Kitui v Republic (Criminal Appeal 62 of 2014)
[2022] KECA 713 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 713 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 62 OF 2014

AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JULY 22, 2022

BETWEEN

BENEDICT KITHEKA KITUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment High Court at Garissa (W. Korir, J.) delivered on 2nd December 2013 in Criminal Appeal No. 8 of 2013)

JUDGMENT

1. The appellant, BKK was charged with two Counts of the offence of defilement contrary to sections 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of Count I was that on 24th February 2011 at Bura Township in the Tana River County within the Coast Region, he intentionally caused his penis to penetrate the vagina of the complainant, CKM, a girl aged 6 ½ years.

3. The particulars of Count II was that on 25th February 2011 at Bura Township in the Tana River County within the Coast Region he intentionally caused his penis to penetrate the vagina of the complainant, CKM a girl aged 6 ½ years.

4. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty to both counts and, during the trial, the prosecution called four witnesses while the appellant made a sworn statement of defence and called no witnesses. He was convicted on both counts and sentenced to life imprisonment.

5. Being aggrieved by the conviction and sentence, the appellant appealed to the High Court, which dismissed the appeal against Count I and allowed the appeal against Count II.

6. Aggrieved further, the appellant appealed to this Court on the grounds that the High Court fell into error when it affirmed the trial court's decision, yet the essential elements for the offence of defilement, particularly penetration, were not conclusively proved; in failing to take into account that he was denied access to the prosecution witnesses statements before the case commenced, which violated his constitutional right to a fair hearing; in failing to find that the fact of penetration was not corroborated; in acting upon a defective charge sheet and failing to appreciate that the trial proceedings were invalid; in finding that the prosecution did not prove its case beyond reasonable doubt as by law required.

7. The appellant, who appeared in person, filed written submissions where he contended that the offence of defilement was not proved to the required standard since the three elements of penetration, the age of the child and whether the appellant was responsible for defiling the complainant, were not established.

8. On the question of penetration, the appellant contended that the complainant did not state that the appellant was responsible for her injuries; that she only stated that "...somebody did me bad manners"; that the court observed that the complainant was traumatised; that if she was unable to explain what transpired, then the court was not capable of satisfying itself that the complainant was being truthful; that consequently, the trial magistrate should not have relied on section 124 of the *Evidence Act* to concluded that penetration occurred. The appellant further argued that the description given by the child that the appellant did "bad manners" to her was not enough to allow the court to find that the complainant was defiled. The appellant relied on the case of *Luka Kanyita Mwai vs Republic* [2020] eKLR for the proposition that the description given by the child of what the appellant had done to her was vague and did not prove penetration. The appellant went further to submit that the the medical documents tendered by Dr. Sultan Sherman PW3 did not prove that penetration had occurred and, therefore, nothing corroborated CKM's evidence that there was penetration.

9. On the second ground, the appellant submitted that his right to a fair hearing as guaranteed by Article 50 of the *Constitution* was violated, as he was not supplied with all the witness statements; that further, his request for PW1 to be recalled was disregarded.

10. The appellant also asserted that the charge sheet was defective because he was charged contrary to section 8 (1) and (2) of the *Sexual Offences Act*, which provision did not exist.

11. Whilst highlighting his submissions, the appellant also prayed that the sentence be reduced or that a non-custodial sentence be imposed as he was HIV positive, and had been a model prisoner; that his illness was affecting him and he wanted to be with his family.

12. Opposing the appeal, learned counsel for the State also filed written submissions. Highlighting them, counsel stated that the complainant's evidence was corroborated by her mother PW 1, who stated that while she was bathing her daughter, she saw injuries and blood stains on her private parts; that on enquiring, the complainant told her that she had been defiled by the appellant; that the trial magistrate had found the complainant to be truthful and had admitted the evidence under section 124 of the *Evidence Act*; that the appellant did not cross examine the complainant or challenge her evidence.

13. With respect to his identity, counsel submitted that the appellant was their neighbour, and was known to the complainant; that penetration was demonstrated by the complainant, and the medical evidence also was supportive of her evidence.

14. Regarding the complainant's age, PW1 and the medical officer who examined CKM confirmed that she was age 6 ½ years old. The trial magistrate conducted a voire dire examination and found that the complainant was too young to be sworn, as a consequence of which age was proved.

15. On the sentence, counsel urged that we decline to interfere with the sentence given the Supreme Court's guidelines of 6th July 2021 issued pursuant to the case of *Francis Karioko Muruatetu and another vs Republic* [2017]eKLR. Counsel concluded by asserting that the evidence of the prosecution witnesses rendered the conviction safe and that the High Court had properly discharged its duty.

16. This being a second appeal, the duty of this Court in appeals of this nature was set out in the case of *Kaingo vs Republic, (1982) KLR 213* at p. 219 thus;

> "A second appeal must be confined to 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. 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)".

17. Hence the issues for consideration are;

    i) Whether the charge sheet was defective;

    ii) Whether his constitutional right to a fair hearing was violated as he was denied access to the prosecution witness statements before the case commenced;

    iii) Whether the offence of defilement was proved; and

    iv) Whether at the fact of penetration was corroborated.

18. We begin with whether his right to a fair hearing pursuant to Article 50 of the *Constitution* was violated when he was allegedly denied the witness statements and an opportunity to recall PW1. At the outset however, we observe that these issues were not raised before the High Court.

19. Related to this, in the case of *Isaac Kinyua Thuku & 2 others vs Republic* [2019] eKLR this Court observed that;

> "In any event it is inappropriate to raise a new matter which was not subjected to an opinion of the two courts below as a ground of appeal. That would amount to litigation in instalments. This Court in Alfayo Gombe Okello v R. [2010] eKLR had this to say as regards such an issue:
>
> > "...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

20. The appellant has sought to raise the issue of witness statements and witness at this late stage before this Court yet, no High Court decision has been rendered, from which an appeal has emanated for our determination. As such, we ought to decline the invitation to determine them.

21. But having regard to the circumstances of the case, we have analysed the proceedings and find that on 27th April 2011, the appellant requested for witness statements after the trial had commenced. The trial court ordered that the "Accused to be supplied with witness statements before the next hearing..." At the next hearing on 11th May 2011, the appellant stated that he was not ready to proceed. He sought an adjournment, and at the same time, requested to recall PW1. Since the prosecution did not object to the applications, the court granted the adjournment, though no specific orders were made. Thereafter, the case came up for hearing on three subsequent occasions, all of which were adjourned because the

appellant was either not in court or not ready to proceed. When he eventually attended court on 10th June 2011, the prosecutor indicated that he would call two witnesses. For his part, the appellant had no objection and in fact indicated that he was ready to proceed. No mention was made either of the witness statements, or the request to recall PW1. By the close of the proceedings, PW1 was not recalled, and neither did the appellant raise the issue before the trial court.

22. The inference that can be drawn from this is, firstly, the appellant must have received the witness statements as ordered by the court, and if he had not, he would have objected to proceeding without them. But he did not. For this reason, we consider the complaint to be unfounded and an afterthought.

23. Secondly, on recall of PW1, his willingness to proceed with the other prosecution witness testimony would be an indication that he no longer wished to recall PW1 for cross examination. Section 146 (4) of the *Evidence Act* provides for recall of witness by parties in the following terms;

> " The Court may in all cases permit a witness to be recalled either for further examination in Chief or for further cross-examination, and if it does so the Parties have the right of further cross- examination and re-examination respectively."

In the case of *Patrick Mutwiri vs Republic* [2018] eKLR

> " Considering that the magistrate in this case exercised that discretion in favour of the appellant and ordered a recall of the said witnesses, it behooved the appellant to follow up on having the said witnesses availed for his cross examination. Instead, he went quiet and the record shows the defence as having proceeded as though no such order had been made. In addition, the appellant never raised the said issue at the first appellate court. This court has in the past stated that where issues of fact fail to be raised at the trial court and at the first appellate court, this court lacks the benefit of having read the reasoning of those courts on the matter and will thus hesitate to interfere with their findings (see Abdalla Hassan Hiyesa v Republic [2015] eKLR and Joseph Kamau Gichuki v Republic [2013] eKLR as well as S J M v Republic [2016] eKLR)."

24. Having neglected to recall PW1, despite the court acceding to his request, and thereafter failing to raise the complaint in the High Court, the appellant cannot now require this Court to delve into the merits or demerits of the oversight on his part. We would add that the record shows that the appellant had occasion to actively cross examine PW1 during the proceedings and, as such, we are not prepared to hold that he suffered any significant violation that can amount to unfair trial. We find that raising the issue at this stage was an afterthought, and we accordingly dismiss it.

25. As concerns the alleged defective charge sheet, the appellant's contention is that he was charged contrary to section 8 (1) (2) of the *Sexual Offences Act*, which provision did not exist. When the issue was addressed by the High Court, notwithstanding that the judge agreed that indeed no such provision existed in the *Sexual Offences Act*, the court concluded that no prejudice was suffered by the appellant on account of the error since the charge sheet was explicit on the nature of the offence he faced.

26. It is true that the charge sheet stated that the appellant was charged contrary to section 8 (1) (2) of the *Sexual Offences Act*. In effect, it ought to have read "...section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*." However, the particulars of the offence are distinctly supportive of the charges so that it was clear to the appellant that the offence he faced was the defilement of a girl aged 6 ½ years. The error in the charging provisions was not fatal and neither was it prejudicial to him. Further, it was capable of being cured by section 382 of the *Criminal Procedure Code*, which provides that the finding

of a court of competent jurisdiction will not be reversed or altered on account of an error or irregularity in the charge. This ground is therefore dismissed.

27. The next issue was whether the prosecution proved its case to the required standard. For this to be established, the key ingredients for the offence of defilement are, namely the complainant's age, the appellant's identity and whether there was penetration, which must have been proved.

28. Before ascertaining them, an outline of the facts is essential. The evidence of PW 1 the complainant's mother was that, CKM who was 6 ½ years old at the time, is her daughter; that on the 26th February 2011 at about 5 pm when she was bathing her, she saw injuries and blood stains on her daughter's private parts; that on enquiring, CKM told her that she had been defiled by their neighbour, K, the appellant. PW2 also stated that the appellant had done bad manners to her, and that it occurred on two occasions, that is, on the 24th and 25th February 2011. PW 1 reported the incident to the police station, and they were thereafter escorted to Bura Healthcare Centre for treatment. Dr. Sherman, examined her and found that her hymen was not intact. She concluded that there was penetration, as the complainant was in pain. She produced a P3 form. PC Reuben Mwaniki was PW4. He investigated the case and reiterated the evidence of PW 1 and PW

29. In his defence, the appellant gave sworn evidence and denied having committed the offence, he stated that PW 1 was his girlfriend and he confirmed that CKM who was 6 ½ years old was his neighbour, and would normally go to visit him.

30. Against this background, we now address the age element. In his defence, the appellant admitted that CKM was 6½ years old. The complainant's mother, PW1 clearly stated that the complainant was 6 ½ years old, as she was born on 6th August 2004. She was a pupil in pre-unit. PW2 also stated that she was 6 years old. And Dr. Sultan Sherman, the medical doctor who examined her also confirmed that she was 6 ½ years old. In view of the certainty of the complainant's age, we are satisfied that her age was proved.

31. As concerns the identification of the appellant, CKM stated that the appellant was a neighbour and that she knew him. The appellant did not deny that he also knew her. He went so far as to admit that the complainant would often visit his house. Based on this evidence, there is no doubt that the appellant was properly identified.

32. On whether penetration was proved, the appellant's complaint is that, CKM's evidence did not specifically indicate that the appellant was responsible for her injuries; that she only stated that *"... somebody did me bad manners";* that the description given by the child that the appellant did "bad manners" to her was not enough for the court to reach a finding that she had been defiled.

33. A reanalysis of the evidence definitively points to the appellant as being the person who defiled the complainant. We say this because, when her mother PW 1, was bathing CKM, she saw injuries and blood stains on her daughter's private parts; that on enquiring, CKM told her that she had been defiled by the appellant, K, who had done bad manners to her. This evidence was fortified by Dr. Sherman's medical report, that found her hymen was not intact, and concluded that there was penetration. In its totality, the prosecution evidence demonstrated that penetration occurred, and that it was the appellant who defiled CKM.

34. The appellant complains that CKM's evidence of penetration was not corroborated, since she did not state that the appellant had defiled her; that the trial magistrate ought not to have applied section 124 of the *Evidence Act* to conclude that the complainant was truthful when in fact she had not stated that she was defiled by the appellant.

35. Addressing the specifics of Section 124 of the *Evidence Act*, the High Court had this to say;

> Once the magistrate believed that the complainant was telling the truth, he was entitled to rely on her evidence and arrive at a conviction on the same without the need for corroboration. All he needed to do was to record in the proceedings the reasons as to why he believed that the complainant was telling the truth."

35. And after concluding that the complainant was truthful, the trial magistrate stated;

> During the testimony I observed her demeanour and the only thing I noticed was that she was traumatized. I did not note anything which would suggest that she is not telling the truth or that she was acting under influence."

36. The appellant seeks to argue that the trial magistrate reliance on section 124 of the *Evidence Act* was superfluous because, CKM did not provide any evidence of penetration and that, therefore, her evidence should have been corroborated. As did the High Court, we have no hesitation in concluding that CKM's evidence was cogent, believable and demonstrated that the appellant had defiled her. This notwithstanding, we also find that it was duly corroborated not only by her mother PW1, but also by the medical doctor as well. Clearly, reliance on CKM's evidence by the trial magistrate in accordance with section 124 of the *Evidence Act* served to further reinforce the prosecution's case, that the appellant defiled CKM.

37. We need go no further than to quote the judgment of the High Court in extenso thus;

> The fact that the complainant was defiled was corroborated by the evidence of her mother PW 1... She told the court that on 26th February, 2011 she was washing her daughter when she complained of pain in her private parts. She checked her vagina and saw injuries on the vaginal wall. She also saw blood. She then enquired from her what had happened and she informed her that her neighbour by the name K had caused the injuries to her. The child further informed her that the assault had taken place on two different days namely 24th February, 2011 and 25th February, 2011.
>
> The evidence of PW 1 was confirmed by the medical officer PW3 Dr. Sultan Sherman who testified that there was evidence of fresh penetration. The evidence adduced before the trial court confirmed defilement. The defilement was linked to the appellant by the evidence of the complainant".

38. Though the appellant denied committing the offence, having considered all the prosecution evidence, it cannot be controverted that the ingredients for the offence of defilement were proved with the result that they pointed to the appellant as the person who defiled the complainant. As such, we find the conviction was safe and we uphold the decisions of both the trial court and the High Court.

39. Finally, with respect to the sentence, the trial court sentenced the appellant to life imprisonment as by law prescribed. As a consequence, the sentence was lawful. By dint of section 361(1) of the *Criminal Procedure Code*, this Court has no jurisdiction to entertain appeals on severity of sentence. After appreciating the appellant's mitigation, and observing the extent of the trauma the child experienced at the appellant's hands, the trial court imposed the sentence of life imprisonment. We have no basis upon which to interfere with that decision.

40. In view of the foregoing the appeal is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

A.K. MURGOR

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K.I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR