Ngeno v Republic (Criminal Appeal 33 of 2017)
[2023] KECA 1530 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1530 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 33 OF 2017

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

DECEMBER 15, 2023

BETWEEN

ROBERT KIPRONO NGENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero J.) delivered on 28th April 2017 in High Court Criminal Appeal No. 168 of 2013 arising from the original trial in Molo Criminal Case No. 357 of 2012)

JUDGMENT

1. Robert Kiprono Ngeno, the Appellant herein, is aggrieved by the dismissal of his first appeal by the High Court, which he had lodged against conviction for the offence of defilement and the sentence of life imprisonment that had been imposed by the Senior Principal Magistrate's Court (H. M. Nyaga SPM) at Molo (hereinafter the 'trial Court'). He has lodged a second appeal in this Court. The particulars of the offence the Appellant was charged with in the trial Court were that on 13th February 2012 in Kuresoi District of Rift Valley Province, he intentionally caused his penis to penetrate the vagina of LCM a child aged 8 years. He also faced an alternative charge of committing an indecent act with a child. The prosecution called four

   (4) witnesses during the trial, after the Appellant pleaded not guilty to the charges, while the Appellant gave sworn evidence and called three

   (3) witnesses in his defence.

2. The complainant testified as PW 1 after a voire dire examination in support of the prosecution's case, that she knew the Appellant as he was a neighbour. That on the material day she was going for lunch from school in the company of one J., when she met the Appellant, who gave them each a ngumu (Youghnut), told them to follow him to the bush where he removed her pant and inserted his "thing"

and did 'tabia mbaya' (bad manners) to her (which she illustrated by pointing at her crotch) while J. stood by, and he then told them to go away. She testified that no one was home when she arrived but her father later came and she told him what the Appellant had done, and when her mother arrived, she was taken to the hospital at Kiptagich then to the police station.

3. The complainant's father (SM) testified as PW2 that his daughter was 8 years old in class one (1), and that on 13th February 2013 she went to school as usual and he went to work. He arrived home at 3.00 pm but did not find her, and she came later at 5.00 pm and he noted that the Complainant walked with a gait and she asked her mother what was wrong. She examined the complainant, who told them that the Appellant had defiled her during the day. Further, that they went to report the case to the complainant's class teacher and took the complainant to hospital the following morning. He stated that he knew the Appellant well as he was a neighbour living in the I.D.P camp with them. PW3 (RC) was the mother of the complainant, and she reiterated that the complainant was eight (8) years old, and that on 13th February 2012 when she got home from work at 5.00 pm, she called the complainant to have tea and noted that she was not walking properly. The complainant then told PW3 that Robert had defiled her after giving her a 'ngumu', and PW3 in turn told her husband. That PW2 and PW3 took the complainant to Kiptagich and later Ole Nguruone hospitals in the morning where a P3 Form was filed. PW3 told the trial Court that Robert was their neighbour in the I. D. P camp and that the complainant took her to the place where the offence took place.

4. John Rono, a Clinical Officer at Olenguruone sub district Hospital testified as PW 4 that on 15th February 2012, a child named LC aged eight (8) was taken to him for examination after an alleged defilement. Upon examination, he noted she had pus discharge on her under pants and her hymen was perforated. The laboratory test revealed many pus cells from negative bacteria and intra extra cellular bacteria which suggested an infection of gonorrhoea. He thus concluded that there was defilement causing gonorrhoea infection, and signed the P3 form which he produced as evidence in Court. Further, the Complainant complained of pain in her vagina.

5. The Appellant was put on his defence by the trial Court and gave sworn testimony that on the material day he had gone to Koiwa and returned home at 5.00pm and in the morning, he was arrested. He denied committing the offence. DW 2, David Chepkwony, testified that the Appellant was his neighbour and had informed him of the allegations against him. He denied being with the Appellant on the day of the alleged offence. Rosar Koech testified as DW 3 that the Appellant was her son, and that on the material day the Appellant went to buy maize at 6.00 pm, came back home and slept. She stated that he was at home over lunch on that day, but that she was not with him, and that he was arrested the next day. DW4 was Wesley Kittony. He stated that he knew the Appellant, who was a neighbour and met him at 6.00 pm on the material day, and they went to take tea in the home of one Christopher and parted ways at 8.00 pm. Further, that the Appellant was arrested the next day. The last defence witness (DW5) was Christopher Bett. He testified that the Appellant was a neighbour and that he came to DW5's home at 7.30 pm in the company of Kittony (DW4) and they had dinner and left. He later learnt that the Appellant had been arrested.

6. The trial Magistrate (H. M. Nyaga SPM) in convicting the Appellant found that there was overwhelming medical evidence that proved penetration and that the victim's testimony regarding the incident was corroborated by that of her parents, she was familiar with the Appellant and identified him by his name Robert, and she was reliable witness. Further that the defence witnesses' testimonies were not consistent and did not raise any reasonable doubt regarding the prosecution's evidence. The Appellant was aggrieved by the decision of the Trial Magistrate and proffered an appeal to the High Court at Nakuru in which he raised four (4) grounds of appeal, namely that the age of the victim

was not proved, vital exhibits were not produced in evidence; a defective charge both in charge and particulars and the Appellant's plausible evidence was not considered.

7. After hearing the appeal, M. Odero J. , while noting that there was a mistake in the citation of the applicable section in the charge sheet as "Section 8(1) (2) of the *Sexual Offences Act*" instead of "Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*" and that the particulars of the offence omitted the word 'unlawfully' found that these omissions did not cause any prejudice to the Appellant and he was aware of the charge which he faced and mounted a vigorous defence to the same, and that the omission of the word 'unlawfully' did not render the charge fatally defective, as an act of intercourse with a minor is in any event unlawful. In addition, that the evidence of the complainant as regards the actions of the Appellant, coupled with that of PW4 as to the perforated hymen and the gonorrhoea infection were proof of penetration Further, that notwithstanding the lack of medical or documentary evidence, the complainant's parent's statements were sufficient to prove the age of the child to be 8 years, and the complainant remained consistent in the identification of the Appellant as her defiler, whom PW2 and PW3 confirmed was their neighbour.

8. Therefore, that this was a case where identification was premised on recognition and that all the ingredients of the charge of defilement were sufficiently proved by the testimony of the four (4) witnesses whom the prosecution availed to the trial court, notwithstanding the failure to testify of the child 'J' who was in the company of the complainant during the defilement. Lastly, the learned Judge found that the defence of the Appellant amounted to a bare denial, and none of the defence witnesses confirmed having met the Appellant at this place called 'Koiwa'. In dismissing the appeal, the learned Judge noted that the conviction of the Appellant was sound and that the sentence of life imprisonment is the mandatory minimum sentence provided for by Section 8(2) of the *Sexual Offences Act*.

9. Dissatisfied with this dismissal, the Appellant lodged the present appeal in which he has raised four grounds namely:

    i. That the first appellate Court erred in law by failing to note that the trial was occasioned with procedural technicalities in that crucial witnesses who were mentioned were never called to testify

    ii. That the first appellate Court erred in law by failing to evaluate the quality of the convicting evidence

    iii. That the first appellate Court erred in law by failing to note that the Respondent charges had no investigation basis as required by law

    iv. That the first appellate Court erred in law by failing to note that the medical evidence adduced did not corroborate the charges.

2. It is necessary at this point to restate the role of this Court as a second appellate Court as set out in *Karani v R* [2010] KLR 73:

> " This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial Court and the first appellate Court considered matter they ought not to have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law"

Our reading of the grounds of appeal raised by the Appellant is that they mainly challenge the evaluation of the evidence and findings thereon by the first appellate Court, which can properly be raised as a legal issue on second appeal.

10. We heard the appeal on this Court's virtual platform on 9th October 2023 and the Appellant, Robert Kiprono Ngeno, was present in person appearing virtually from Nyeri Maximum Prison and was represented by learned counsel Mr. Steve Opar, while the Respondent was represented by the learned Senior Prosecution Counsel Ms. Jacklie Kisoo. The two counsels relied on their respective written submission dated 19th July 2023 and 3rd October 2023 respectively.

10. Mr. Opar's submissions were that the age of the complainant was not proved to the required standard since no documents were produced by the prosecution to prove the age and the trial Court did not attempt to ascertain the apparent age of the complainant since it had the privilege to see her demeanour and physical appearance. Reliance was placed on Rule 4 of the *Sexual Offences (Rules of the Court)*, 2014 for the position that the birth certificate is conclusive evidence of age, and the decisions of this Court in *Kaingu Elias Kasomo v Republic*, Malindi Criminal Appeal No. 504 of 2010, and *Hadson Ali Mwachongo v Republic* [2016] eKLR that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the said age. Therefore, that the first appellate Court erred in finding that the oral evidence of PW 2 and PW3 was conclusive proof of the age of the complainant, and the age was not proved by the evidence on record.

10. In rejoinder, Ms Kisoo submitted that that failure to produce medical and other documentary evidence to prove the age of the complainant was not fatal to the prosecution case, since the complainant was sufficiently intelligent and knew her age, the court made its own observation and recorded the same and the complainant's parents, who knew her best, confirmed the age. Reliance is placed on the case of Mwalango Chichoro Mwanjembe [2016] eKLR in this regard, and for the position that age was sufficiently proved to the required standard and that the said evidence was credible, reliable and remains unshaken.

10. While it is indeed the position that age is conclusively proven by the production of a birth certificate or other medical evidence on the date of birth, we are of the view that the evidence of the parents of a child particularly the mother of a child, who is present at the time of the birth of a child, is also reliable and cogent evidence as to the age of that child. This court explained this position as follows in *Mwalango Chichoro Mwanjembe* [supra]:

> " "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 documentary 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 guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*, Cr. Appeal No. 19 of 2014 and *Omar Uche v R*, Cr. App. No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda, Crim. Appeal No. 2 of 2000*. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable".

10. The first appellate court therefore did not err in relying on PW2 and PW3's evidence that the age of the complainant was eight years, being the evidence of the father and mother of the complainant, and the age of the complainant was proved to the required standard.

11. Mr. Opar also submitted that penetration was not proved beyond reasonable doubt and that PW4 did not make a conclusive finding as to whether the complainant was infected with gonorrhoea, and that a perforated hymen could occur from birth and sexual intercourse was not the only cause of the same. The counsel also observed that the complainant was with one J. on the material date, a crucial witness who was not invited by the prosecution to testify. Further, that the Investigating Officer did not testify before the trial Court to demonstrate the investigations which he undertook to charge the Appellant, and that the Appellant's conviction was therefore unsafe.

10. Ms Kisoo's position was that penetration was sufficiently proved through the oral testimony of PW 1 which was corroborated by the oral and medical evidence of PW 4 to the satisfaction of the provisions of section 2 of the *Sexual Offences Act* on the definition of penetration. Further, that the complainant's evidence of identification by recognition which pointed to the Appellant as the perpetrator of the offence was not challenged. Lastly, that the prosecution case was not prejudiced in absence of J.'s testimony or that of the investigating officer, since the prosecution was able to prove all ingredients of the offence of defilement, and failure to call the two witnesses was not fatal and the conviction was safe.

10. The evidence of the complainant in the trial Court as regards what transpired on the material date and what the Appellant did to her, which we have summarised in this judgment, was reproduced verbatim by the first appellate Court in its judgment, with the learned Judge noting as follows: "The complainant has given a graphic account of what happened to her. The court takes judicial notice of the fact that young children who lack adequate vocabulary to describe the act of sexual intercourse invariably refer to the act as "tabia mbaya". The child demonstrated by pointing to her crotch area..." After evaluating the evidence of PW2, PW3 and PW4 the learned Judge found that their evidence corroborated the evidence of the minor, and was in no doubt that the complainant was indeed defiled as she had stated.

10. We have no reason to interfere with these findings. It is evident that the learned Judge considered the evidence that was adduced in the Trial Court, adequately analyzed the said evidence, and made a finding supported by the evidence. In this regard the legal threshold to be met of penetration was that proof was required to be adduced that there was full or partial insertion of the Appellant's genital organ into the victim's genital organ as required by section 2 of the *Sexual Offences Act*. This threshold was met by the evidence of PW1 as to the actions of the Appellant that "he put his thing here" while pointing at her crotch, and supported by the medical evidence of PW4 on the state of the minor's genital organs upon examination which demonstrated a perforated hymen, and fact that she had contracted a sexually transmitted disease. It is notable in this respect that direct evidence of penetration adduced by the complainant is not contested, and the medical evidence which is being challenged by the Appellant is merely corroborative.

10. Lastly, Mr. Opar submitted that should this Court find that the conviction was proper, we should consider the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR where it was found that life imprisonment was unconstitutional and set aside the sentence. We however need to clarify with respect to this submission that the decision of the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic* (supra) was that the mandatory death sentence is unconstitutional, and the said Court did not make any finding on the unconstitutionality of life imprisonment. Further reliance was placed on the decision by the European Court of Human Rights in Vinter and Others v the United Kingdom (Application No. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9th

July 2013) and of this Court in Malindi Criminal Appeal No. 12 of 2021 (Nyamweya, Lesiit & Odunga JJ. A) where the said Courts reiterated that life sentence was unconstitutional. According to Mr. Opar, the 13-year imprisonment sentence already served had presented the Appellant with an opportunity for rehabilitation and was sufficient deterrence, and he should therefore be discharged.

10. Ms. Kisoo was of a contrary view. On whether the sentence of life imprisonment was constitutional, the counsel placed reliance on Section 8 (2) of the *Sexual Offences Act* which provided for the sentence upon conviction of the offence of defilement as life imprisonment for a child of eleven (11) years or less and the sentence passed upon the Appellant was therefore a lawful sentence. Additionally, that the sentence was proper befitting the aggravating circumstances of this case, which were that the Appellant was an adult man who took advantage of an innocent child of tender years and infected her with gonorrhoea, and that he demonstrated no remorse throughout the proceedings for committing the offence. Lastly that the Appellant did not raise issue of constitutionality of the life imprisonment sentence at the first appellate court, and therefore this court had no jurisdiction to address the issue on a second appeal. In conclusion, Ms. Kisoo urged this Court to find the appeal devoid of merit, and uphold the Appellant's conviction and sentence.

10. We shall be brief in our consideration of the arguments on the issue of the sentence imposed on the Appellant. We agree with Ms Kisoo that the issue of the unconstitutionality of the life sentence was not urged in the first appeal, and cannot therefore be raised in this appeal. The learned Judge upheld the sentence of life imprisonment in the first appeal on the ground that it was a mandatory minimum sentence provided for under section 8(2) of the *Sexual Offences Act*. Subsequent to the said judgment, the Supreme Court of Kenya delivered the judgment in Francis Karioko Muruatetu & Another v Republic [supra] declaring the mandatory death sentence as unconstitutional, and the reason for the decision was that mandatory sentences are unconstitutional to the extent that they deprive an accused person of the benefit of mitigating circumstances, and the courts of the discretion to impose appropriate sentence on a case-to-case basis.

10. We can therefore interfere with the sentence imposed on the Appellant on this ground, and we note in this respect that the Appellant still insisted on his innocence in mitigation, and have also taken into account the aggravating nature of the offence. We therefore uphold the conviction of the Appellant for the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*, and only partially allow the appeal against the sentence by setting aside the sentence of life imprisonment, and substituting it with a sentence of forty (40) years imprisonment, which shall run from the date of sentence by the trial Court on 2nd September 2013.

10. It is so ordered

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023

P. NYAMWEYA

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR