James Charo alias Kidero v Republic (Criminal Appeal 11 of 2019)
[2022] KECA 13 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 13 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 11 OF 2019

DK MUSINGA, SG KAIRU & S OLE KANTAI, JJA

FEBRUARY 4, 2022

BETWEEN

JAMES CHARO ALIAS KIDERO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Malindi (N. Mwangi, J.) dated 17th April 2018 in H.C.CR.A. No. 72 of 2013)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of November 2009 and the 15th day of January 2010 at [Particulars Withheld] area in (Particulars withheld] Location, within Malindi District of the Coast Province, the appellant intentionally and unlawfully caused his male genital organ to penetrate the female genital organ of the FC (PW1) [Name Withheld], a girl aged 17 years.

2. The trial magistrate convicted and sentenced the appellant to 15 years' imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision of the trial magistrate and appealed to the High Court. The High Court (N. Mwangi, J.) agreed with the finding and decision of the trial court and upheld the conviction and sentence.

3. A summary of the facts is that sometime in the month of November 2009, the appellant approached FC with a promise to marry her and provide for her. At this time, FC was a standard 7 pupil at [name withheld) primary school. Between the months of November 2009 and January 2010, the appellant and FC engaged in sexual intercourse, which resulted in FC becoming pregnant. Upon learning that she was pregnant, FC informed the appellant but the appellant went silent. The mother of FC discovered that FC was pregnant and informed the father of FC (PW2) who visited the school

where FC was studying and together with the school headmaster inquired from FC as to the identity of the person who had impregnated her. FC identified the appellant as the person who had impregnated her.

4. PW2 accompanied by FC reported this incident to the Malindi Police Station and recorded his statement. PW3, Corporal Millicent Soi, who was a Police Officer based at the Malindi Police Station, interrogated FC in the presence of her father (PW2) and FC stated that it was the appellant who had impregnated her. PW3 referred FC to the Malindi District Hospital where a pregnancy test was conducted on FC and a P3 form in her name was filled. PW4, Ibrahim Abdulahi is the clinical officer who examined FC and filled the P3 form. According to the P3 form, at the time of examination FC's virginity had been broken and the pregnancy was positive. PW4 observed and concluded that FC had been defiled. PW5, a Senior Dentist based at the Malindi District Hospital conducted an age assessment on FC and determined that she was 17 years old when the appellant engaged her in sexual intercourse.

5. The appellant gave unsworn evidence in his defence in which he explained that a man known as Charo Gona had requested him to prepare a coffin for his mother at a cost of Kshs.5,000.00. The said Charo Gona paid a deposit of Kshs.3,000.00. When the appellant went to demand for the balance, the said Charo Gona became rude and on the same day the appellant was arrested by the police and accused of defiling FC.

6. On his appeal to this Court, the appellant relies on his amended grounds of appeal which he filed in Court on 11th May 2021. The amended grounds of appeal are that the trial magistrate erred in law and fact by failing to consider that no birth certificate or age assessment report was produced to prove the exact age of FC at the time the offence is alleged to have been committed; that the trial magistrate erred in law and fact by failing to consider that no age of injuries was recorded in part B (2) of the P3 form to connect the date of commission of the alleged offence; the trial magistrate erred in law and fact by failing to consider that no DNA test was conducted to connect the unborn child with the appellant; that the trial magistrate did not address himself to the issue of time gap of about 6 months from the date the appellant is alleged to have committed the offence to the date the report was made to the police. Lastly, the appellant argued that the trial magistrate erred in law and fact by failing to consider that the appellant's defence was not challenged by the prosecution.

7. During the hearing of the appeal before us, the appellant appeared in person while the respondent was represented by Ms. Karanja, learned Prosecution Counsel. The appellant had filed written submissions which he relied on in arguing his appeal.

8. In his written submissions, the appellant submitted that the age of FC was not proved as no birth certificate or age assessment report was produced before the trial court. In this regard, the appellant sought to rely on the cases of *Alfayo Gombe Okello v. Republic [2010] eKLR* and *Gilbert Muriti Kanampu v. Republic, Embu HCCRA No. 97/2007, eKLR*,where age was said to be critically important in proving the offence of defilement. With regard to penetration, the appellant submitted that this was not proved as no samples were taken from him or FC, nor was he subjected to DNA test as provided for under the provisions of section 36(1) of the *Sexual Offences Act* No. 3 of 2006. The appellant further submitted that failure to indicate the age of injuries found on FC in the P3 form did not connect to the date of commission of the offence. The appellant further argued that if FC was defiled on the diverse dates as alleged, he could not understand why FC did not immediately make a report to the police and had to wait for six months to do so. In a nutshell, the appellant asked this Court to find that the offence of defilement had not been proved to the required standard.

9. Ms. Karanja, learned Prosecution Counsel on her part sought to rely on her written submissions filed in Court on 28th April 2021. Due to the fact that the appellant had filed amended grounds of appeal,

Ms. Karanja sought leave to respond orally to each of the amended grounds of appeal. With regards to the age of FC, it was submitted that an age assessment report was produced in court by PW5 which confirmed that FC was 17 years old when she was defiled by the appellant. On the issue of DNA testing, Counsel submitted that a DNA test was not necessary since FC had identified the appellant as her defiler and her evidence was believable. With regard to the question of failure to indicate the age of injuries in the P3 form, she submitted that the High Court had sufficiently addressed this issued in its judgment. Learned Prosecution Counsel submitted that the sentence imposed on the appellant was sufficient. However, when we questioned whether the fact that the appellant and FC were living together as husband and wife had any bearing to this case, learned counsel submitted that owing to emerging jurisprudence this could have a bearing on sentencing.

10. The obligations of this Court in a second appeal are by dint of section 361 of the Criminal Procedure Code confined to matters of law only. In *Karingo v R [1982] KLR 213*, this Court stated thus:

> " A second appeal must be confined to points of law and this Court with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja vs. R (1956) 17 EACA 146*."

11. The issue that we must determine is whether the key ingredients of the offence of defilement, that is; age of the victim, penetration and the identity of the offender were proved beyond doubt in order to sustain a conviction.

12. The appellant argues that the no birth certificate or age assessment report was produced by the prosecution to show the age of FC at the time the offence is alleged to have been committed. Under the *Sexual Offences Act* No. 3 of 2006, age of the victim determines the nature of the offence and the consequences that flow from it. It is therefore important that age be proved to the required standard. In *Hadson Ali Mwachongo v Republic [*2016] eKLR, the Court stated asfollows:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient in the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

13. In the instant case, no birth certificate was produced to prove the age of FC. However, an age assessment report was produced before the trial court by PW5 as prosecution exhibit 3. At paragraph 22 of the impugned judgment, the learned judge noted as follows:

> " Although the appellant argued that the age of PW1 was not proved, PW5 Dr. Ariba Olembo a Senior Dentist at Malindi District Hospital produced an age assessment report as P. exh. 2 which confirmed that PW1 was 17 years of age...."

14. In the case of *Francis Omurani v Uganda, CR. A 2/200* the Court held as follows:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense...."

15. The age assessment report produced in court by PW5 showed that FC was aged 17 years at the time of defilement and therefore she did not have legal capacity to consent to sexual intercourse with the

appellant. The appellant did not challenge the production or the contents of the age assessment report before the trial court. Accordingly, we find that the age assessment report was sufficient proof that FC was aged 17 years old when she had sexual intercourse with the appellant. This ground of appeal is therefore without merit.

16. With regards to the submission that no DNA test was conducted to connect the unborn child to the appellant, it is well established that medical test is not mandatory under section 36 of the *Sexual Offences Act* No. 3 of 2006. In any case, what is before this Court is not a question of paternity but one of defilement. An essential ingredient of this offence is penetration and not impregnation. See *Evans Wanjala Wanyonyi v. Republic* [2019] eKLR.

17. This Court dealt with issue of paternity test in defilement cases in the case of *Williamson Sowa Mbwanga v. Republic[2016] eKLR*. The Court held as follows:

> " ...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See *TWEHANGANE ALFRED V. UGANDA,* CR. APP. NO. 139 OF 2001).
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> It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing, In *ROBERT MUTUNGI MUMBI V. REPUBLIC*, CR. APP. NO. 5 OF 2013 (Malindi), this Court stated thus regardingsection 36(1) of the Act:
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> "Section 36(1) of the (Sexual Offences) Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

18. Similarly, in *George Kioji v Republic, CR. APP No. 270 of 2012 (Nyeri)* this Court held as follows:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

19. In this case, FC testified before Court that the appellant had promised to marry her and take care of her needs. FC testified that she had sexual intercourse with the appellant on diverse dates which led to her becoming pregnant. When FC was questioned by her father who was in the company of the school headmaster on who had impregnated her, she told them that it was the appellant. FC also told PW3 that it was the appellant who had impregnated her. The evidence of identification of the appellant by FC as the person who had intercourse with her was by way of recognition. We do find that the evidence of FC on the identity of the person who defiled her was believable. Accordingly, we enter the finding that this ground of appeal is devoid of any merit.

20. As to the issue of penetration, we are satisfied that there was sufficient evidence. The findings in the P3 form, which was produced in evidence by PW4 confirmed that FC's virginity had been broken. The pregnancy test on FC was positive. PW4 concluded that FC had been defiled. The fact that the virginity of FC had been broken at the date of her medical examination confirms that there was penetration of her genital organ. Indeed, the fact that the pregnancy test was positive came back positive is sufficient proof that there was sexual intercourse. FC identified the appellant as the person she had sexual intercourse with and we have already noted that the evidence of FC was believable.

20. Going by the findings of this Court in the cases of *Williamson Sowa* (*supra*) and *George Kioji* (*supra*), it is our view that even in the absence of a paternity test, there was sufficient evidence that the appellant defiled FC and impregnated her.

22. On the question of age of injuries to FC's private parts, we concur with the learned judge that owing to the time gap between the date of defilement and the date FC was examined by PW4, it could not have been possible for PW4 to indicate with certainty the age of the injuries.

23. Accordingly, we find and hold that the prosecution proved all the key ingredients of the offence of defilement and hence the conviction of the appellant by the trial court and the subsequent dismissal of his appeal was sound.

24. Before we address our minds to the sentence meted upon the appellant, we feel inclined to point out as indeed the first appellate court did, that the charge sheet upon which the appellant took plea for the charge of defilement was defective. The appellant was charged under section 8(4) of the *Sexual Offences Act* No. 3 of 2006. He ought to have been charged under section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. That notwithstanding, we agree with the learned judge that the appellant was able to plead and cross-examine witnesses and for this reason we are satisfied that the appellant was fully aware of the charges facing him before the trial court. Therefore, we are satisfied that the irregularity did not in any way imperil the appellant or occasion him a failure of justice.

25. Regarding the sentence imposed on the appellant, we find that it was lawful and there is no basis for interfering with it. Consequently, we dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 4th day of February, 2022.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. *ole* KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR