DKY v Republic (Criminal Appeal 21 of 2020)
[2022] KECA 381 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 381 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 21 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 4, 2022

BETWEEN

DKY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (R. Korir, J.) delivered on 26th February 2020 in High Court Criminal Appeal No 32 of 2017)

JUDGMENT

1. This, a second appeal, lodged by DKY, the Appellant herein, against the judgment rendered by the Garsen High Court (hereinafter "the High Court"). The High Court upheld the conviction of the Appellant for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, and sentence of 20 years' imprisonment that had been imposed for the conviction by the Principal Magistrate's Court at Garsen (hereinafter "the trial court").

2. The particulars of the offence, as they appeared on the charge sheet in the trial Court, were that "on the 22nd day of February 2017 at about 23 50 hrs at [Particulars Withheld] Village, Salama Location, Tana Delta Sub County, intentionally caused his penis to penetrate the anus of AGD, a child aged 14 years." The Appellant also faced the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The prosecution called six witnesses to testify in the trial, while the Appellant gave sworn testimony and called three witness in his defence.

3. The High Court (R. Korir, J.) in a judgement rendered on 26th February 2020, found that the omission of the term unlawful in the charge sheet did not render the charge sheet defective; that the failure to charge the appellant under Section 8(3) of the *Sexual Offences Act* instead of Section 8(2) of the same act did render the charge sheet defective however under Section 382 of the Criminal Procedure Code, the defect was curable. The court was satisfied that the prosecution evidence proved penetration and that

the conduct of the Appellant before and after the sexual act placed him at the scene. It was found that the age of the complainant was proven vide the birth certificate that was to the effect that she was born on 11th April, 2002; that there was proof of penetration vide the account of PW1 as corroborated by medical evidence; and that the Appellant was identified through circumstantial evidence that pointed towards the Appellant as the perpetrator.

4. The High Court further found the Appellant's defence unbelievable as it had contradictions and dismissed the same. It was concluded that the trial magistrate erred in failing to apply Section 186 of the Criminal Procedure Code to convict the Appellant for incest and mete a life imprisonment sentence on the appellant. Therefore, that the prosecution's case was proven to the required standard.

5. When this appeal came up for hearing on 1st December 2021, the Appellant was in person while the Respondent was represented by learned prosecution counsel, Ms Valarie Ongeti who was holding brief for Mr. Orwa. The Appellant relied on his written submissions, while Ms Ongeti informed the Court that Mr. Orwa would rely on the submissions dated 25th November 2021.

6. The role of this Court as a second appellate court was succinctly set out in *Karani vs. R [2010] 1 KLR 73* wherein this Court expressed itself as follows:-

> " This is a second appeal. 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."

7. The Appellant in his grounds of appeal herein contends that the High Court erred in law by not considering that the prosecution did not prove their case to the required standard of the law; there were massive contradictions and invariances from the prosecution case; the prosecution did not prove their case as the nature of the light at the scene of the crime was not taken into consideration, and finally not considering his defence evidence. However, the Appellant chose to focus his submissions on mitigation, which he stated was an important element for fair trial process, and made reference to the cases of *Dismas Wafula Kilwake vs Republic* Criminal Appeal No. 129 of 2014 and *Francis Muruatetu vs Rep* [2017] eKLR for this proposition.

8. According to the Appellant, had the trial Court considered his mitigation, he would have been given a sentence of not more than 10 years, and he made reference to Article 25 (c), 28, 50 (2) of *the Constitution* and section 329 of the Criminal Procedure Code, for the submission that failing to allow the trial Court discretion to consider mitigating circumstances, and subjecting him to a mandatory sentence, violated his right to dignity. He placed reliance on the case of *Evans Wanjala Wanyonyi vs Rep* [2019] eKLR where this Court substituted a 20-year imprisonment with a 10-year imprisonment for an Appellant convicted of defiling a 14-year-old girl, and in Rophus Furaha Ngombo vs Rep No 42 of 2018 where this Court substituted a 15-yearimprisonment with an 8-year imprisonment for a conviction of defilement of a 14-year-old.

9. It was thus the Appellant's submission that the sentence meted on him was harsh and excessive considering the mitigation. Additionally, that he was fully reformed and ready to join society. He averred that he was 61 years old with a family that depended on him for survival, which was ready to accept him back to the society when given a second chance.

10. The learned prosecution counsel for the Respondent on his part submitted on the ingredients that needed to be proved to constitute the offence of defilement. On the requirement of penetration, reliance was placed on Section 2 of the Sexual Offence Act for the definition of penetration and Section 124 of the *Evidence Act*. They concluded that there was sufficient corroboration from the undisputed medical evidence by PW2 who confirmed PW 1 was sodomized, and the evidence of PW1 and the conclusion reached by PW2 was compelling evidence against the Appellant in the absence of any other material to the contrary.

11. On the requirement of age of the complainant, it was submitted that there were credible findings from the evidence of PW1, PW2 and PW6 who produced the birth certificate and the age of the complainant who was found to be 14 years old. Further, that the Appellant did not produce any evidence to rebut the evidence tendered. On the issue of identification, it was the complainant's evidence that she managed to switch on the solar light to see her assailant entering her parent's room and concluded it was her father.

    Additionally, that the circumstantial evidence pointed to the Appellant and no one else after the prosecution managed to put the Appellant at the scene of the crime on the material day, and the Appellant did not controvert neither shake the prosecution evidence.

12. It was submitted that minor, trivial contradictions and inconsistencies in the evidence of the prosecution witness does not affect credibility of witnesses. Further, they are not fundamental to the main issues and hence cannot create reasonable doubt in the prosecution case, thus the argument that the evidence was tainted by inconsistencies and contradictions should fail. On the defence evidence, it was submitted that the trial Court and the High Court considered the same and dismissed it as a sham. Lastly, on the sentence, reliance was placed on the holding in the case of *Macharia vs Republic* [2003] EA 559, that sentencing is an exercise of the trial court's discretion, and the appellate court should not interfere unless it is manifestly excessive or illegal. It was submitted that the 20-year sentence is lawful.

13. Two issues arise for determination in this appeal, namely whether the Appellant's conviction was upheld on the basis of a sound legal analysis and assessment of the evidence, and whether the sentence imposed on the Appellant is legal. Even though the first issue was not canvassed by the Appellant in his submissions, we shall briefly analyse if the findings of the High Court were supported by the evidence.

14. The facts giving rise to the appeal from the evidence adduced in the trial Court are that on 22nd February 2017, PW1 arrived home from school and found the Appellant, but that her mother was not home. Later that night, she felt someone grab her mouth and nose, and the assailant pushed her on the mud floor and she felt his penis penetrating her anus. When the assailant left she managed to stand and put on the solar light, and she saw him entering her mother's room with a towel wrapped around his waist, and he warned her not to tell anyone. PW1 told the chairman of the school of the assault the next morning, who took her to the class parent, who in turn took her to the Salama location chief. The Chief gave the complainant a letter dated 23rd February 2017 which she took to her Uncle C on the same date. They then went to Gamba Police station on 24th February 2017, where her uncle was given a P3 form and took it to Garsen Health Centre where she was examined and treated.

15. Buya Said Shevo, (PW2) the clinical officer at Garsen Health Centre, confirmed examining the complainant's anus and found a normal sphincter with tenderness, no bruising and pain in the anus. He did not however, examine the vagina. He concluded there was mild penetration of the anus and captured the offence as sodomy. He filled the P3 form on 24th February 2017. PJ (PW3), the Chief of Salama location, RNW (PW4), a school teacher at the complainant's school and. HEK, PW 5, the head teacher at the complainant's school, confirmed receiving reports from a distressed PW1 about the defilement by her father.

16. Inspector James Munuve of Gamba Police Station who was PW6, and the Investigating officer in the case, confirmed that the complainant came to the police station crying in the company of C of Hewani area on 24th February 2017. He asked PC Mwenda to book the report and took the child to Garsen Health Centre. The complainant said her father had defiled her, and that she was examined and taken to a rescue centre in Malindi. PW6 then went to Hewani with an informer who pointed out the Appellant to him, and he arrested the Appellant.

17. The Appellant gave his sworn evidence and called 3 witnesses who testified in his defence. The appellant denied the charges and told court that he was arrested on 24th February, 2019 for beating his child for stealing Kshs.1,000/-and strangling his child, and that when taken to the police station he was informed that he defiled someone. He asserted that he punished his child for stealing Kshs.1,000/-.

18. DW2, PKLK, a married daughter of the Appellant, testified that she was not aware of the events on 22nd February 2017 but was aware that the complainant run away from home saying her parents caned her. ALD, (DW3) the complainant's brother, stated that the complainant took Kshs.1,000/- from their father, was caned and she ran away. He told court that he was not aware of what happened on 22nd February, 2017. DW4, HHM and wife of the Appellant, stated that when she travelled back on 22nd February 2017, her children told her the complainant stole Kshs.1,000/- from their father and was caned.

19. We start our consideration by reiterating the holding by this Court in *John Mutua Munyoki vs Republic*, [2017] eKLR, that under the *Sexual Offences Act*,the main elements of the offence of defilement are as follows:

> " (i) The victim must be a minor, and
>
> ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice."

In this regard, genital organs are defined in section 2 of the *Sexual Offences Act* to include the whole or part of male or female genital organs and for purposes of the Act, include the anus.

20. It is notable that PW1's evidence of penetration of her anus was corroborated by the medical evidence of PW2 who examined PW1 and filled the P3 form.

The complainant's age was ascertained by a birth certificate produced by PW 6, who obtained the complainant's original birth certificate from her mother, DW4, and which indicated that PW1 was born on 11th April 2002 and therefore 14 years at the time of the offence. On identification of the perpetrator of the offence, PW1's evidence was that she saw the assailant entering her parent's room after she managed to put on the solar light. The High Court observed that the Appellant was able to identify the Appellant from these circumstances. In addition, the Appellant had been placed at the scene earlier in the day by the complainant, and this was thus a case of recognition, the Appellant having been previously known to the complainant.

21. The Appellant's defence was not material to the offence, and the portrayal of the complainant as troubled did not raise any doubts as regards the commission of the offence by the Appellant, and on the contrary reinforced the debilitating effects of the offence on the complainant. The High Court therefore did not err in its evaluation of the evidence adduced in the trial Court and in upholding the conviction of the Appellant for the offence of defilement.

22. On the second issue as regards the sentence of twenty year's imprisonment, this Court can only address the legality of the sentence and not its severity, as the Appellant urges us to do. It is notable that

under section 8(3) of the *Sexual Offences Act*, there is a mandatory minimum sentence of twenty years imprisonment for defiling a child between the age of twelve and fifteen years. The legality of mandatory and minimum sentences in sexual offences has been restated by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v. Republic*, (2021) eKLR and in the Kenyan *Judiciary's Sentencing Policy Guidelines*. The sentence imposed on the Appellant by the trial Court was a minimum sentence and legal, and we cannot accede to the Appellants' request that his sentence be reduced.

23. We accordingly find that this appeal has no merit and the same is dismissed in its entirety.

24. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR