Koech v Republic (Criminal Appeal 17 of 2017)
[2023] KECA 1377 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1377 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 17 OF 2017

K M'INOTI, F SICHALE & FA OCHIENG, JJA

NOVEMBER 24, 2023

BETWEEN

BERNARD KIPRONO KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kericho (Mumbi Ngugi J as she then was) dated 29th March 2017 in HC. CRA NO. 16 OF 2015.)

JUDGMENT

1. Bernard Kiprono Koech (the appellant herein), has preferred this second appeal against the judgment of Mumbi Ngugi J (as she then was) dated 29th March 2017, in which he had initially been charged at the Chief Magistrate's Court in Kericho with the offence of defilement contrary to section 8 (1), as read with Sub Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 3rd day of June 2014, at (particulars withheld), he unlawfully and intentionally

   did an act which caused penetration of his penis into the vagina of CC a girl aged 3 years.

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 wilfully and unlawfully indecently assaulted CC, a child aged 3 years by touching her private parts namely her vagina.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on 21st April 2015, Hon. L. Kiniale (then Senior Resident 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 29th March 2017, Mumbi Ngugi J (as she then was), found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal that is before us vide a Notice of Appeal dated 7th April 2017 and

supplementary memorandum grounds of appeal dated 7th July 2015, raising 2 grounds of appeal as follows;

> 1. That the learned appellate judge of the high court erred in law by upholding the appellant's conviction and sentence of life imprisonment awarded by the lower court but failed to appreciate evidence through an intermediary as clearly stated under section 31 of the *Sexual Offences Act* No. 3 of 2006, was not followed thus causing the appellant great prejudice and his fundamental rights given under article 50 of *the Constitution* were prejudiced.

2. That the learned appellate judge of the high court erred in law by upholding the appellant's conviction and sentence of life imprisonment awarded by the lower court but failed to note that the elements of the offence of defilement were not proved. Penetration could not be proved without corroboration of the evidence of the victim."

7. Briefly, the background to this appeal is as follows: C.L was PW1 and the complainant's mother who testified on her own behalf and on behalf of the complainant as an intermediary pursuant tosection 31 of the *Sexual Offences Act*, the trial court having found the complainant to be a vulnerable witness on account of her age.

8. It was her testimony that on 3rd June 2014, she was in the farm weeding maize with her two children when she heard the complainant crying. She called her out but she did not respond. She then went to check on her while calling her, whereupon the complainant responded from the appellant's house crying. The complainant told her that the appellant had touched her. She checked the complainant and she saw a lot of dirt and discharge that looked like sperms on her private parts. She subsequently took her to a nearby dispensary where she was referred to Kericho district hospital where she was treated. They were later referred to Kipkelion police station where the matter was reported.

9. CKL testified as PW2. It was his evidence that on 3rd June 2014, he was in the farm when his wife (PW1) called him and informed him that the appellant had raped their daughter. They took the complainant to the dispensary where it was indeed confirmed that she had been defiled.

10. Mitei Weldon was PW3 a clinical officer at Kipkelion sub district hospital. He produced a P3 Form in respect of CC a girl aged 3 years who had a history of having been defiled on 4th June 2014. Upon examination, he found that the complainant was in fair general condition and she had bruises at the vaginal orifice (labia minora), which was also highly inflamed and swollen. Additionally, her hymen was torn with a fresh injury. He confirmed that indeed the complainant had been defiled.

11. PW4 was Thomas Kibet Kosgey, the assistant chief Siret sub location. He testified that on 4th June 2014, he was heading to the office when he got a call from a neighbouring chief who informed him that there was someone on the run within his jurisdiction. As he walked on, he found members of the public interrogating the appellant. He subsequently arrested him and escorted him to Kipkelion police station.

12. PW5 was PC Faussy Kayoro from Kipkelion police station and the investigations officer in this case. He was on duty on 4.6.2014 when a male adult by the name Charles (PW2), called him and reported that his 3-year-old daughter had been defiled by the appellant who was their neighbour. He recorded their witness statements and issued them with a P3 Form and later charged the appellant with the current offence.

13. The appellant in his defence gave an unsworn statement and called no witness and denied having committed the offence. He testified that he had been framed by the villagers and that the chief who arrested him had been bribed to arrest him.

14. When the matter came up for plenary hearing before us on 19th September 2023, the appellant who appeared in person sought to rely on his written submissions dated 7th July 2023. Mr. Ondimu learned counsel appeared for the State and equally sought to rely on his written submissions dated 31st August 2023.

15. Turning to the first ground of appeal, it was submitted by the appellant that the procedure of appointing an intermediary pursuant to Section 31 of the *Sexual Offences Act* was not followed and that this was prejudicial to him since he could not get first hand evidence from the victim; that nowhere was it indicated in the court records that the child was ever brought to court and further that he was denied an opportunity to cross examine the victim thus denying him his right to a fair trial guaranteed under Article 50 (2) of *the Constitution*.

16. The learned judge was further faulted for upholding the appellant's conviction and sentence of life imprisonment by failing to note that the elements of the offence of defilement were not proved. It was the appellant's submission that PW1 did not witness the defilement and thus her evidence could not be proof of penetration and that since the victim did not testify and thus the appellant was not identified as the perpetrator.

17. On the other hand, it was submitted for the respondent that the trial court had noted that the complainant was 3 years old and shy, whereupon the court subsequently on account of her age declared her a vulnerable witness as required under Section 31 of the *Sexual Offences Act*. Further that the court gave reasons for declaring the complainant vulnerable, when it went ahead and appointed her mother (PW1), as an intermediary. It was further submitted that this ground was never raised during the hearing of the 1st appeal and thus should be dismissed.

18. Regarding the elements of the offence, it was submitted that PW1 testified that she saw her daughter coming from the appellant's house crying. The complainant stated that the appellant had touched her and on checking, PW2 found that there was dirt on her private parts which looked like sperms. PW3, a registered clinical nurse who examined the complainant found she had bruises at the vaginal orifice which was highly inflamed and swollen and that he came to the conclusion that the complainant had been defiled. It was thus submitted that it was clear that the ingredient of penetration was proved to the required standard. Consequently, we were urged to dismiss this ground of appeal.

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

20. In *Kados vs. 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 ..."

21. In *David Njoroge Macharia vs. 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 vs. Republic [1984] KLR 213)."

22. Turning to the first ground of appeal, the appellant faulted the learned judge for upholding his conviction and sentence based on the evidence of an intermediary thus occasioning him great prejudice under Article 50 of *the Constitution*.

23. First of all, we note that the appellant did not raise this issue in his first appeal before the high court through the further amended petition of appeal dated 1st February 2017. There is therefore no basis upon which the appellant can be heard to fault the learned judge for failing to address an issue that was not before her.

24. Be that as it may, the appellant submitted that the procedure of appointing an intermediary was not followed as the trial court

did not conduct a voir dire examination to ascertain whether the complainant understood the essence of speaking the truth.

25. We have carefully gone through the record which shows that when the matter came up for hearing on 30th July 2014, the prosecutor intimated to court that he had three witnesses and that he was ready to proceed. The appellant equally intimated to court that he was ready to proceed. There is however no indication from the record as to whether the complainant was in court on this day. The court subsequently recorded as follows;

> " The complainant is aged 3 years and is very shy. She also does not understand Kiswahili. On account of her age this court declares the complainant a vulnerable witness under Section 31 of the *Sexual Offences Act* and orders that the mother gives evidence as an intermediary and on her own behalf."

26. In the case of *M.M v Republic* [2014] eKLR this court (differently constituted) stated as follows as regards the procedure for appointing an intermediary pursuant to section 31 of the *Sexual Offences Act*, No. 3 of 2006;

> "It is clear from Sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering

from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness. The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings."

27. It is evident from the record that the trial court did not follow the strict procedure provided for in the *M.N* Case (supra) in appointing PW1 as an intermediary of the complainant. It is also not in dispute that the complainant was a vulnerable witness within the meaning of section 2 and 31 (1) (b) of the *Sexual Offences Act*.

28. Section 2 of the Act defines a vulnerable person as follows; "vulnerable person" means a child, a person with mental disabilities or an elderly person and "vulnerable witness" shall be construed accordingly."

29. On the other hand,section 31 (1) (b) of the Act provides;

> "31.
>
> Vulnerable witnesses

30. As a matter of fact, PW1, who was the complainant's mother testified that at the time of commission of the offence, the complainant was 2 years and 10 months and her evidence towards this respect remained unchallenged throughout the trial.

31. In our view, failure to follow the procedure provided for in the M.N Case (supra), was not fatal to the prosecution's case and that the appellant was not in any way prejudiced by this omission for the following reasons: immediately after PW1 gave her testimony, the appellant stated as follows;

> " I plead for forgiveness."

32. The court subsequently informed him as follows:

> " It is time for cross examination."

33. The appellant subsequently replied as follows;

> " I don't have a question for this witness. I understand the proceedings." (Emphasis ours).

34. From the above extracts from the record, it is clear that the appellant understood the charges he was facing and at one point he even pleaded for forgiveness. Additionally, the evidence of PW1 remained unchallenged throughout the trial and the appellant did not even attempt to cross examine her, despite having been afforded an opportunity by the trial court to do so. In addition, PW1's evidence that her daughter had been defiled was corroborated by the independent evidence of PW3, the clinical officer

who examined the complainant and he confirmed that indeed the complainant had been defiled and that her hymen was torn and that she had a fresh injury.

35. Faced with a similar situation like in the present case where the complainant had not testified, this Court in the *M.N* Case (Supra) stated thus;

> "Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, Section 33 of the *Sexual Offences Act* allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both. In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness. Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. (Emphasis ours).

36. We fully reiterate and adopt the above position and hold that failure to follow the procedure in appointing an intermediary as enunciated in the above case was not prejudicial to the appellant and the same was curable under Section 382 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Consequently, we find no merit on this ground of appeal.

37. We now turn to the second ground of appeal, where the appellant faulted the High Court for upholding his conviction and failing to note that the elements of the offence of defilement were not proved by the prosecution. It was the appellant's submission that the complainant did not testify and that as such, the appellant was not identified as the perpetrator. Further, that PW1 did not witness the defilement and that her evidence therefore cannot be proof of penetration.

38. It is indeed not in dispute that the complainant in this case did not testify, the trial court having declared her a vulnerable witness pursuant to Section 31 of the *Sexual Offences Act*.

39. Be that as it may, PW1 who was the complainant's mother testified that on 3rd June 2014, she was in the farm weeding maize with her two children when she heard the complainant crying. She called her out but she did not respond whereupon she went to check on her and she responded from the appellant's house while crying. The complainant then told her that the appellant had touched her and on checking on her, she found that there was a lot of dirt on her private parts. It was her further evidence that he appellant was well known to her as a neighbour and that the complainant was 2 years and 10 months. It is imperative to note the evidence of this particular witness remained unchallenged and uncontroverted throughout the trial. As a matter of fact,immediately after she finished testifying, the appellant pleaded for forgiveness whereupon the court informed him that it was time for cross examination pursuant to which the appellant responded by saying that he did not have any question(s) for the witness and that he understood the proceedings.

40. Additionally, the evidence of this particular witness that the complainant had indeed been defiled was corroborated by the evidence of PW3 the clinical officer who examined the complainant and found that she had bruises at the vaginal orifice which was also highly inflamed and swollen and that her hymen was torn and that she had a fresh injury and that this was indicative of a sexual assault. The

contention by the appellant that PW1 did not witness this offence being committed is clearly without basis as there are normally no witnesses in offences of this nature.

41. It is also not lost on us that immediately after PW1 gave her testimony, the appellant pleaded for forgiveness. Further, immediately after PW2 gave his testimony, the appellant opted not to cross examine her prompting the trial court to warn him of the seriousness of the offence he was facing pursuant to which the appellant again pleaded for forgiveness and stated that he had

understood what the witness had stated. The prosecution subsequently prayed for another date pursuant to which the appellant again stated;

> "I object. I have asked for forgiveness from the parents of the minor. It is true I committed this offence." (Emphasis ours).

42. The court subsequently ordered that the plea be read afresh to the appellant whereupon the appellant pleaded guilty to the same but he subsequently changed the plea immediately after the trial court warned him for 3rd time of the seriousness of the charges he was facing.

43. It is now well settled that for a conviction to be found on a charge of defilement, three key ingredients must be proved namely; age of the victim, proof of penetration and identification of the appellant as the perpetrator of the offence. Having considered and re-evaluated the evidence on record, it is our considered opinion that all the ingredients for the offence of defilement were proved to the required standard contrary to the appellant's contentions as the evidence of the key witnesses namely PW1, PW2 and PW3 remained largely unchallenged, consistent and credible throughout the trial. Additionally, the conduct of the appellant all along smacked of a person who was guilty as he even pleaded for forgiveness on several occasions and even entered a plea of guilty only to renege on the same after being warned by the court of the seriousness and severity of the charges he was facing. Consequently, nothing turns on this ground of appeal and the same must fail.

44. Ultimately therefore, 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 that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement. We are satisfied that it was the appellant who defiled the complainant and no one else.

45. We therefore find and hold that the appellant's conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss his appeal on conviction.

46. Turning to sentence, the appellant was sentenced to life imprisonment as provided under Section 8(2) of the Sexual Offences Act, a sentence he has contended takes away the discretion of the Court in sentencing.

47. We are aware of the jurisprudence that has been emerging from this Court recently as regards the mandatory nature of sentences provided for under the *Sexual Offences Act* and more so, the indeterminate nature of life sentence where the Court has been frowning on the nature of such sentences as they indeed fetter the discretion of a judge in imposing an alternative sentence in an appropriate case and are to some an extent an affront on the doctrine of separation of powers.

48. Be that as it may, we have considered the circumstances under which this offence was committed and we find the same to be aggravated on account of the victim's age who was barely 3 years old at the time of the commission of the offence. However, the appellant in his mitigation before the trial court appeared remorseful and even pleaded for forgiveness several times and at one time even pleaded guilty only to backtrack on the same after being warned by the court of the seriousness of the charge he was facing.

49. Having said so, and in view of the above, we are inclined to exercise our discretion in favour of the appellant to reduce the sentence. Accordingly, we set aside the sentence of life imprisonment meted out on the appellant and substitute the same thereof with a sentence of 35 years' imprisonment to run from the date of his conviction in the trial court on 21st April 2015.

50. The appellant's appeal only succeeds to that extent. We so order.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF NOVEMBER, 2023.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F.A OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR