex Wambani Joseph v Republic* [2020] eKLR held that;

> " On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. It was confirmed by the Clinical Officer, Munene, that the complainant's anus was tender, slightly dilated and had deep cuts and that the nature of the offence was defilement. Munene testified that from the diagnosis carried out, there was evidence of penetration. The two courts below cannot therefore be faulted for relying on the medical evidence that was adduced to conclude that there was penetration."

38. According to SK, the appellant inserted his penis in his anus. This was corroborated by the evidence of the clinical officer whose examination of SK disclosed multiple tears of the anal erifile, and that the area was red and dilated. Essentially, therefore, given SK's clear description of the incident, and having regard to the medical evidence that identified the nature of injuries SK sustained, we are satisfied that penetration of SK by the appellant was effectively proved.

39. On the failure to call witnesses, section 143 of the *Evidence Act* is explicit that no particular number of witnesses in the absence of any provision of law to the contrary is required to prove any fact.

40. In the case of *Benjamin Mbugua Gitau v Republic* [2011] eKLR it was held that;

> " This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the *Evidence Act* Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

41. The appellant complained that one Alice Wambui and Joseph Lelesaka (Maasai) who had offered SK accommodation while he was away from home should have testified. But from a re-evaluation of the record, neither of the two witnesses saw the appellant sexually violate SK. It was SK who told them

what had happened to him. The learned judge took the view, and rightfully so, that calling them as witnesses would not have added any value to the prosecution's case as they would have simply narrated the events as told to them by SK. Furthermore, the Investigating Officer testified that he was unable to locate them as they had since moved away from where they were residing. Without the two witnesses having seen what transpired on the material day, as did the High Court, we also find that their failure to testify would not have enhanced the prosecution's case, and neither did it occasion a miscarriage of justice to the appellant. This ground fails.

42. On identification of the perpetrator of the offence, this Court in the case of *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, stated that identification should be free from error, having regard to all the surrounding circumstances.

43. In the present appeal, the appellant introduced himself to SK, and the two worked together the whole day until 7.00 p.m. SK had previously seen the appellant at the bus park pushing his cart before the incident. In view of his having seen the appellant on other occasions, and on account of SK having worked with him for a considerable period in broad daylight on the material day, this was clearly a case of recognition and not identification of a stranger. See *Patrick Muriuki Kinyua & another v R* [2015] eKLR. Without doubt, just like the courts below, we are satisfied that the appellant was properly identified given the prevailing conditions and circumstances which enabled his identification.

44. From the foregoing, the ingredients of the offence of defilement were proved beyond reasonable doubt which rendered the conviction safe. And just like the High Court, we too uphold the conviction.

45. Finally, on the sentence imposed, in his oral submissions, the appellant urged that we review the sentence imposed of 20 years since he was remorseful and had reformed his ways. He prayed for another chance.

46. Section 361(1) (a) of the *Criminal Procedure Code* provides that, "...severity of sentence is a matter of fact". The only instance when a second appellate court can consider an appeal on sentence is where the sentence is illegal, or one that cannot be justified given the offender personal circumstances, for instance the age or such other special circumstances. In this case, the sentence meted out was as prescribed by law and we have no reason to interfere with it.

47. In sum, the appeal fails in its entirety and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

A.K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR