SKG v Republic (Criminal Appeal 36 of 2019)
[2022] KECA 151 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 151 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 36 OF 2019

W KARANJA, MSA MAKHANDIA & A MBOGHOLI-MSAGHA, JJA

FEBRUARY 18, 2022

BETWEEN

SKG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (C. B. Nagillah, J.) dated 10th May 2017 in Kiambu High Court Criminal Appeal No. 48 of 2016)

JUDGMENT

1. The appellant was charged before the Chief Magistrate's Court at Thika with the offence of defilement of a child contrary to Section 8 (1) (2) of the *Sexual Offences Act*. The particulars were that on 26th March 2014 within Kiambu County, the appellant wilfully and unlawfully caused his penis to penetrate the vagina of FW, a child aged 11 years. The alternative charge was committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that, the appellant on 26th March 2014 within Kiambu County unlawfully and intentionally touched the vagina of FW, a child aged 11 years. The appellant denied the offences and a trial followed.

2. The evidence presented by the prosecution before the trial court was as follows. After a voire dire examination, FW, (PW1) the minor of 11 years was found to understand the nature of the oath and suitable to give sworn evidence. She testified that on 26th March 2012 at about 6:00 pm, she was at home with her mother PW2, a younger sister and the appellant. The mother left to purchase greens, while the appellant kneaded "chapati" flour and PW1 cleaned dishes. PW1 suddenly felt a piece of cloth tighten her mouth and she was lifted up. Looking up she saw the appellant and got scared. The appellant put her in bed, pulled his trouser down as well as PW1's bikers and pant. The appellant pressed his penis on PW1's private parts and she felt a lot of pain. The appellant untied her and threatened to kill her if she said anything about the incident. PW1 thereafter put her clothes back on,

slapped the appellant and ran back to clean dishes. PW1's mother found her crying and she told her she had a headache.

3. The mother PW2 testified that she had left PW1 and the appellant at home that evening to purchase some food and returned to find that PW1 had not cleaned the dishes and was wiping tears and not able to eat after being served supper.

4. On the following day, a school teacher, M , asked PW1 why she was not active but she did not disclose what had happened to her. However, PW1 was finally able to disclose her ordeal to another teacher PW3, EM. The head teacher was informed and PW1's mother was summoned to the school. PW1 was taken to Ruiru Hospital where she was treated and advised to report to the police. On the way to the police station they met the appellant. PW3 testified that, even before she talked to the appellant, he swore that he had not committed the offence.

5. PW4 Joanne Munene, a clinical officer, testified that she filled the P3 form in respect of the minor who had been referred to the hospital by Ruiru police station. The minor's vagina was torn and had a yellowish discharge. There was spermatozoa in the discharge and also in the urinalysis test. PW4 concluded that there was evidence of defilement.

6. The defilement was reported at Ruiru police station before PW5, PC Mohammed Rono. PW5 stated that the minor recounted to him her ordeal and stated that she had been defiled severally by the appellant but could not remember the exact dates. The mother presented a birth certificate to show that the minor was born on 13th February 2007. The appellant was arrested and later charged.

7. In his defence, the appellant made an unsworn statement stating that on the material day he accompanied his wife to the market. He went to an M-PESA shop and withdrew some money. He gave some of the money to his wife to purchase some provisions. His wife went home and he remained at the shopping centre. He returned home at about 7:00pm and helped in kneading dough. The next day in the afternoon his wife was summoned to school. The appellant called the head teacher and went to hospital. He met his wife and PW1 as they came from hospital accompanied by a police officer who arrested him on allegations of having sexually assaulted PW1 which he denied.

8. The trial court, after considering and evaluating the evidence, found that the prosecution case had been proved beyond reasonable doubt. The appellant was found guilty of the main count and convicted accordingly. He was subsequently sentenced to life imprisonment.

9. Aggrieved by the conviction and sentence, the appellant lodged an appeal, Kiambu High Court Criminal Appeal No. 48 of 2016, on the grounds that the trial record contained a vital omission for failure to record the plea; the trial magistrate erred by conducting the trial in a manner that violated the appellant's constitutional right to a fair hearing under Article 50 (2) of the *Constitution* for non-provision of witness statements; that the trial magistrate erred by failing to find that the penile penetration on the complainant's genitalia was not proved to the required threshold since no DNA tests were conducted on the spermatozoa allegedly found on her; and that the trial magistrate erred by failing to note that there existed sufficient evidence of a grudge between the appellant and the complainant to justify a framed case.

10. The learned judge found that the proceedings disclosed the words "the plea entered: not guilty" and also noted that a fully-fledged trial had been conducted to its logical conclusion. The learned judge also found that folio 1 of the handwritten proceedings was missing. The learned judge held that a full trial was conducted and a judgment delivered accordingly; that the offence of defilement had been proved; and that Section 382 of the Criminal Procedure Code addresses such anomalies. The learned judge dismissed the appeal in the result.

11. Still aggrieved the appellant lodged the present appeal on the grounds that the two courts below erred in law by:

    a) Failing to observe that the medical evidence did not prove that the appellant had committed the alleged offence.

    b) Failing to find that the appellant was not supplied with witness statements in violation of Article 50 (2) (c) (j) of the Constitution.

    c) Failing to analyse and evaluate the whole evidence and come up with independent conclusion as required of him by law.

    d) That the prosecution did not prove their case beyond reasonable doubt as required by the law that it was the appellant that committed the alleged heinous act.

12. In his written submissions the appellant cited Charles Wamukoya v Republic Cr. Appeal No. 72 of 2013 for the proposition that the ingredients forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. The appellant submitted that the prosecution did not conclusively prove that he had committed the alleged offence. That there was no evidence in the form of a P3 form confirming the appellant was examined as PW4 alleged and no evidence that a DNA test was conducted to link the appellant to the spermatozoa detected in the vaginal discharge and urinalysis test when PW4 examined the minor. The appellant noted that the medical documents are not part of the record of proceedings. The appellant submitted that PW1 testified about being defiled once whereas PW4 testified that she stated that she had been defiled severally, hence the two witnesses contradicted each other. The appellant faulted the judge for convicting him on the basis of his recognition by the victim.

13. The appellant also submitted that the issue of a grudge and evidence that his first wife had differences with his second wife was not taken into account by the two courts below.

14. The appellant further submitted that in a case of defilement, the main issue was whether he is the one who committed the offence to the exclusion of anyone else. He relied on the case of *Amos Kinyua Kugi v Republic [2015] eKLR* where the court held that given the weak evidence on identification and glaring contradictions in the prosecution evidence, a DNA test would have sufficed to clear all doubts that the appellant was the perpetrator; and *Manson v Braithwaite 432 US 98 (1977)* to the effect that a majorityof convictions proved wrongful by DNA technology were based on a sincere and confident, but mistaken witness.

15. On the issue of non-provision of witness statements, the appellant submitted that he had repeatedly requested for witness statements but these were not provided in time. When he finally received the statements, he was not given sufficient time to prepare his defence. That during the testimony of PW1, he was not asked whether he was ready to proceed. This was a clear violation of his constitutional rights, particularly the right to a fair trial under Article 50 (2)(c) and (j) of the Constitution. He cited the case of *Simon Githaka Malombe v Republic [2015] eKLR* for theproposition that failure to supply witness statements relegated the appellant to the position of a mere observer of his own trial and robbed him of the ability to conduct a proper cross-examination.

16. On the ground that the High Court failed to analyse and re-evaluate the whole evidence as required by the law, the appellant submitted that the learned judge did not consider his submissions before the court and only pointed out that the appeal was contested by the learned State Counsel. That the learned judge did not consider the grounds of appeal and give the reasons as to why he agreed or disagreed with each ground. That the learned judge just made a summary of the case and dismissed the same.

17. He also submitted that he ought to have been charged under Section 20 (1) of the Sexual Offences Act since according to the evidence on record, he was the complainant's father. That Section 20 (1) gives the trial court the discretion to impose a sentence from 10 years to life imprisonment. He cited *GM v Republic [2017] eKLR* where the court observed that the rationale of the legislature was that the same family member who is convicted might be required to cater for the children. It should be noted, however, that this issue was not canvassed in the trial court, High Court and in the present appeal.

18. Opposing the appeal, Mary Wang'ele, Assistant Director of Public Prosecutions, filed written submissions. On the issue of failure to prove identification of the appellant as the perpetrator, Counsel submitted that identification of an offender can be through recognition, identification or through any other evidence, forensic or otherwise, that places the accused at the scene of crime as the perpetrator. Counsel submitted that the evidence of PW1 confirms that the appellant was well known to the complainant as her step-father who she lived with in the same house. That the evidence shows that on that day the appellant was alone with the PW1 in the house and therefore had the opportunity to commit the offence to the exclusion of any other person.

19. The trial court found the minor's evidence believable, consistent and satisfactory, and unshaken by the appellant in cross-examination, and the same was corroborated by that of her mother, teacher, as well as medical evidence. She contended that the trial court having found the minor's evidence satisfactory, no corroboration was required by dint of the proviso to Section 124 of the *Evidence Act*.

20. On the ground of non-provision of witness statements, Counsel submitted that the appellant was comprehensively facilitated by the court as required by the law when he made request for witness statements. When PW1 testified, the appellant never indicated that he had not received witness statements, yet he was present and ready to proceed and extensively cross-examined PW1. The appellant therefore suffered no prejudice.

21. On the ground that the High Court had failed to analyse and re-evaluate the whole evidence as required by law, Counsel submitted that the court duly recognised and appreciated its duty as set out in *Okeno v Republic [1972] EA 32*. The court made a finding that the offence of defilement was properly proved. Counsel submitted that even though the analysis leading to the conclusion is not evident on record, it did not in any way occasion a failure of justice to the appellant. She cited the case of *Alexander Ongaisa & 8 others v Republic [1993] eKLR* where thetrial court had made similar broad conclusions and this Court held that the trial court was right in the conclusions and the failure to analyse in detail the evidence before the trial court did not occasion any failure of justice to the appellants.

22. As this is a second appeal, the Court ought to confine itself to matters of law only, as provided under Section 361 (1)(a) of the *Criminal Procedure Code*, unless it is shown that the findings of fact by the two courts below are based on no evidence, or if it is shown that the courts acted on wrong principles in making the findings.

23. During the hearing of this appeal, the appellant conceded that he indeed received copies of the witness statements but lamented that after receiving the statements, he was not given sufficient time to prepare his defence. The appellant did not indicate the date he received the witness statements. The last request he made for the statements was when the case came up for mention on 21st June 2012. There were four further mentions of the case before the hearing on 16th August 2012 when PW1 testified. The appellant did not alert the trial court that he had not received the witness statements at any of the four further mentions. The conclusion that can be drawn from the record is that the appellant received the witness statements within a reasonable time to prepare his defence. The record also reveals that the appellant extensively cross-examined the key prosecution witnesses, therefore it cannot be concluded

that the delay in providing the witness statements to the appellant impeded or violated his right to a fair trial under Articles 50 (2) (c) and (j) of the Constitution.

24. The offence of defilement is set out under Section 8 (1) and (2) of the Sexual Offences Act as follows:

> " 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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."

25. Section 2 of the Sexual Offences Act defines

> " penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The age of PW1 of 11 years not being in dispute, the burden was therefore on the prosecution to prove that penetration occurred on PW1 and that the perpetrator was the appellant.

26. The duty of the first appellate court as set out in in Okeno v Republic (supra) to consider and evaluate theevidence afresh and draw its own conclusions; making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. We are of the view that the first appellate court met this threshold.

27. From the evidence on record, PW1 positively identified the appellant as the perpetrator. The appellant was not a stranger to PW1 given the fact that they lived in the same house and she referred to the appellant as her father. This was therefore a case of identification through recognition. In *Anjononi & Others v Republic (1976-80) 1 KLR 1566 atp. 1568*, this Court held that:

> " ...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

28. The trial court found believable, consistent and that the evidence of PW1 was satisfactory. In *Nelson Julius Karanja Irungu v Republic [2010] eKLR* this Court reiterated the better vantage point trial courts have in assessing credibility of witnesses thus:

> " As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses. Their evidence must nevertheless meet the test of consistency relevance and veracity."

29. There was no doubt created by the cross-examination of PW1 by the appellant, and her evidence remained consistent. At this point the evidence of PW1 was enough to secure a conviction in this case, as the court was satisfied that the witness was truthful. The proviso to Section 124 of the Evidence Act provides that:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

30. The evidence of PW1 was further corroborated by her mother who confirmed that the appellant remained in the house with PW1 when she left to purchase groceries; as well as the medical evidence of injuries to the vagina and presence of spermatozoa indicating that PW1 had been defiled. In the face of the unwavering testimony of PW1 and the corroborating evidence that followed, the lack of DNA testing of the semen detected in the vaginal discharge or urinalysis did not affect the credibility of the evidence before the court. See *David Kahura Wangari v Republic [2016] eKLR*. The circumstances in *Amos Kinyua Kugi v Republic* [2015] eKLR cited by the appellant are distinguishable from the instant case in that the appellant in that case was a complete stranger to the complainant, and there were contradictions in the evidence regarding where the complainant regained consciousness thereby casting doubts as to when the appellant was identified as the perpetrator and by whom.

31. The prosecution proved its case to the required standard. The conviction was safe. The sentence imposed is statutory and mandatory. We have no room to interfere with the same.

32. It follows that this appeal must fail. The same is therefore dismissed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022

W. KARANJA

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JUDGE OF APPEAL

ASIKE- MAKHANDIA

.....

JUDGE OF APPEAL

A.MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR