Kinuthia v Republic (Criminal Appeal 56 of 2020)
[2023] KECA 1272 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1272 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 56 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

DENIS KINUTHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 23rd October 2019 in High Court Criminal Appeal No. 16 of 2018)

JUDGMENT

1. In this second appeal, Denis Kinuthia, the appellant, is challenging the judgment of the High Court at Malindi (R. Nyakundi, J.) delivered on October 23, 2019 upholding the judgment of Magistrate's Court at Kilifi in which he was convicted for the offence of defilement contrary to section 8(1) and (4) of the *Sexual Offences Act* and sentenced on August 25, 2017 to a prison term of 15 years.

2. The appellant complains that High Court erred in failing to find that the ingredients of the offence, namely, identification, penetration and the age of the complainant were not proved; that the evidence was contradictory; that the complainant was not truthful; and that the sentence, a mandatory sentence, is harsh and excessive and his mitigation was not considered.

3. The facts as established by the two courts below are that the complainant, EPK whose age was stated in the charge sheet to be 15 years, was sent home from school on account of fees. Instead of going home, EPK, moved in with the appellant and stayed with him for a week between March 14, 2016 and March 20, 2016. It was her testimony that she knew the appellant and was in a relationship with him for 4 months.

4. According to the complainant's mother (PW3) and grandmother (PW2), the complainant disappeared from home for a whole week from 14th March following which they made a report to the Chief and to the police and based on investigations found the complainant at the appellant's house.

5. Suleiman Said (PW4), a neighbour to EPK's family got information from EPK's father about her disappearance. He accompanied EPK's father and PW2 to the appellant's house where they saw EPK. He stated:

> " We saw Eunice in the house. The girl's father called her. She came out. The door was closed. She opened. We took her to Dennis' mother home and told her we had found her inside Dennis's house. Eunice tried to run. We held her and tied her hands. We went to the village elder."

He stated that the appellant was later arrested.

6. Corporal Clara Bingo (PW5) of Kilifi Police Station where the appellant was taken, was the investigating officer. She directed EPK to be taken to hospital for examination. She stated that the PRC and P3 Form showed that the child had been defiled and that she then preferred charges against the appellant. She stated that her investigations revealed that the complainant was found in the appellant's house. PW5 produced the clinic card relating to the complainant which indicated her date of birth as March 12, 2000.

7. On behalf of his colleague Dr. Suchra who examined EPK at Kilifi District Hospital, Dr. Noor Mohamed (PW6) of the same hospital produced the P3 form. It showed that EPK's hymen was broken, was rugged and vagina bruised, and that blood spots present were consistent with penetration. He also produced PRC Form on behalf of Nelly Ndungu who had prepared it.

8. In his defence, the appellant stated that he hails from Mkoroshoni, that on 21st (presumably of March 2016) he was at home working when his friend, one Omari, invited him for his birthday; that he went there at 4.00 p.m.; that people who he did not know "came and told me we go home" and he accompanied them to a palm wine pub; that at the pub he met "Mzungu" and they hired a tuk tuk which, instead of taking him home, took him to the police; that he was then taken to court on March 29, 2016 where he denied the charges. He stated that the complainant stated that she had two boyfriends, Evans, and Dennis; that although she said she was a student, there was no evidence that she goes to school; and that the doctor did not give evidence of the age of the child. He denied that he committed the offence.

9. The trial magistrate was satisfied that the prosecution had established all the ingredients of the offence; that the complainant's age was established to be slightly over 15 years based on the birth notification; that the appellant was well known to the complainant and stayed with him for a week; and that the medical evidence established she had been defiled.

10. On the appellant's first appeal, learned Judge of the High Court was also satisfied that all ingredients of the offence of defilement and upheld the conviction and sentence.

11. During the hearing of the appeal before us on May 16, 2023, the appellant who appeared virtually from Manyani Prison, relied entirely on his written submissions which amplified his grounds of appeal. Learned senior principal prosecution Counsel Miss. A. Fuchaka also relied entirely on her written submissions urging that the evidence tendered by the prosecution was cogent and established its case beyond reasonable doubt.

12. In a second appeal such as this, our mandate under section 361 of the *Criminal Procedure Code* is limited to a consideration of matters of law only. In *Karani v R* [2010] 1 KLR 73 the Court express that:

> " 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."

13. As already stated, the appellant's grievances with the decision of the High Court is that it erred in failing to find that the ingredients of the offence, namely, identification, penetration and the age of the complainant were not proved; that the evidence was contradictory; that the complainant was not truthful; and that the sentence is harsh and excessive and his mitigation was not considered.

14. There are concurrent findings by the trial court and the High Court that the ingredients of the offence of defilement were proved to the required standard and consequently, we have a duty, as stated in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 [2010] eKLR

> "...to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

15. The testimony of the complainant left no doubt that the appellant was a person well known to her, was in a relation with him for months, and lived with him in his house over a period of a week and had sexual relations with him over that period. In the complainant's words:

> " On 14th March 2016-March 20, 2016, I was staying with the accused. We had sex. He called me to go to his home. He told me to sleep there. I slept there for one week. My parents found me at the place we went to the police. I wrote statement. I went to the hospital. I was told I was five months pregnant. We had a relationship with the accused for 4 months. The pregnancy is his."

16. The fact that the complainant was found at the appellant's house was corroborated by the testimony of her mother (PW3), her grandmother (PW2) and by the neighbour (PW4) who traced and rescued her from the appellant's house.

17. As regards penetration, over and above the testimony of the complainant in that regard, there was Post Rape Care (PRC) form and the Medical Examination Report by Dr. Suchra of Kilifi District Hospital (produced before the trial court on her behalf by PW6) who examined the complainant and observed that her hymen was broken and that her "vagina was bruised and had blood spots which is consistent with penetration".

18. The age of the complainant was stated in the charge sheet to be 15 years. Her testimony was that she was in primary school in class 5. Her mother PW3 stated that her daughter "is 15 years". The investigating officer, Corporal Clara Bingo, produced a clinic card relating to the complainant indicating her date of birth as March 12, 2000. The complainant was therefore just past the age of 15 years on 14th March 2016.

19. In the result, the findings by the trial court and the High Court that the ingredients of the offence were proved to the required standard are well supported by the evidence and we have no basis for interfering with the same.

20. On sentence, Section 8(4) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. The trial court, as already indicated, sentenced the appellant to serve 15-year imprisonment which the High Court upheld on the basis that it was lawful. The appellant asserts that the sentence is harsh, and that Section 8(4) of the *Sexual Offences Act* has the effect of depriving the trial court of discretion in sentencing.

21. The learned Judge of the High Court considered the matter of sentence in the context of the Supreme Court decision in *Francis Karioko Muruatetu and another v Republic*, S C Petition No. 15 consolidated with SC Petition No 16 of 2015 [2016] eKLR to the extent that mandatory sentences take away the discretion of the court to take into account mitigating factors of each case and deny convicts the chance to mitigate before concluding that the sentence imposed by the trial court was lawful and upholding the same. Apart from the consideration that under section 361(1)(a) of the *Criminal Procedure Code* severity of sentence is a matter of fact and therefore outside the ambit of this appeal, based on the analysis preceding its pronouncement, we have no basis for faulting the High Court.

22. In conclusion, we find no merit in this appeal. Accordingly, it is dismissed.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL