Kaburu v Republic (Criminal Appeal 86 of 2016)
[2022] KECA 789 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 789 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 86 OF 2016

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

JUNE 24, 2022

BETWEEN

HARRISON MUNDIA KABURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mshila, J.) dated 13th October 2016 in HC.CR. A No. 117 of 2011)

JUDGMENT

1 The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars were that on the 8th October 2009 at [Prticulars Withheld] Village in Nyeri District within Central Province he intentionally and unlawfully inserted his genital organ into the genital organ of LMN a girl aged 16 years. He also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. We need not set out the particulars thereof as the appellant was not convicted or sentenced on the same.

2 The prosecution called a total of five witnesses during the trial. The prosecution evidence was that LMN, a girl aged 14 years while on her way to school met the appellant who held her hand and led her to his house and made her lie on the sofa set, removed her pant and defiled her. She thereafter proceeded to school. Due to the pain that she was experiencing while at school she informed her Teacher EGK PW2 of her ordeal. PW2 in turn sent her home to her grand-mother, HN (PW3) after she had talked to her on phone and explained what LMN had informed her. She later met them at Gachaga Police Post and accompanied them to the Nyeri Provincial Hospital where she was examined. That she was aware of a similar case that was in court involving the same appellant and LMN.

3 PW3 HN, the grandmother to LMN testified that LMN was 14 years old at the time of the incident although she did not have a birth certificate. She was at the time in class 6 and mentally challenged.

That she was called from school by PW2 and told that LMN was unwell and had been sent home. Upon questioning her she informed PW3 that while going to school, she met the appellant at his gate, who held her hand and took her to his house and defiled her. PW3 reported the matter to Gachaga police Post and took her to hospital in the company of PW2. That there was a similar case pending in court between the appellant and LMN.

4 PW4, Dr. Njoroge Wambui, a doctor based at Nyeri Provincial General testified on behalf of Dr. Mutheka who was not able to testify, as he had proceeded for further studies. He confirmed that LMN was mentally retarded. He estimated her age to be 14 years. From his examination of LMN, the external genitalia was normal. However there was laceration of labia minora, hymen was broken and there was whitish discharge. He concluded that LMN had been defiled.

5 PW5 PC Stephen C. Macharia of Gachaga police post received the report from PW3 and LMN that the appellant had raped LMN whilst on her way to school which he booked. Later he arrested the appellant and charged him with the offences aforestated.

6 After consideration of the prosecution case, the trial court found the appellant with a case to answer and put him on his defence. The appellant opted to give a sworn statement and called two witnesses. It was his evidence that on the fateful day he was away in Nyeri town the whole day in the company of James Kirathe (DW2), who had arrived at his house at 6:30am. They later proceeded to town to run errands and later came back home late. He therefore had no opportunity of defiling LMN.

7 DW2 Hannah Wanjini Macharia, the wife to the appellant testified on his behalf and reiterated that the appellant was not home on the material day as he had left home for Nyeri town early in the morning, in the company of DW3. She remained indoors and never saw LMN come to her house, at any time.

8 DW3 James Kirathe is the person the appellant claimed had spent the whole day with, on the material day. He had asked the appellant to accompany him to Nyeri town for some errands and they only came back home much later in the evening.

9. After evaluation of the evidence before it, the trial court found that all the ingredients of the offence of defilement had been proved and accordingly convicted the appellant. Upon conviction the appellant was sentenced to 15 years' imprisonment.

10 The appellant aggrieved by the said conviction and sentence, appealed to the High Court on the grounds that; the evidence of LMN was not corroborated, there were inconsistencies in the evidence of the prosecution witnesses, there were no medical laboratory tests conducted on both the appellant and LMN; the prosecution did not prove its case beyond reasonable doubt and lastly that the trial Magistrate disregarded the appellant's defence.

11 The High Court heard the appeal and after considering the record before it dismissed the appeal in its entirety. In dismissing the appeal, the High Court held that: there were no material inconsistencies and contradictions that went to the root of the prosecution case; the appellant was identified, nay, recognized by LMN whilst in the act: there was penetration that was medically proved and finally, that from the evidence of LMN, PW3 and PW4, the age of LMN was proved to be 14 years.

12 Being dissatisfied by the decision of the High Court, the appellant has approached this court on second and perhaps last appeal on the grounds that the High Court erred in law and fact by: affirming the conviction and sentence yet the evidence of recognition and or identification was not carefully scrutinized; upholding the trial Court's decision, despite there being no proof of penetration; not holding that LMN was not a child under Section 2 of the *Children Act*; not holding that documents in proof of age of LMN were not tendered; failing to note that LMN was mentally retarded; failing to note that the appellant had faced similar charges and was acquitted; and lastly that the two courts

below erred in failing to consider the appellant's defence that there was a grudge between the appellant and PW3.

13 The appellant in his written submissions framed issues for determination as whether: the requisite precautions when handling a mentally challenged minor were taken; the ingredients of the offence were established and whether the High Court failed to consider relevant facts.

14 On the first issue; the appellant submitted that there was no voire dire that was conducted on LMN despite her age and mental capacity. Further, there should have beena medical assessment report regarding her mental challenge but none was tendered. That even if the testimony of LMN was considered safe, it needed corroboration, however the two courts below wrongly sought such corroboration from the evidence of PW2 and PW3. That, since their evidence was a regurgitation of what they were told by LMN, it did not amount to corroboration at all.

15 As to whether the ingredients of the offence were established, the appellant submitted that first, the age of the complaint was never ascertained. That age was vital as by dint of its definition, the offence is precipitated by age and the type of sentence is premised on the age of the victim. That in the present case the age was never established as there were no documents produced or age assessment report save for what LMN, PW3 and PW4 stated in court. The appellant relied on the cases of *Francis Omuroni Vs. Uganda* Criminal Appeal No. 2 of 2000, *Joseph Kibet Vs. Republic* [2014] eKLR and *Daniel Kamau Vs. Republic* [2019] eKLR to buttress on the importance of proving the age of a sexual victim. Secondly, as to penetration, the same was not proved as LMN only stated that the appellant "did a bad thing" to her and the court was left to fill in the gaps as to whether there was either partial or complete penetration as envisaged under Section 2 of the *Sexual Offences Act*. Further, no samples were taken from the parties for DNA testing as required under Section 36(1) of the *Sexual Offences Act*, and lastly that by PW4 stating that the hymen was broken did not prove penetration for it is possible that it could have been as a result of earlier sexual encounters or any other cause. To drive this point home, the appellant referred us to the case of PKW Vs. Republic [2012] eKLR.

16 On identification, the appellant submitted that no description of the appellant was made by LMN. The appellant submitted that there were several inconsistencies in the evidence of identification which should have been resolved in his favor but the High Court ignored the inconsistencies which were material.

17 In conclusion, the appellant submitted that the evidence was insufficient, incredible, unreliable, fabricated, speculative, full of conjecture and lacked any probative value and the conviction based on the same was thus unsafe and the appeal should be allowed therefor.

18 In opposing the appeal, the respondent, submitted that the High Court properly re-assessed, re-evaluated and re-analyzed the evidence before reaching its own findings as statutorily required. It was submitted that the appellant's contention that his identification was not proved was not true as the appellant was recognized being a person well known to LMN and this was a concurrent finding of both courts below which this court should not depart from. On the age of LMN the respondent submitted whilst relying on the case of Francis Omuroni Vs. Uganda (supra), that age may be proved by a birth certificate, the victim's parents evidence, by observation and common sense. That the age of LMN had been proved through the testimony of herself, PW3 and PW4. They all placed her age at 14 years. As to her mental status, the respondents submitted that from the lower court record, the court had indicated that despite the retardation of LMN, she was consistent and her evidence pointed to the appellant as the perpetrator of the offence. The trial court could only have reached this conclusion after conducting voire dire examination. This was equally the finding of the High Court. This court has no basis to depart from this finding.

19 On the issue of specimens being taken from the parties, the respondent submitted that the High Court dealt with the issue by stating that it was not an ingredient of the offence of defilement. As to whether there was bad blood between the appellant and PW2, the respondent submitted that as rightly put by the High Court, the same was never raised before the trial court which was the proper forum to deal with the issue and should not be entertained by this Court. The respondent thus prayed that the appeal be dismissed.

20 Having considered the record of appeal, submissions by both parties and the authorities cited, we take cognizance of the fact that this is a second appeal and by dint of Section 361(1) of the Criminal Procedure Code, a second appeal is confined to matters of law only. This indeed was stated in the case of *Karingo Vs. Republic [1982] KLR 213*, thus:-

> " A second appeal must be confined to the points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

21 Flowing from the above and having considered the grounds of appeal we discern only one issue of law for determination and it is, whether or not the offence of defilement was proved as required in law. We have carefully read and considered the two judgments of the courts below, note that, the two courts below made concurrent findings on the three ingredients of the offence that have to be proved before a conviction can be returned. Both courts found that the age of LMN was 14 years and the same was proved through evidence of LMN herself, PW3 and PW4. As stated in the Ugandan case of Francis Omuroni Vs. Uganda (supra), whose conclusions we agree with, the age of a minor victim of sexual violence can be proved in any of the following ways, medical documents, birth certificates, victim's own or her parents' and or guardians' evidence, common sense as well as by simple observation. The evidence of these witnesses regarding the age LMN was not countered at all by the appellant. Neither did he raise it in cross examination of these witnesses. The appellant's insistence that the age of LMN could only be proved through medical documents is neither here nor there. The other ingredient is penetration. Again this fact was proved to the satisfaction of the courts below. That penetration had been proved by LMN herself and PW4 who examined her immediately after the incident and prepared the P3 form. We note that though the appellant's submission that penetration whether partial or complete was not proved and that broken hymen per se, was not sufficient and that DNA testing should have been undertaken on the parties to proof of defilement. Again we must revert to the decisions of the two courts below which addressed these concerns at length. We have no basis to depart from their conclusions. Suffice to add that immediately after the incident, LMN was taken to hospital and was medically examined, and tell-tale signs of defilement including whitish discharge from her genitalia were noted. There must then have been penetration. We also hasten to add that DNA testing per se cannot prove defilement and is indeed irrelevant considering the ingredients of the offence that have to be proved. DNA testing is only relevant for purposes of paternity.

22 As to whether the appellant was identified as the perpetrator of the heinous act, the two courts below were satisfied that the appellant who was a person well known to LMN and PW3. He therefore was properly identified and that the said recognition was free from any possibility of error. We note that the incident happened in broad day light and the appellant was with LMN for a long time and he was not disguised at all as to make it difficult for LMN to recognize him. Nor did the appellant deny knowledge of LMN and PW3. Further by his own admission, this was not the only case of defilement preferred against him with LMN as the complainant. It is therefore obvious that these are people well known to each other, thereby ruling out the possibility of a mistaken recognition.

23 Turning to the question of voire dire examination, we note that LMN was aged 14 years at the time of the incident. By the time she was testifying, she was over 14 years old. A minor of such an age

does not require voire dire examination. The time honored threshold for voire dire examination is 14 years. See *Maripett Loonkomok Vs. Republic* (2016) eKLR. In any event failure to administer *voire dire* or to administer it properly cannot vitiate the entire trial. That question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi Vs. Republic*, Nyeri Criminal Appeal No. 10 of 2014 (UR). In this case therefore whether *voire dire* examination was administered on LMN before her evidence was taken is neither here nor there. On the question as to whether LMN was not a child under the provision of Section 2 of the Children's Act is immaterial as although under the Children's Act a child means that under the age of 10 years, in the instant case the appellant was charged under the *Sexual Offences Act* whose meaning and threshold age of a child is 18 years. The issue of age however is necessary for sentencing purposes in order to dictate the sentence period.

24 The appellant's defence that, there existed a grudge between the appellant and PW3 was duly considered and was found not convincing. We note though that in the trial court, the appellant advanced the defence of alibi but in the High Court, the appellant advanced the defence of the grudge. Obviously these defences were contradictory pointing to the fact that they were cooked-up which did not help the appellant's case at all. Both defences were therefore rightly rejected by the two courts below.

25 In our view, the findings by the trial court and the High Court were based on the sound evidence adduced by the prosecution. We see no reason to disturb those findings and thus the appeal is devoid of merit and is accordingly rejected in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR